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THE  
FEDERAL REPORTER.

VOLUME 110.

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CASES ARGUED AND DETERMINED  
IN THE  
CIRCUIT COURTS OF APPEALS AND CIRCUIT  
AND DISTRICT COURTS OF THE  
UNITED STATES.

PERMANENT EDITION.

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FEDERAL REPORTER, VOLUME 110.

**JUDGES**

OF THE

**UNITED STATES CIRCUIT COURTS OF APPEALS AND THE  
CIRCUIT AND DISTRICT COURTS.**

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<sup>1</sup> Died November 1, 1901.

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# CASES

## ARGUED AND DETERMINED

IN THE

## UNITED STATES CIRCUIT COURTS OF APPEALS AND THE CIRCUIT AND DISTRICT COURTS.

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UNITED STATES v. S. P. SHOTTER CO.

(Circuit Court, S. D. Alabama. May 27, 1901.)

No. 1,215.

**FEDERAL JURISDICTION—DIVERSE CITIZENSHIP—CORPORATIONS.**

A corporation of one state is not, for the purpose of federal jurisdiction, under Act Cong. March 3, 1887, as amended by Act Cong. Aug. 13, 1888, an inhabitant or resident of another state in which it has a usual place of business.<sup>1</sup>

At Law.

Morris D. Wickersham, U. S. Atty., for the United States.  
Stoutz & Armbrecht, for defendant.

TOULMIN, District Judge. The question raised by the demurrer is one of jurisdiction. The defendant is a corporation incorporated under the laws of the state of West Virginia, but at the time of the act complained of it had a place of business and carried on business in this state and in this district by and through a representative or agent, on whom service of process was had in this case. The judiciary act of 1875 provided that no civil suit shall be brought against any person outside of the district in which he resides or may be found at the time of service of process, etc. Under the act the decisions of the federal courts were that when a foreign corporation carried on business in a state by means of an agent or representative appointed to act there, and having charge and management of such business, it impliedly assents to be found and sued there in the person of such agent. It was held that a corporation may be found in a foreign state, within the meaning of the federal law, when it exercises its powers by express consent of the legislature of such state, or when it is required by a general law of the state to appoint an agent for the service of process as a condition to the transaction of

<sup>1</sup> Citizenship of corporations, see note to *St. Louis, I. M. & S. Ry. Co. v. Newcom*, 6 C. C. A. 174.

business within the state. *Railroad Co. v. Harris*, 12 Wall. 65, 20 L. Ed. 354; *Insurance Co. v. French*, 18 How. 404, 15 L. Ed. 451; *Ex parte Schollenberger*, 96 U. S. 369, 24 L. Ed. 853; *Boston Electric Co. v. Electric Gas-Lighting Co. (C. C.)* 23 Fed. 839. The state of Alabama imposes as a condition to the transaction of business within the state a liability to suit here by service on an agent. Doing business in the state by an agent was treated by the authorities as an agreement or consent on the part of the foreign corporation to be "found" here, within the meaning of the federal judiciary act of 1875, for the purpose of suit, whether in the state or federal courts. *U. S. v. American Bell Tel. Co. (C. C.)* 29 Fed. 17-37. The act of March 3, 1887, as amended by act of August 13, 1888, fixing the jurisdiction of the circuit courts of the United States, omits the clause in the act of 1875 allowing a defendant to be sued in the district where he is "found." *St. Louis R. Co. v. Pacific R. Co. (C. C.)* 52 Fed. 770; *Shaw v. Mining Co.*, 145 U. S. 444, 12 Sup. Ct. 935, 36 L. Ed. 768. Under the acts of March 3, 1887, and August 13, 1888, a corporation incorporated in one state only cannot be compelled to answer in a circuit court of the United States held in another state, in which it has a usual place of business, to a civil suit, at law or in equity, brought by a citizen of a different state. *Shaw v. Mining Co.*, *supra*. The case of *Shaw v. Mining Co.* was a suit brought in the circuit court of the United States for the Southern district of New York against the Quincy Mining Company, a corporation organized under the laws of the state of Michigan, and having a usual place of business in the city, county, and state of New York. Service of process was had on the secretary of the defendant company in the Southern district of New York. The defendant appeared and moved for an order to set aside the service. The order was granted on the ground that the defendant was "a corporation created and existing under the laws of the state of Michigan, and is not an inhabitant of the Southern district of New York." The case went to the supreme court on a petition for a writ of mandamus to the circuit court to command it to take jurisdiction of the case. The writ of mandamus was denied. The court, in its opinion, said "that the act of 1887, and as corrected in 1888, re-enacts the rule that no civil suit shall be brought against any person in any other district than that whereof he is an inhabitant, but omits the clause allowing a defendant to be sued in the district where he is found." The court holds that where the jurisdiction is founded upon any of the causes mentioned in the act, except the citizenship of the parties, it must be brought in the district of which the defendant is an inhabitant; that the act referred to applies to corporations; and that a corporation is an inhabitant of the state under whose laws it was created. See, also, authorities cited in the opinion of *Shaw v. Mining Co.*, *supra*. In *U. S. v. Southern Pac. R. Co. (C. C.)* 49 Fed. 297, Justice Harlan holds that the federal circuit courts possess no powers except such as the constitution and acts of congress concur in conferring, and the presumption is that every case is without their jurisdiction until the contrary affirmatively appears; that the act of congress of March 3, 1887, requiring suits in which the federal jurisdiction is founded only on

diversity of citizenship to be brought in the district of the residence either of the plaintiff or of the defendant, does not apply to suits brought by the federal government; and that the only restriction with respect to such suits is that they shall be brought in the district of which the defendant is an "inhabitant." He, however, holds that a corporation is an "inhabitant" of the state in which it has a usual place of business, and does business by its agent or representative. On the last point he maintained the jurisdiction of the case, on which proposition he differs with the supreme court of the United States. See *Shaw v. Mining Co.*, supra. The suit at bar is not one founded on the diverse citizenship of the parties. It seems to me that the case of *Shaw v. Mining Co.*, supra, is directly in point, and must control the decision in this case. I am therefore constrained to sustain the demurrer, and it is so ordered.

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STARR et al. v. CHICAGO, R. I. & P. RY. CO. et al.

(Circuit Court, D. Nebraska. April 25, 1901.)

**1. JURISDICTION OF FEDERAL COURTS—POWER TO DETERMINE.**

The federal courts must determine for themselves the limits of their jurisdiction, and as to such question the supreme court of the United States is the final arbiter.

**2. SAME—FEDERAL AND STATE COURTS—PRIORITY OF JURISDICTION.**

Wherever a federal court and a state court have concurrent jurisdiction, the tribunal whose jurisdiction first attaches holds it to the exclusion of the other until its duty is fully performed and the jurisdiction involved is exhausted; and, when a federal court has so acquired priority of jurisdiction, it is its duty to protect such jurisdiction by injunction, if necessary, and that right is not affected by the eleventh constitutional amendment, withholding from its jurisdiction suits against states, nor by Rev. St. § 720, prohibiting the issuance of injunctions to stay suits in a state court.

**3. SAME—SUITS AGAINST STATE.**

A suit to enjoin individuals acting as officers of a state from enforcing an unconstitutional enactment to the injury of the rights of complainants is not one against the state, within the meaning of the eleventh constitutional amendment, but is one within the jurisdiction of the federal courts.<sup>1</sup>

**4. SAME—PRIOR FEDERAL JURISDICTION—PROTECTION BY INJUNCTION.**

A federal court in a suit by stockholders of a railroad company issued a preliminary injunction restraining such company from putting in force a schedule of rates prescribed by a state statute alleged to be in violation of the constitution of the United States, and also enjoining officers of the state, who were made defendants, from instituting proceedings to enforce such statute. In related suits against the same state officers, involving the same questions, and by stipulation to be determined on the same evidence, appeals were taken to the supreme court of the United States, which held the statute unconstitutional, and also that the suits were within the jurisdiction of the court, and the injunctions granted therein were made permanent. An attorney general of the state, who subsequently succeeded to the office, instituted suits in the name of the state in state courts against the railroad company defendant in the first-named suit, in which there had been no final hearing, to recover heavy

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<sup>1</sup> Federal jurisdiction in suits against state, see note to *Tindall v. Wesley*, 13 C. C. A. 165.

penalties for its failure to put in force the schedule of rates prescribed by such statute. *Held*, that such suits were an interference with the prior acquired jurisdiction of the federal court, and, on proper application therefor, its injunction would be extended to the new attorney general, to restrain him from further prosecuting them until its own determination of the pending suit.

5. RES JUDICATA—JUDGMENT DECLARING UNCONSTITUTIONALITY OF STATUTE.

Where the supreme court of the United States has determined that a state statute is unconstitutional, and has affirmed a decree perpetually enjoining the attorney general of the state from enforcing it, such adjudication of the invalidity of the statute is conclusive upon an attorney general who subsequently succeeds to the office.

In Equity. On demurrer to supplemental bill and motion for temporary injunction.

Woolworth & McHugh, for complainants.

Frank N. Prout, per se.

Before SANBORN, Circuit Judge, and MUNGER, District Judge.

SANBORN, Circuit Judge. This is a demurrer to a supplemental bill of the complainants, which discloses these facts: In 1893 the legislature of the state of Nebraska passed an act commonly called the "Maximum Freight Rate Law," which named certain rates of transportation, required the railway companies operating in that state to reduce their rates to those there prescribed, and provided that they should become liable to severe penalties for any failure to comply with its provisions. Comp. St. Neb. 1893, c. 72, art. 12. The complainants were stockholders of the Chicago, Rock Island & Pacific Railway Company; and on August 3, 1893, they exhibited to this court their bill in equity against the railway company, George H. Hastings, who was then the attorney general of the state of Nebraska, and numerous other parties, officers of the state, upon whom the discharge of some duty devolved under the act of the legislature to which we have adverted. They alleged in this bill that the rates prescribed by this act were confiscatory, and that the law was unconstitutional, and prayed for a temporary and perpetual injunction against the defendants, forbidding them from taking any action to put in operation or to enforce any of the provisions of the law. On August 3, 1893, this court issued a temporary injunction upon a bond for \$10,000, which forbade the railway company from putting in operation the rates prescribed by the law and from complying with its provisions; prohibited George H. Hastings, the attorney general, from bringing, or aiding in bringing, or causing or advising to be brought, any proceeding by way of injunction or mandatory or other process or civil action or indictment against said company for or on account of any act or omission commanded or forbidden by the act; and restrained the members of the board of transportation of the state from taking any action under the law until the further order of this court. At about the same time that this suit was commenced, the stockholders of the Chicago, Burlington & Quincy Railroad Company, of the Chicago & Northwestern Railway Company, and of the Union Pacific Railway Company,

brought suits of the same nature against those companies, respectively, and against George H. Hastings, the attorney general, and against the other officers of the state, and prayed for the same relief. The issues in the four suits were the same, and they were prosecuted and defended by the same counsel. Voluminous proofs were taken in the three suits against the other companies, and it was agreed that the proofs taken in those suits should have the same force and effect in this suit as if taken herein, and that the same decree should be eventually rendered in this suit that should be finally affirmed or rendered by the supreme court in those suits. Constantine J. Smyth succeeded George H. Hastings as attorney general of Nebraska, and was substituted for him in the three suits. These three cases finally resulted in decrees to the effect that the maximum freight rate law was unconstitutional; that the railway companies, the board of transportation, its members and secretaries, were forbidden from putting in force the rates it prescribed, or from complying with its provisions; "and that the attorney general of this state be in like manner enjoined from bringing, aiding in bringing, or causing to be brought, any proceeding by way of injunction, mandamus, civil action, or indictment against said companies, or either of them, or their receivers, for or on account of any action or omission on their part commanded or forbidden by said act." *Smyth v. Ames*, 169 U. S. 466, 477, 550, 18 Sup. Ct. 418, 421, 435, 42 L. Ed. 819, 850. Smyth was not substituted for Hastings in this suit. In ignorance of the injunction herein, he brought an action in the name of the state of Nebraska, in the year 1900, in the supreme court of the state of Nebraska, against the Chicago, Rock Island & Pacific Railway Company, for \$310,000, and another in one of the district courts of the state for \$150,000, penalties prescribed by the freight rate law for the failure of the company to disobey the injunction of this court, and to reduce its rates of transportation to the rates prescribed by that act. About January 1, 1901, the defendant Frank N. Prout succeeded Smyth as attorney general of the state. To the action in the supreme court of Nebraska the railway company answered the proceedings in this suit in this court, and made a motion for judgment on the pleadings, which was denied by the supreme court of the state on the ground that this court, on account of the eleventh amendment to the constitution, had no jurisdiction to enjoin the attorney general or any other officer of the state from enforcing the provisions of this unconstitutional law. *State v. Chicago, R. I. & P. Ry. Co.* (Neb.) 85 N. W. 557. The prayer of the supplemental bill is that the injunction in this case be extended to Frank N. Prout, as attorney general of the state of Nebraska; that he be restrained from further prosecuting the two actions against the railway company; and that the complainants have general relief. The ground of the demurrer is that the relief sought by the supplemental bill is in contravention of the eleventh amendment of the constitution of the United States, which provides:

"The judicial power of the United States shall not be construed to extend to any suit at law or in equity commenced or prosecuted against one of the



United States by citizens of another state or by citizens or subjects of any foreign state."

The contention of Mr. Prout is that this court has no jurisdiction to enjoin him from enforcing the maximum freight law, because he is acting not for himself, but for and in the name of the state, and that this proceeding is in reality a suit against the state.

This court is not at liberty to disregard the decisions of the supreme court of the United States. Its duty is completely performed when it protects the rights and administers the remedies of litigants in strict accord with the rules of law established by those decisions. In the case before us the opinions of that court, and the decrees which it has rendered or affirmed, have conclusively settled every question which has been presented, and have left nothing open for our discussion or decision. We shall accordingly content ourselves with a brief statement of the principles which determine and the authorities which compel our action.

1. The federal courts must determine for themselves the limits of their jurisdiction, and the supreme court of the United States is the final arbiter in all questions of this nature. A renunciation of this power or a failure to discharge this duty would be fatal to our system of government. It would withdraw the keystone of the arch. *U. S. v. Peters*, 5 Cranch, 115, 3 L. Ed. 53; *Freeman v. Howe*, 24 How. 450, 459, 460, 16 L. Ed. 749.

2. Wherever a federal court and a state court have concurrent jurisdiction, the tribunal whose jurisdiction first attaches holds it to the exclusion of the other until its duty is fully performed and the jurisdiction involved is exhausted. This rule applies equally to civil and criminal proceedings. *Harkrader v. Wadley*, 172 U. S. 148, 164, 19 Sup. Ct. 119, 43 L. Ed. 399; *Sharon v. Terry* (C. C.) 36 Fed. 337; *Wallace v. McConnell*, 13 Pet. 135, 10 L. Ed. 95; *Clark v. Five Hundred and Five Thousand Feet of Lumber*, 65 Fed. 236, 12 C. C. A. 628, 24 U. S. App. 509; *Gates v. Buckeye*, 12 U. S. App. 69, 4 C. C. A. 116, 53 Fed. 961; *Chittenden v. Brewster*, 2 Wall. 191, 17 L. Ed. 839; *Orton v. Smith*, 18 How. 263, 265, 15 L. Ed. 393; *Union Trust Co. v. Rockford, R. I. & St. L. R. Co.*, 6 Biss. 197, 24 Fed. Cas. 704 (No. 14,401); *Owens v. Railroad Co.* (C. C.) 20 Fed. 10; *Union Mut. Life Ins. Co. v. University of Chicago* (C. C.) 6 Fed. 443; *Freeman v. Howe*, 24 How. 450, 16 L. Ed. 749; *Peck v. Jenness*, 7 How. 612, 622, 625, 12 L. Ed. 841; *Taylor v. Carryl*, 20 How. 583, 596, 597, 15 L. Ed. 1028; *Wiswall v. Sampson*, 14 How. 52, 14 L. Ed. 322; *Covell v. Heyman*, 111 U. S. 176, 4 Sup. Ct. 355, 28 L. Ed. 390; *Heidritter v. Oilcloth Co.*, 112 U. S. 294, 302, 5 Sup. Ct. 135, 28 L. Ed. 729; *Riggs v. Johnson Co.*, 6 Wall. 166, 196, 18 L. Ed. 768; *Central Trust Co. of New York v. South Atlantic & O. R. Co.* (C. C.) 57 Fed. 3.

3. The foregoing principle is so indispensable to the harmonious working of our systems of federal and state jurisprudence that neither the eleventh amendment to the constitution, nor section 720 of the Revised Statutes, which prohibits the issue by a court of the United States of a writ of injunction to stay proceedings in any court of a state, can be permitted to interfere with its maintenance.

The court which first obtains jurisdiction of the subject-matter and of the necessary parties to a suit may, and if it discharges its duty it must, if necessary, issue its injunction to prevent any interference by any one with its effectual determination of the issues, and its administration of the rights and remedies involved in the litigation. *French v. Hay*, 22 Wall. 250, 22 L. Ed. 857; *Dietzsch v. Huidekoper*, 103 U. S. 494, 26 L. Ed. 497; *Moran v. Sturges*, 154 U. S. 256, 14 Sup. Ct. 1019, 38 L. Ed. 981; *Fisk v. Railroad Co.*, 10 Blatchf. 518, Fed. Cas. No. 4,830; *Garner v. Bank*, 33 U. S. App. 91, 16 C. C. A. 86, 67 Fed. 833; *Terre Haute & I. R. Co. v. Peoria & P. U. R. Co.* (C. C.) 82 Fed. 943.

4. In suits to enjoin officers of a state from inflicting threatened injury upon property rights, two classes of cases arise: (1) Those in which the suits are held to be in reality against the state, and of which the federal courts may not take jurisdiction on account of the eleventh amendment to the constitution; and (2) those in which the threatened acts may not be justified under the authority of a state of which the national courts have jurisdiction, and to which the prohibition of the eleventh amendment has no application. In *Pennoyer v. McConnaughy*, 140 U. S. 1, 10, 11 Sup. Ct. 699, 35 L. Ed. 363, the supreme court thus distinguished these classes:

"The first class is where the suit is brought against the officers of the state, as representing the state's action and liability, thus making it, though not a party to the record, the real party against which the judgment will so operate as to compel it to specifically perform its contracts. *Ex parte Ayers*, 123 U. S. 443, 8 Sup. Ct. 164, 31 L. Ed. 216; *Louisiana v. Jumel*, 107 U. S. 711, 2 Sup. Ct. 123, 27 L. Ed. 448; *Antoni v. Greenhow*, 107 U. S. 769, 2 Sup. Ct. 91, 27 L. Ed. 468; *Cunningham v. Railroad Co.*, 109 U. S. 446, 3 Sup. Ct. 292, 609, 27 L. Ed. 992; *Hagood v. Southern*, 117 U. S. 52, 6 Sup. Ct. 608, 29 L. Ed. 805. The other class is where a suit is brought against defendants, who, claiming to act as officers of the state, and under the color of an unconstitutional statute, commit acts of wrong and injury to the rights of property of the plaintiff acquired under a contract with the state. Such suit, whether brought to recover money or property in the hands of such defendants unlawfully taken by them in behalf of the state, or for compensation in damages, or, in a proper case, where the remedy at law is inadequate, for an injunction to prevent such wrong and injury, or for a mandamus, in a like case, to enforce upon the defendant the performance of a plain, legal duty, purely ministerial, is not, within the meaning of the eleventh amendment, an action against the state. *Osborn v. Bank*, 9 Wheat. 738, 6 L. Ed. 204; *Davis v. Gray*, 16 Wall. 203, 21 L. Ed. 447; *Tomlinson v. Branch*, 15 Wall. 460, 21 L. Ed. 189; *Litchfield v. Webster Co.*, 101 U. S. 773, 25 L. Ed. 925; *Allen v. Railroad Co.*, 114 U. S. 311, 5 Sup. Ct. 925, 962, 29 L. Ed. 200; *Board of Liquidation v. McComb*, 92 U. S. 531, 23 L. Ed. 623; *Poindexter v. Greenhow*, 114 U. S. 270, 5 Sup. Ct. 903, 962, 29 L. Ed. 185."

This classification has since been repeatedly approved. *Ex parte Tyler*, 149 U. S. 164, 192, 13 Sup. Ct. 785, 37 L. Ed. 689; *Scott v. Donald*, 165 U. S. 107, 17 Sup. Ct. 262, 41 L. Ed. 648; *Tindal v. Wesley*, 167 U. S. 204, 220, 17 Sup. Ct. 770, 42 L. Ed. 137.

5. This case falls in the second class. It is a suit to enjoin individuals, acting as officers of the state, from enforcing an unconstitutional enactment to the injury of the rights of the complainants. It is not governed by the eleventh amendment to the constitution, and this court has complete jurisdiction of its subject-matter and of the parties to the litigation. *Reagan v. Trust Co.*, 154 U. S. 362,

369, 371, 373, 390, 14 Sup. Ct. 1047, 38 L. Ed. 1014; *Smyth v. Ames*, 169 U. S. 515, 517, 518, 18 Sup. Ct. 418, 42 L. Ed. 819. The opinion in *Smyth v. Ames* concludes all discussion of this question. We are all bound to abide by that decision, because it is the supreme law of the land. That case presented the same unconstitutional law, the same pleadings, the same issues of fact, and the identical question of law upon the determination of which this suit hinges. The supreme court of the United States there decided that this court had jurisdiction to issue, and that it rightfully issued, its writ against the attorney general of the state of Nebraska, enjoining him from bringing and from aiding in bringing any suits or proceedings to enforce the provisions of the maximum freight rate law of Nebraska. In view of this conclusive adjudication of the very question here in issue, it would be an idle task to distinguish or review other cases wherein other questions, such as the power of a court of equity to enjoin criminal proceedings, were involved, as in *Fitts v. McGhee*, 172 U. S. 516, 531, 19 Sup. Ct. 269, 43 L. Ed. 535, and *Harkrader v. Wadley*, 172 U. S. 148, 169, 170, 19 Sup. Ct. 119, 43 L. Ed. 399, and we refrain from their consideration or discussion. It is enough that the highest court in the land—the court by whose decisions courts, counsel, and citizens alike are bound to abide—has authoritatively determined the very issue involved in this case, and here we must leave it.

This suit, then, was commenced in 1893. This court at that time obtained jurisdiction of the subject-matter of this litigation, of the issue whether or not this law of Nebraska was constitutional and enforceable, and of the parties to this suit,—the railway company and those who were then acting as officers of the state. It rightfully enjoined the company from reducing its rates to those prescribed by the law, and it lawfully prohibited the attorney general of the state and its other officers from enforcing its provisions. That injunction has never been vacated or modified, and it still remains in force. *Vulcanite Co. v. Folsom* (C. C.) 3 Fed. 509. The defendant Frank N. Prout is prosecuting actions commenced in 1900, six years after this suit was begun, to recover of the defendant railway company penalties to the amount of \$450,000 because it obeyed the injunction of this court, and failed to reduce its charges to those specified by the unconstitutional law. In other words, the effect of these later actions is to toll off to another court the question which has long been and still is properly in litigation here, to severely punish one of the parties to this suit for its obedience to an injunction lawfully issued upon a prayer of the complainants in this court, and to forestall and nullify any decision and decree of this court regarding issues of which it first lawfully took jurisdiction. The impropriety, the inadmissibility, of such a proceeding, in the light of the fundamental rules of our judicial systems, to which we have now adverted, is so manifest that we have no doubt that the learned attorney general, when his attention is once directed to them, will at once perceive the propriety and necessity of suspending all action in other courts involving the unconstitutionality of this law, and the right and duty of this railway company to reduce its charges

to those there prescribed, until this court, which first acquired jurisdiction of the issues and the parties, has finally determined the questions presented. The court of appeals has frequently required the federal courts of this circuit to stay their hands and to hold their suits in abeyance until the final determination by the state courts of issues of which those courts first acquired jurisdiction. *Gates v. Bucki*, 4 C. C. A. 116, 53 Fed. 961; *Zimmerman v. So Relle*, 25 C. C. A. 518, 80 Fed. 417, 419. If the state courts had first taken jurisdiction of the issues involved in this suit, we should have gladly followed the foregoing decision, but the rule applies where the federal court first takes jurisdiction as well as where jurisdiction is first acquired by the state court. The enforcement of this rule, that the court which first takes jurisdiction must retain and exercise it to the exclusion of all proceedings in other courts until its jurisdiction is exhausted by the final judgment or decree, and by its effective execution, is indispensable to prevent unseemly conflicts between courts and their officers, and "confusion worse confounded." The maintenance of this rule requires that the defendant Frank N. Prout, acting as attorney general of the state of Nebraska, shall not bring or prosecute in any other court any actions or proceedings involving the constitutionality of the maximum freight rate law of Nebraska, and the rights and duties of this railway company thereunder to reduce its rates to those there prescribed, until the final determination of this suit, and that the jurisdiction and power of this court to determine those issues, to render and enforce its decrees in this case, shall be left unlimited and unvexed by any such proceedings. The supreme court decided in *Smyth v. Ames* that this court rightfully issued its injunction to this effect against the then attorney general of the state of Nebraska upon the same facts which the supplemental bill alleges and the demurrer admits condition the rights and remedies of the parties to this suit. There is no escape from the conclusion that the complainants are entitled to the same relief against the present attorney general of this state. He has no higher right or better authority to proceed against this railway company, subsequent to a decision of the supreme court that the law under which he is acting is unconstitutional, than his predecessor had to proceed under it before that decision. *New Orleans v. Citizens' Bank*, 167 U. S. 388, 389, 17 Sup. Ct. 905, 42 L. Ed. 202. The demurrer to the supplemental bill must be overruled; a writ of injunction must be issued against Frank N. Prout, temporarily restraining him from bringing or prosecuting actions, in accordance with the views expressed in this opinion; and, if the defendants elect to stand upon this demurrer, a final decree in the form approved by the supreme court in the case of *Smyth v. Ames* must be rendered herein in favor of the complainants.

## STATE TRUST CO. v. KANSAS CITY, P. &amp; G. R. CO. et al.

(Circuit Court, W. D. Missouri, W. D. April 15, 1901.)

No. 2,331.

## 1. REMOVAL OF CAUSES—TWO DEFENDANTS—PETITION BY ONE.

Where a suit commenced in a Missouri state court by a Missouri corporation against two other corporations of that state on a cause of action not separable as to defendants is removed to the United States circuit court on the petition of one defendant, on the ground that the controversy was separate and involved a federal question, it must be remanded, since one defendant had not the right to have the action removed.<sup>1</sup>

## 2. COURTS—JURISDICTION—PRIORITY—INJUNCTION.

Where by suit in the United States circuit court a mortgage of a railroad has been foreclosed and the property sold under a decree requiring the purchaser to enter his appearance in such action, such purchaser may by supplemental bill enjoin a suit in a state court by a creditor of such railroad company to recover a pre-existing claim and enforce a lien on such property, and attacking the good faith of the foreclosure proceedings, notwithstanding Rev. St. § 720, prohibiting injunctions to stay proceedings in state courts, since such section extends only to cases in which the jurisdiction of the state court first attached, and not to cases over which the federal court had prior jurisdiction.<sup>2</sup>

## In Equity.

In 1899 suit was instituted in this court in the above-entitled cause to foreclose mortgages given by the Kansas City, Pittsburg & Gulf Railroad Company, executed to the complainant as trustee, securing bonds of the company to the extent of about \$23,000,000. Receivers were appointed by the court, and the property placed in their hands pending the foreclosure proceedings. On February 5, 1900, a final decree was rendered in the foreclosure proceeding, under which all the property and assets of every kind and description belonging to the Kansas City, Pittsburg & Gulf Railroad Company, upon certain terms and conditions therein mentioned, was decreed to be sold on the 19th day of March, 1900, at which sale the Kansas City Southern Railway Company, a corporation organized for such purpose, became the purchaser; and, having complied with the terms and conditions of such sale, the sale was duly confirmed by order of court on March 20, 1900. Thereupon a deed was duly executed to the purchaser by the receivers; and the railroad and all the property of the Kansas City, Pittsburg & Gulf Railroad Company covered by said mortgages was turned over and delivered to the Kansas City Southern Railway Company, and it took immediate possession thereof, and, pursuant to the provisions of the scheme of reorganization, issued and put upon the market and negotiated its bonds, creating a first and second mortgage lien upon the railroad property. The Guardian Trust Company, a Missouri corporation, was a party defendant to said foreclosure suit, and was one of the trustees for the bondholders of the Kansas City, Pittsburg & Gulf Railroad Company. The provisions of the decree of foreclosure and confirmation aforesaid, in so far as they are pertinent to this controversy, will sufficiently appear in the following opinion of the court. After said foreclosure and sale of said property as aforesaid, said Guardian Trust Company instituted suit in the state circuit court of Jackson county, Mo., against the said Kansas City, Pittsburg & Gulf Railroad Company and the Kansas City Southern Railway Company, claiming to be

<sup>1</sup> Separable controversy as ground for removal, see notes to Robbins v. Ellenbogen, 18 C. C. A. 86; Mecke v. Mineral Co., 35 C. C. A. 155.

<sup>2</sup> Restraining proceedings in state courts, see notes to Garner v. Bank, 16 C. C. A. 90; Trust Co. v. Grantham, 27 C. C. A. 575.

the owner and holder of certain obligations of the Kansas City, Pittsburg & Gulf Railroad Company, which it alleges are preferential claims, prior in equity and right to that of the mortgagees under the mortgages foreclosed in the principal suit. The petition in the state court charges, *inter alia*, that the proceedings had in said foreclosure suit in this court were collusive and fraudulent, in that the stockholders and bondholders of the Kansas City, Pittsburg & Gulf Railroad Company associated themselves together for the purpose of reorganizing the property of that company by means of said foreclosure sale in order to fraudulently cut out the claims of unsecured creditors, while preserving to the bondholders and stockholders their full interest in the property; that the foreclosure proceedings aforesaid in this court, and the appointment of the receivers therein, were in furtherance of said scheme, and the decree of foreclosure was in execution thereof. While not asking to disturb the decree of this court, the petition asked to have its claim established against the property in the hands of the Kansas City Southern Railway Company, and declared to be prior in right to the said mortgages, and for execution against the property so purchased by the Kansas City Southern Railway Company. The Kansas City Southern Railway Company, in response to the summons issued upon said suit in the state court, appeared at the return day thereof, and filed its petition for the removal of the cause into the United States circuit court for this district, on the ground of a separable controversy, and because the controversy involved a federal question. The state court sustained the application for removal. The plaintiff filed a motion in this court to remand the cause to the state court; and pending this motion the Kansas City Southern Railway Company has filed a bill in the nature of a supplemental bill in the principal foreclosure suit of the State Trust Company against the Kansas City, Pittsburg & Gulf Railroad Company et al., reciting said foreclosure proceedings, the appointment of receivers, the decree of foreclosure, sale and confirmation of the property, and the substance of the suit aforesaid instituted in the state court, praying for an injunction from this court enjoining the Guardian Trust Company from the further prosecution of said suit in the state court.

Lathrop Morrow and Fox Moore, for Kansas City Southern Ry. Co.

Trimble & Braley and John A. Eaton, for Guardian Trust Co.

PHILIPS, District Judge (orally). This cause has been submitted to the court on two questions: First, on the motion of the plaintiff to remand the cause to the state court; and, second, in case said motion be sustained, as to the right of the Kansas City Southern Railway Company, on a bill in the nature of a supplemental bill in the original foreclosure proceeding, to enjoin the Guardian Trust Company from the further prosecution of the suit in the state court.

Without entering into a discussion of the first question, it is sufficient for the court to say that as the suit instituted in the state court by the Guardian Trust Company against the Kansas City, Pittsburg & Gulf Railroad Company and the Kansas City Southern Railway Company is an independent suit at law, and both the defendants are Missouri corporations, the right of the defendant the Kansas City Southern Railway Company to remove the whole cause into this court cannot be sustained. The controversy is not separable as to the defendants. An examination of the more recent decisions of the supreme court of the United States is against the right of such removal. The motion to remand, therefore, will be sustained.

The remaining question, then, is whether the Kansas City Southern Railway Company has a right, by a supplemental bill filed in the original foreclosure proceedings in this court, to enjoin the suit instituted by the Guardian Trust Company in the state court. This question is answered by a review of the adjudicated cases and the provisions of the decree of foreclosure and confirmation of sale in the receivership case. In *Sharon v. Terry* (C. C.) 36 Fed. 337, Mr. Justice Field, on the circuit, delivered an instructive opinion on the question of the right of the court which first obtains jurisdiction of the subject-matter and the parties in a proceeding in equity to retain jurisdiction to the end, to the exclusion of any other court. He said:

"This court, having the power to hear and determine the subject-matter in controversy, and having first obtained possession of the controversy, is fully at liberty to retain it until it shall have disposed of it. The general rule is that, as between courts of concurrent and co-ordinate jurisdiction, the court that first obtains possession of the controversy must be allowed to dispose of it without interference from the co-ordinate court. \* \* \* Where a party is within the jurisdiction of this court, so that on a bill properly filed here this court has jurisdiction of his person, although the subject-matter of the suit may be situated elsewhere, it may, by the ordinary process of injunction and attachment for contempt, compel him to desist from commencing a suit at law, either in this state or any foreign jurisdiction, and, of course, from prosecuting one commenced after the bringing of the suit in this court."

Proceeding then to a discussion of the applicability of section 720 of the United States Revised Statutes, which provides that the writ of injunction shall not be granted by any court of the United States to stay proceedings in any court of the state, except in cases where such injunction may be authorized by law relating to proceedings in bankruptcy, he observed that:

"Notwithstanding the very general terms of the prohibition, with the single exception mentioned, it has been settled that it does not apply where the federal court has first obtained jurisdiction, or where, the state court having first obtained jurisdiction, the case has been removed to the federal court. In such cases the federal court may restrain all proceedings in a state court which would have the effect of defeating or impairing its jurisdiction. It extends only to cases in which the jurisdiction of the state court has first attached. With its proceedings, then, no federal court can interfere by injunction."

In *Fisk v. Railroad Co.*, 10 Blatchf. 520, Fed. Cas. No. 4,830, the circuit court of the United States for the Southern district of New York issued an injunction restraining that corporation from taking any steps in the state court to procure its own dissolution, and the effect of the statute in question was considered. Judge Blatchford, in deciding the case, said:

"The provision of section 5 of the act of March 2, 1793 (1 Stat. 334), that a writ of injunction shall not be granted to stay proceedings in any court of a state, has never been held to have, and cannot properly be construed to have, any application except to proceedings commenced in a court of a state before the proceedings are commenced in the federal court. Otherwise, after suit brought in a federal court, a party defendant could, by resorting to a suit in a state court, defeat in many ways the effective jurisdiction of person and subject-matter. Moreover, the provision of the act of 1793 must be construed in connection with the provision of section 14 of the act of Sep-

tember 24, 1789 (1 Stat. 81), that the federal courts shall have power to issue all writs which may be necessary for the exercise of their respective jurisdictions. It may properly be considered as necessary for the exercise of the jurisdiction of this court over the corporation in question that it should be restrained from taking steps in a state court to put itself out of existence."

Speaking of the case of *Dietzsch v. Huidekoper*, 103 U. S. 494, 26 L. Ed. 497, in which an action of replevin had been commenced in the state court of Illinois and removed to the circuit court of the United States, he said:

"An injunction was issued, and the supreme court held that it was properly granted, observing that 'a court of the United States is not prevented from enforcing its own judgments by the statute which forbids it to grant a writ of injunction to stay proceedings in a state court.' It is essential to the due administration of justice in the federal courts that they have full power to issue all process necessary for the exercise of their jurisdiction, and such power is in explicit terms conferred by the statute upon them."

In *Jesup v. Railroad Co.* (C. C.) 44 Fed. 663, it was held that where a railroad under a receivership is sold, and the purchaser assumes the payment of existing debts and liabilities of the receivership, it was the duty of the court to protect the purchaser against all such demands which are not just and proper against the receiver, and, to that end, to require all such demands to be presented to it for allowance; that where, on the strength of such covenant to the purchaser, a person brings an action in the state court against him to recover for a tort to his realty committed by the receivers, such demand being primarily chargeable on the fund in the hands of the federal court arising from the sale, such court would restrain the prosecution of the action, and require the claimant to present his claim to it, for the reason that a judgment thereon in the state court would entitle him to satisfy it out of any property subject to levy in the hands of the purchaser. The provisions of the decree in that case were, in respect of the question under discussion, much like the provisions of the decree in the foreclosure proceedings herein. In that case it was provided both in the decree and in the order of confirmation that the receivers should deliver certain of the assets, papers, and property to the Wabash Railroad Company, the purchaser, on the condition that the company was to pay and satisfy all debts and liabilities of the receivership remaining unpaid, authorizing the company to defend in that case. The decree in that case did not go to the extent of the decree here, requiring the purchaser to enter his appearance to the principal suit and become a party thereto. The court observed, respecting such provision in the decree, that:

"It is therefore clearly the duty of the court to see that the purchaser is not required to pay or satisfy any claim or judgment of any kind that would not be a proper and just liability of said receivers. If the court had not discharged said receivers upon the conditions recited in the order, releasing them from further responsibility in connection with this property, it would have retained the assets, books, and vouchers in his hands, and adjusted all the liabilities incurred by them as receivers, by and through the proceedings customary in such cases. It is clearly the duty of this court to protect the purchaser of this property to the same extent and in the same manner that it would have protected the receivers if they had been retained for the purpose of settling all these outstanding claims. When the purchaser



bought this property it purchased it upon the conditions named in the decree and order of sale. The purchase price so obtained became a fund in the hands of this court for distribution to the beneficiaries under its decree. The court would certainly protect this fund from being diverted. This agreement to pay such just claims as might be allowed against the receiver is in fact a part of the purchase price paid by said purchaser for the road, and it is the duty of the court to protect it against any unjust claims by the same diligence and care that it would protect the fund if actually in the registry of the court for distribution. The distribution of this fund and the allowance of claims against the receivers, which is in fact a part of the purchase price, is exclusively within the control of this court. As the court would not allow any other tribunal to distribute any part of the purchase price, so it cannot safely or properly allow any other tribunal to say what are proper claims against the receivers to be paid out of this fund, or by the purchaser as a part of its purchase price for the property."

The court then lays down the fundamental proposition that, as such promise and agreement on the part of the purchaser constitute an additional consideration, it is the duty of the court, in good faith to the purchaser, to supervise and determine what claims should be paid and rejected against the property; and therefore it is an indispensable requisite that all the parties who assert claims against the purchaser because of the stipulation and covenant made by the decree or order of the court should establish such claims in the court by the usual proceedings in such class of cases; that, if the claimant were permitted to prosecute his action in the state court, he would have a right to satisfy his judgment out of any property subject to levy in the hands of the purchaser. The court further said (which is an answer to the suggestion made by counsel on the argument of this case) that while counsel "assured the court that they expected, in case they recovered judgment, to come to this court and ask to have it allowed and paid by the purchaser on this covenant, yet there is no legal barrier which would prevent the plaintiff from satisfying such judgment by levy and sale of subsequently acquired property in the hands of the purchaser."

In *Fidelity Ins., Trust & Safe-Deposit Co. v. Norfolk & W. R. Co.* (C. C.) 88 Fed. 815, the decree of foreclosure provided, as in the case at bar, that the purchaser should be let into possession on delivery of the deed of the master making the sale, and that the purchaser should take the property subject to all liabilities incurred by the receiver, to be determined and enforced by the court ordering the sale. The receiver remaining in possession 60 days after the delivery of the deed, a liability arose during this period for the negligent operation of the road. It was held—First, that the liability was one arising under the receivership, enforceable by the federal court under the terms of the decree; and, second, that where the federal court, by its decree of sale, obtained jurisdiction so far as to determine and enforce against the property sold claims for liabilities incurred by the receivers, it is proper for the court to enjoin the prosecution of an action on such claim in a state court, without violating section 720 of the Revised Statutes, prohibiting courts from granting injunctions to stay proceedings in state courts. It is true that that case is distinguishable from the one at bar, as it was a liability of the receivers, while the case at bar is a liability

accruing prior to the appointment of the receivers. But the principle of law involved is not affected. The court observed in this last case that:

"The court did not surrender its jurisdiction over this class of claims, nor did its jurisdiction end with the execution and delivery of the deed of conveyance. It specifically provided in the decree of sale what liabilities the purchaser of the railroad property should assume as a part of the purchase price therefor, and how such liabilities should be ascertained. These provisions of the decree entered into and became a part of the contract of purchase. The railway company by its purchase became a party to this suit. It is bound by the terms of the decree of sale, and it has a right to have them enforced in its behalf."

In *Central Trust Co. v. Western N. C. R. Co.* (C. C.) 89 Fed. 24, this question is quite thoroughly reviewed by Judge Simonton, in which the following propositions are laid down: Where the decree of the federal court and the confirmation of sale provided that the purchaser should become and be regarded as a party to the suit, although the decree of sale was binding, it did not determine the case. The case is so far a continuing proceeding that the purchaser could file a supplemental bill for an injunction restraining third parties from bringing suit in the state court to attack the decree of the circuit court, and that the federal court would enjoin such proceeding in the state court, the effect of which would be to annul its judgment, notwithstanding the provisions of section 720 of the Revised Statutes. Speaking of the decree, which provided that the cause and the purchaser under its jurisdiction were subject to the enforcement of such orders as might from time to time become necessary, the court said:

"If the purchaser, under the clauses quoted, is held bound to the court to obey its orders, surely the purchaser has a corresponding right to call upon the court for its aid against what has been done in opposition to its orders. One of the obligations of the purchaser is to hold subject to the first mortgage, and in argument it has been claimed that the purchaser has, as between itself and the North Carolina Railroad Company, become the principal, as far as the debt under this mortgage is concerned, and the North Carolina Railroad Company a surety."

See, also, *French v. Hay*, 22 Wall. 250, 22 L. Ed. 857.

In *Minot v. Mastin*, 37 C. C. A. 234, 95 Fed. 737, the court say:

"No rule is better established than that a court having the custody of property through the agency of its receiver will not suffer that possession to be disturbed, either by levy or sale under process issued by some other court, or by the bringing of an independent suit against its receiver to recover the possession of the res, or to enforce a lien thereon, or to establish any other claim thereto."

Under paragraph 16 of the decree of foreclosure in the receivership at bar, it is provided that the master's deed shall vest in the purchaser all the right, title, estate, and interest and property, real and personal estate, and franchises, in fee simple, forever, to the property sold, and shall entitle the grantee, upon compliance with the conditions of sale, to the possession of the premises and property, and shall be a perpetual bar, both in law and equity, to the Kansas City, Pittsburg & Gulf Railroad Company, and the defendants in this suit, and each and every of them, and all persons claim-

ing by, from, or under them, or any of them, of, in, or to, or in respect of, said premises, property, or franchises, etc. The fifteenth paragraph of the decree lays the obligation upon the purchaser to make payment of all indebtedness and liability incurred by said railroad company, "which may be finally found and decreed to be prior in lien or superior in equity to said mortgage." Paragraph 19 of the decree directs the master to give notice to all holders of claims against the railroad company or the receivers to present the same to him for allowance, or, "if a claim against the receivers, to bring suit against them thereon; and barring all such claims that shall not be presented or sued on within six months." It will be recalled that in the discussion at bar counsel for plaintiff in the state court directed special attention to the language last above quoted, as authority for the institution of this suit. The language "or, if a claim against the receivers, to bring suit against them," was inserted by the court, bearing in mind the provisions of the judiciary act of 1887-89 (25 Stat. 436), authorizing parties to bring suit against receivers without leave of the court. In drawing the decree the court was regardless of this right, and therefore employed this language in reference to causes of action against the receivers during their administration of the property; but the other class of claims, such as the one at bar, was to be presented to the master for allowance. The second clause of the sixth paragraph expressly requires that the purchaser at the foreclosure sale should enter his appearance in this court, and gives him the right to contest any claim, demand, or allowance undetermined at the time of sale, or which thereafter may have arisen or been presented, and which would have been payable out of the proceeds of the sale herein, or by such purchaser, or with which the property purchased would have been chargeable. By the very terms of the decree, therefore, the purchaser was made a party to this suit, in effect continuing the jurisdiction of the court over the subject-matter, with the right to determine all claims assumed by the purchaser, giving the purchaser the right to contest the same, with the right of appeal therefrom. These provisions in their very nature contemplated that all proceedings attempting to charge the property in the hands of the purchaser with liens or preferred claims should be instituted in this court, and not in any other jurisdiction. In the decree confirming the sale the court reserved and retained jurisdiction of the cause, with power to enforce the provisions of the decree, including the right to retake possession of the property and sell any part of it to enforce compliance with the orders of the court in respect of the payment of the prior indebtedness and liabilities imposed upon the purchaser by the decree. The decree further required the presentation of all claims for allowance to the master within six months, and for a hearing and determination of the same, reserving the right to retake possession of the property and sell the same, or to appoint a receiver, if the purchaser should fail or refuse "to pay such sums which may in this cause, or in any of the courts of ancillary jurisdiction, be allowed and directed to be paid." The Guardian Trust Company, plaintiff in the suit in the state court, was a party defendant to the fore-

closure proceedings in this court. By every consideration of right and justice, it is bound and controlled by the provisions of the decree therein. It might have intervened in the principal suit if it desired to do so. *Minot v. Mastin*, 37 C. C. A. 234, 95 Fed. 734. In *Cutter v. Water Co. (C. C.)* 96 Fed. 777, the court animadverted upon the conduct of one who was a party to the suit, standing by during the litigation without asserting any prior claim, and suggested that he was guilty of such laches in the case as ought to preclude him from afterwards asserting a prior claim. In the case at bar the Guardian Trust Company stood by during the whole litigation, and allowed the decree of foreclosure to be entered, the property sold, and the deed delivered to the purchaser, the Kansas City Southern Railway Company, and possession taken of the property, with knowledge of the fact that the purchaser thereupon issued and put upon the market and sold bonds of the company, without protest, or making known the claim which it now seeks to assert against this railroad property in the suit in the state court, in which it, in effect, assails the validity of the decree, and asks for the enforcement of a lien against the purchased property prior to that of the mortgage. Notwithstanding the protest of counsel that the object of the suit in the state court is only to establish the existence of a claim against the property purchased at the foreclosure sale, without more, it is quite apparent from the various and repeated allegations and charges in the petition filed in the state court that it was modeled after the bill of intervention in the case of *Louisville Trust Co. v. Louisville, N. A. & C. R. Co.*, 174 U. S. 674, 19 Sup. Ct. 827, 43 L. Ed. 1130, the object of which was to assail the validity of the decree of foreclosure on the ground of fraud in obtaining it. It is unnecessary to quote from the allegations of the petition filed in the state court to sustain this conclusion. Paragraph after paragraph of the petition charges a fraudulent conspiracy among the organization committeemen to secure the foreclosure, with a view of the reorganization of the company so as to cut out the rights of other creditors, and that such fact was not disclosed to the court in the foreclosure proceedings. It is distinctly and repeatedly alleged that the plan devised by the reorganization committee and the parties thereto was to secure the foreclosure for the protection of the parties interested in said plan, so as to get complete control of the property, and issue bonds and stock in the new company, and cut out other bond and stock holders and creditors; that after the sale the Kansas City Southern Railway Company, for the purpose of carrying out said plan or scheme, issued or was about to issue first mortgage bonds in the sum of \$750 for each \$1,000 of bonds issued by said Kansas City, Pittsburg & Gulf Railroad Company, and deliver the same to the holders and owners of said bonds of the defendant railway company, and that it had issued or was about to issue preferred and common stock, and deliver the same to the stockholders of the Kansas City, Pittsburg & Gulf Railroad Company, in accordance with the terms of said modified plan; that said values were based solely upon the right to acquire in said new company, under said modified plan, its capital stock, and thereby secure

and obtain an interest in the property of the Kansas City, Pittsburg & Gulf Railroad Company so to be sold. In positive contradiction of the assertion made by counsel that the only purpose of the proceeding in the state court is to establish the validity of the plaintiff's claim against the Kansas City, Pittsburg & Gulf Railroad Company, the prayer for relief is not only for judgment for the amount which may be found to be due the plaintiff, but it expressly prays that said judgment shall be decreed to be prior in right and prior in equity to any indebtedness secured by the mortgage foreclosed, and that the amount adjudged to be due the plaintiff be declared to be a prior lien upon the property acquired by the Kansas City Southern Railway Company under the foreclosure sale, and, further, that the plaintiff have the process of the state court for the enforcement, by levy and sale, against the property acquired under the foreclosure sale for the collection and payment of said judgment, and that the plaintiff have such other and further relief as the nature of the case requires. Manifestly, this would be an interference with the prior jurisdiction of this court to determine the question of priority between said judgment creditor and the mortgagee in the foreclosure suit. By the very terms of the decree of foreclosure the purchaser thereunder was assured that such questions of priority and the liability of the purchaser were reserved for the determination of this court, whose jurisdiction, as alleged in the supplemental bill, is a continuing one. It is furthermore apparent from the petition in the state court that the purpose and object of the suit is to inquire into the regularity and legality of the proceedings in this court resulting in the foreclosure and sale of the property. It was, moreover, admitted and stated by counsel for plaintiff that the Guardian Trust Company had heretofore presented its claim, pursuant to the provisions of the decree of court, for allowance, which claim is now pending before the master appointed by this court in the foreclosure proceeding; thereby having recognized the superior jurisdiction of this court, and sought relief in the manner thereby provided. The jurisdiction of this court over the subject-matter of the suit instituted by plaintiff has never been cast off. The property of the Kansas City, Pittsburg & Gulf Railroad Company, purchased as aforesaid by the Kansas City Southern Railway Company under the provisions of the decree of foreclosure and the order approving the sale, is, in contemplation of law, in custodia legis, under the control of this court. Any liability imposed upon the Kansas City Southern Railway Company for debts and obligations of the Kansas City, Pittsburg & Gulf Railroad Company has its origin in the decree of this court, by which any claimant asserting any right against said purchaser must come to this court and submit to its jurisdiction alone to have his claim litigated and determined. To repeat, in requiring the purchaser of the mortgaged property to submit itself to the jurisdiction of this court for the determination of any claims against it, it was assured of the exclusive jurisdiction of this court to determine what claims it should be required to pay in addition to the purchase money at the sale. It is therefore the duty of this court to protect it in such right. It would be an act of bad faith

on the part of this court to the purchaser under the decree to subject it to the investigation and judgment of some other court for the determination of any liability arising before it took the property. The proper remedy for the protection of the purchaser under the foreclosure decree is by a supplemental bill filed in the original proceeding, to which it was made a party, and for an injunction to restrain the claimant from further proceeding in the state court. It is accordingly so ordered.

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LENGEL v. AMERICAN SMELTING & REFINING CO. et al.

(Circuit Court, D. New Jersey. May 13, 1901.)

**1. FEDERAL COURTS—JURISDICTION—DISTRICT OF SUIT.**

Under section 1 of the act of congress of August 13, 1888, amending act of March 3, 1887, where the jurisdiction of a federal court is dependent on the fact that the action is between citizens of different states the suit can only be brought in the district where all the plaintiffs reside, or in the district where all the defendants reside who are indispensable or necessary parties.

**2. SAME—STOCKHOLDER'S SUIT.**

A stockholder who is a citizen and resident of Pennsylvania cannot maintain a suit in a federal court in the district of New Jersey against the corporation, which is a citizen of New Jersey, and its directors and third persons, who are citizens and residents of another state, to set aside or enjoin the enforcement of an alleged illegal contract made by the directors on behalf of the corporation with their co-defendants, where timely objection is made by the nonresident defendants, who in such case are indispensable parties.

**3. SAME—SUITS OF LOCAL NATURE.**

A suit by a stockholder against the corporation and others to restrain the enforcement of a contract by which the corporation sold stock to its co-defendants is not one to "enforce any legal or equitable lien or claim" against the stock, within the meaning of Rev. St. § 738, authorizing the bringing in of nonresident defendants in such suits.

In Equity. On motion by defendants to dismiss for want of jurisdiction.

James Buchanan, Geo. L. Crawford, and Arthur J. Baldwin, for complainant.

Thomas Thacher, Chas. Untermeyer, and John S. Johnson, for defendants.

Before GRAY, Circuit Judge, and KIRKPATRICK, District Judge.

GRAY, Circuit Judge. This case is brought to the attention of the court upon a rule to show cause why a preliminary injunction should not issue. The rule was granted and the motion is now made upon a bill filed by Irvin D. Lengel, the complainant, who alleges that he is a citizen of the state of Pennsylvania, and a stockholder in the American Smelting & Refining Company, one of the defendants, and a corporation of the state of New Jersey. The suit is brought as a stockholder's suit, in conformity to the requirements of the ninety-fourth equity rule, and purports to assert rights be-

longing to the corporation itself. The real defendants, therefore, are the directors of the corporation, and the individual members of the firm of *Gugenheim's Sons*, with which firm the said directors are alleged to have had the negotiations and made the contract complained of in the bill. The ground of jurisdiction is the diverse citizenship of the parties to the suit, and we are now confronted with a motion made by counsel, who appear provisionally for that purpose, to dismiss the bill for want of jurisdiction, and we are referred to a statute of the United States in that behalf. The act of congress of August 13, 1888, amending the act of March 3, 1887, provides in its first section, among other things, as follows:

"And no civil suit shall be brought before either of said courts against any person by any original process or proceeding in any other district than that whereof he is an inhabitant, but where the jurisdiction is founded only on the fact that the action is between citizens of different states, suits shall be brought only in the district of the residence of either the plaintiff or the defendant."

With this requirement of the statute in view, we turn to the opening paragraphs of the bill, and find that it is alleged that the complainant is a citizen of the state of Pennsylvania; that the *American Smelting Company*, being a corporation of the state of New Jersey, is alleged to be a citizen of that state, but that the other defendants, with the exception of *Grant B. Schley*, a citizen of the state of New Jersey, being the directors and officers of the defendant company, 13 in number, and the members of the firm of *M. Gugenheim's Sons*, 8 in number, are alleged to be citizens of the state of New York. Under this law the supreme court of the United States, in *Shaw v. Mining Co.*, 12 Sup. Ct. 935, 36 L. Ed. 768, in deciding that a corporation incorporated in one state only cannot be compelled to answer in a circuit court of the United States, held in another state, in which it has a usual place of business, to a civil suit at law or in equity brought by a citizen of a different state, took occasion to say that the general object of this act, as appears upon its face, is to contract, and not enlarge, the jurisdiction of the circuit courts of the United States. In the case of *Phosphate Co. v. Brown*, 20 C. C. A. 428, 74 Fed. 321, in the circuit court of appeals for the Fourth circuit, *Simonton*, circuit judge, in delivering the opinion of the court of appeals, says:

"As to the second question: Could the circuit court of the United States for the district of West Virginia take jurisdiction of this bill, as amended, and make the decree thereon appointing a receiver and granting the injunction? The complainants are citizens and residents of the state of Pennsylvania, and the defendants are, one of them, a corporation of the state of West Virginia, and the other, a corporation and resident of the state of New York. \* \* \* No federal question is involved, and the jurisdiction depends upon the citizenship of the parties."

After quoting the act of 1887, as corrected by the act of 1888, and citing certain decisions of the supreme court hereinafter referred to, he says:

"Clearly, therefore, the court had no jurisdiction over the case as amended. The learned counsel for the complainants say that the *Central Trust Company* is neither an indispensable nor a necessary party, and that the presence of that company cannot oust the jurisdiction; but, again, the complainants who

made the motion, and who asked the court to amend the bill, in order to make this corporation a party, now say that such an amendment was improper or unnecessary."

In *Strawbridge v. Curtiss*, 3 Cranch, 267, 2 L. Ed. 435, Chief Justice Marshall, in considering the question of jurisdiction as dependent on diverse citizenship, says:

"Each distinct interest should be represented by persons all of whom are entitled to sue, or may be sued, in the federal court."

In *Coal Co. v. Blatchford*, 11 Wall. 172, 20 L. Ed. 179, the supreme court, in again discussing the question of diverse citizenship as a ground of jurisdiction, says:

"In other words, if there are several co-plaintiffs, the intention of the act is that each plaintiff must be competent to sue, and, if there be several defendants, each defendant must be liable to be sued, or the jurisdiction cannot be entertained."

So the supreme court, in *Anderson v. Watts*, 138 U. S. 694, 11 Sup. Ct. 449, 34 L. Ed. 1078, by the present chief justice, says:

"If each of the indispensable adverse parties is not competent to sue or be sued, then the circuit court cannot maintain cognizance of the suit."

The cases in the supreme court just referred to were, it is true, dealing with the question of diverse citizenship only as a ground of jurisdiction, but the reasoning by which the conclusion is reached that all the indispensable parties must be competent to sue or be sued, in order to support the jurisdiction, is applicable to the requirements of the act of 1888, upon which the motion to dismiss is grounded. "Where the jurisdiction, therefore, is founded only on the fact that the action is between citizens of different states," as is the case here, the requirement of the act plainly is that suit must be brought either in the district where all the plaintiffs, if they be more than one, reside, or in the district where all the defendants, if they be more than one, reside. In this case, the suit having been brought by a citizen and resident of Pennsylvania in the district of New Jersey, it is requisite, under the act in question, that all the defendants named in the bill shall be residents of the district of New Jersey. The fact, however, is, as already stated, that the bill alleges that the corporation defendant only is a citizen of New Jersey, and that all the individual defendants, save one, composing the directors of the corporation and the members of the firm of M. Gugenheim's Sons, who are, in a suit of this kind, the real defendants, are citizens of the state of New York, and cannot be sued by this complainant in the district of New Jersey. There can be no question of waiver in this case on the ground of voluntary appearance of unsuable defendants, since there has been not only no such general appearance, but a special appearance for the purpose of making the objection to the jurisdiction. Neither is there any ground for the suggestion made by counsel that, the corporation being a resident of the district of New Jersey, the other parties to the suit are not indispensable, and may be disregarded, and the case proceeded with against the one suable defendant. In the first place, the complainant has elected to make these residents of New York defendants; and, in the second place, that they are indispensable



appears from the whole theory and framework of the bill, and from the relief prayed for. The gravamen of the complaint in the bill is an alleged illegal contract made by certain of the individual defendants, as directors of a smelting company, with the firm of M. Gugenheim's Sons, the members of which are the other individual defendants; and all these, save one of the directors of the corporation, are alleged to be residents of New York, and not of the district of New Jersey, as required in such a case by the statute. The contract sought to be annulled, or the fulfillment of which is sought to be restrained, was a contract between the corporation and the firm of M. Gugenheim's Sons, and it would be idle to say that the members of that firm were not indispensable parties to such a suit. The principal relief also sought in the case is against the members of the firm of M. Gugenheim's Sons, who are sought to be restrained in marketing the stock which they are alleged to have bought from the smelting company, and the consideration for which it is alleged may have passed from them to the corporation. If the question of indispensability of the parties is one proper to be considered, it would appear that in this case there is no room for denying that all the defendants named must be considered as indispensable parties to the bill. An ingenious argument was made by counsel for the complainant, that, under section 738 of the Revised Statutes, jurisdiction might be maintained in this case on the ground that the subject-matter of the suit was really the capital stock of the New Jersey corporation, and as such must be considered as being in the district of New Jersey. But the language of that act, it is to be observed, is:

"When any defendant in a suit in equity, to enforce any legal or equitable lien or claim against real or personal property within the district where the suit is brought, is not an inhabitant of, nor found within, the said district, and does not voluntarily appear thereto, it shall be lawful for the court to make an order," etc.

It is very clear that the present suit is not brought to "enforce any legal or equitable lien or claim against real or personal property," within the meaning of this statute. Even the trusteeship, casually suggested, as regards the stock issued to the Gugenheim's Sons, is a remedial trusteeship, to be declared by the court for the purpose of accomplishing the relief which the complainant thinks, on other grounds, he is entitled to. The enforcement of an antecedent existing lien held by the complainant is not the subject-matter of this suit. We are compelled to the conclusion, therefore, that the court is without jurisdiction to proceed in this case, and the motion to dismiss is therefore granted.

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KROMER v. EVERETT IMP. CO. et al. (GROLL et al., Interveners).

(Circuit Court, D. Washington, N. D. August 10, 1901.)

**FEDERAL JURISDICTION—CITIZENSHIP—INTERVENTION.**

The only ground for federal jurisdiction in a suit to establish complainant's right as an heir of deceased to an undivided interest in land being the diverse citizenship of complainant and defendants, jurisdiction of the dependent controversy between interveners, also claiming undi-

vided interests as heirs of deceased, and defendants, all citizens of the same state, is ousted by dismissal of the case so far as involving any interest of complainant.

J. M. Epler, for interveners.

Francis H. Brownell, for defendants.

HANFORD, District Judge. This is a suit in equity commenced by Emma Kromer to establish her right as one of the heirs of Edward D. Kromer, deceased, to an undivided interest in certain real estate situated in the city of Everett, and now in possession of the defendants. The complainant claimed the right to sue in this court on the ground of a controversy between citizens of different states; she being a citizen of the state of Oregon, and the defendants being citizens of the state of Washington. The interveners also claim to be heirs of Edward D. Kromer, and came into the case seeking an adjudication of the questions as to their rights to undivided interests in the same real estate. After the interveners had filed their complaint, the complainant, Emma Kromer, for a consideration sold and conveyed all her interest in the property to the defendants, and with her consent the case has been dismissed so far as it involves any title or interest which she may have had in or to the property. The case has been argued and submitted to the court upon the question as to the sufficiency of special pleas filed by the defendants, supported by an answer.

It is my opinion that this court has no jurisdiction of the controversy between the interveners and the defendants. Therefore it will be unnecessary to consider the merits of the case, or the matter pleaded in bar of the action. The pleadings do not present any question of federal law, and there is no ground upon which jurisdiction can be maintained, except the diversity of citizenship between the complainant and the defendants alleged in Emma Kromer's complaint. If the interveners, by reason of the interest which they claim to have in the property, and their voluntary appearance to aid the complainant in her contention, may be regarded as joint plaintiffs and indispensable parties, the case must certainly be dismissed, because the interveners and the defendants are all citizens of this state, and there is no controversy between citizens of different states. The case, however, was originally commenced in this court upon the theory that the interest of the complainant in the property was separable from the interest of the interveners, and that she had a right to wage the suit alone, and that her controversy was capable of being fully determined without the presence of the interveners; and it is now contended that the conveyance of her rights to the defendants has no effect upon the rights claimed by the interveners with respect to the property. The questions to be determined are whether the court has jurisdiction to determine a controversy between citizens of the same state which has been introduced into a suit between citizens of different states by an intervening complainant, and whether the court has been ousted of jurisdiction to determine such separable controversy by dismissal of the suit as to the original parties.

Except questions which might be raised as to the identity of the interveners and their relationship to the decedent, from whom they claim to have derived title to the property, the issues presented by their complaint are identical with the issues presented by the original complaint. On account of their interest in the property, and the effect upon their claim of an adjudication of the issues tendered by the complaint, they are proper parties, and leave to intervene might have been lawfully granted by any court having jurisdiction to determine the rights of all the parties; but as they seek an adjudication of a separable controversy affecting only their rights, which could not have been originally brought into this court either by joining them as co-plaintiffs with Emma Kromer, nor by an independent suit, their scheme of intervention is a mere attempt to evade a rule prescribed for the express purpose of limiting the jurisdiction of United States circuit courts. The rule as to joint parties is concisely stated by Chief Justice Marshall in the case of *Strawbridge v. Curtiss*, 3 Cranch, 267, 2 L. Ed. 435, as follows:

"Each distinct interest should be represented by persons, all of whom are entitled to sue, or may be sued, in the federal courts; that is, that where the interest is joint each of the persons concerned in that interest must be competent to sue, or liable to be sued, in those courts."

And in the case of *New Orleans v. Winter*, 1 Wheat, 91-94, 4 L. Ed. 44, the supreme court denied the jurisdiction of a federal court in a case brought by two plaintiffs claiming title to property as joint heirs because one of them was not entitled to sue in a United States federal court. In the opinion by Chief Justice Marshall, the court said:

"In this case it has been doubted whether the party might elect to sue jointly or severally. However this may be, having elected to sue jointly, the court is incapable of distinguishing their case, so far as respects jurisdiction, from one in which they were compelled to unite."

The principle of these decisions, and others in which they have been followed, is that a party not entitled to sue in a federal court in his own right cannot gain admission into a federal court by voluntarily associating himself with a party who has the right, and grafting his controversy upon a separate controversy of which the court has jurisdiction. Consistently with this principle, I am constrained to hold that the defect of jurisdiction has not been obviated by presenting the controversy in a separate pleading, nor by mere delay in introducing the controversy until after jurisdiction of the suit between the original parties had attached. As the case now stands, there is only left for determination a controversy between parties all of whom are citizens of this state; and, regardless of the question as to whether this controversy might have been cognizable in this court as a mere incident of the suit originally commenced, it is now the duty of the court to dismiss it for want of jurisdiction, pursuant to the provisions of the fifth section of the act of March 3, 1875, defining the jurisdiction of circuit courts of the United States (1 Supp. Rev. St. U. S. 83), which provides that:

"If, in any suit commenced in a circuit court, or removed from a state court to a circuit court of the United States, it shall appear to the satisfac-

tion of said circuit court, at any time after such suit has been brought or removed thereto, that such suit does not really and substantially involve a dispute or controversy properly within the jurisdiction of said circuit court, \* \* \* the said circuit court shall proceed no further therein, but shall dismiss the suit or remand it to the court from which it was removed, as justice may require. \* \* \*

I consider that the case must be dismissed for want of jurisdiction, because the present controversy, when introduced into this court, was a mere dependent upon the original suit, and by the termination of the original suit the dependent controversy necessarily falls. The case cited in which it has been held that, after a court has acquired jurisdiction of the parties and the subject-matter of the cause, subsequent changes by the substitution of new parties, or the mere changing of domicile, will not affect the jurisdiction, are not in point. As long as the subject-matter of a suit of which a court has acquired jurisdiction remains undetermined, the court will disregard changes in the situation of parties; but in this case the whole subject-matter of the original suit has been finally and completely eliminated, and the only support which the interveners' controversy had to rest upon has been removed. I hold that the plea to the jurisdiction is sufficient and valid, and a decree will accordingly be entered dismissing the interveners' bill of complaint.

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In re NEWARK & H. TRACTION CO.

(Circuit Court, D. New Jersey. June 24, 1901.)

**REMOVAL OF CAUSES—FILING RECORD BEFORE SUCCEEDING TERM—JURISDICTION TO MAKE EX PARTE ORDERS.**

Where proceedings against landowners for the condemnation of land under the eminent domain statutes of a state are removed by defendants into a federal court, the adverse party may file the record therein at any time, without waiting until the first day of the succeeding term; and thereupon it is competent for the judge to make such ex parte orders as are conformable to the state practice in like cases, such as fixing a time for the appointment of commissioners, etc.

On Motion to Set Aside Ex Parte Order.

Sherard Depue, for the motion.

Halsey M. Barret, opposed.

GRAY, Circuit Judge. In the matter of the application of the Newark & Hackensack Traction Company for the appointment of commissioners to examine and appraise the land of Mortimer M. Sanford and others, and assess the damages, argument was had before me at the March term of the circuit court in regard to the sufficiency of the order made by Judge Kirkpatrick fixing the time and place for hearing the application. At the argument I was inclined to think that the said order had been improvidently granted, but further consideration of the briefs of counsel on both sides has brought me to the conclusion that the order was properly granted, and that the action of Judge Kirkpatrick was in accordance with the approved practice in such cases. There is nothing in the statutes

of the United States regarding removals to forbid such an order being made. It is true that by the statutory bond the defendant, or the party on whose petition the removal is ordered, has until the first day of the next succeeding term within which to file the record in the circuit court of the United States. It is perfectly well settled, however, that the other party to the suit or proceeding may file the record at any time before the first day of the next succeeding term, and, having done so, it is competent for the judge of the circuit court to make such ex parte orders as the essential character of the proceeding certified in the record makes proper or necessary; such order not being in the nature of a step in the proceeding to final judgment, or in the determination of the merits of the controversy. The statute of New Jersey provided for such ex parte fixing of a day for the appearance of the owners, occupants, and other persons interested in the proceeding, and it is the proceeding under the New Jersey statute that has been removed into this court. Every litigation or controversy justiceable in a court of justice presupposes an ex parte act or step on the part of the actor or pursuer by which the proceeding before the court is initiated. The order made by Judge Kirkpatrick in the present case would then be analogous to the issuance of a summons at the commencement of a suit to the parties to be impleaded, warning them to appear at a time stated, in order that they may be before the court. The order in the present case will be considered as continued until Monday, the 1st day of July, when a further adjournment, or such other proceedings as may be taken before the judge who made the original order, may be had.

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NEW ENGLAND PHONOGRAPH CO. v. EDISON et al.

(Circuit Court, D. New Jersey. June 28, 1901.)

EQUITY—SUFFICIENCY OF BILL—MULTIFARIOUSNESS.

A bill which alleges that complainant was granted an exclusive license within certain territory by the owner of a patent for a valuable consideration; that one of the defendants succeeded to the ownership of the patent and the rights and responsibilities of the licensor under the contract; that such defendant owns and controls the other defendants, which are corporations; and that all the defendants, conspiring together for the purpose, have violated the contract by invading the territory of complainant,—states a cause of action for equitable relief, and is not demurrable on the ground of multifariousness.

In Equity. On demurrer to bill.

Howard W. Hayes, for the motion.

Elisha K. Camp and Louis Hicks, opposed.

GRAY, Circuit Judge. The allegations of the bill in this case are, substantially: That the North American Phonograph Company was a corporation organized and chiefly owned by Thomas A. Edison, one of the defendants, for the purpose of exploiting certain of his inventions relating to the phonograph. That the other defendants, the Edison Phonograph Company and the Edison Phonograph

Works, were also largely owned and controlled by the said Edison. That the North American Phonograph Company, prior to October 12, 1888, by conveyance and assignment from the said Edison, joined in by the said Edison Phonograph Company, Edison Phonograph Works, and one Jesse H. Lippincott, became the owner of the sole and exclusive right, title, and interest in and to certain patents of the defendant Edison appertaining to the phonograph. That, in consideration of the payment of \$100,000 in cash, and other good and valuable considerations, the said the North American Phonograph Company, on October 12, 1888, invested the complainant the New England Phonograph Company with the sole and exclusive right to use and to sell phonographs and appliances therefor within the New England states for a term of 15 years. On the same date the defendants Edison, Edison Phonograph Company and Edison Phonograph Works, by an agreement in writing with the North American Phonograph Company, in all respects authorized, ratified, and confirmed the said contract between the said the North American Phonograph Company and complainant, and gave and executed guaranties, wherein and whereby they undertook and agreed to ratify, confirm, and respect the said exclusive contract. That the said defendant Edison afterwards became the president of the North American Phonograph Company, and obtained control thereof as its president and stockholder. That he and his co-defendants entered upon a plan or scheme by means of which they might deprive the complainant of the enjoyment and profits of the exclusive rights aforesaid, and divert the same to themselves. That the North American Phonograph Company, under the management of the said Edison, became hopelessly insolvent in 1894, and that a receiver was duly appointed by the chancellor of the state of New Jersey, by whom all its property and assets, including contracts with the complainant, were sold, and bought in by the said Edison, who conveyed a portion of them to the National Phonograph Company, one of the defendants herein, and a corporation alleged to have been formed by the said Edison in his own interest, for the purpose of taking title to and dealing in his said patents and inventions. That the other defendant corporations were also formed for the same purpose, and largely owned and controlled by the said Edison. It is then alleged that the defendants, conspiring together, as aforesaid, to injure the said complainant, invaded the territory within which the said exclusive rights had been conferred upon it, and sold and used, and caused to be sold, within the said territory, phonographs and supplies therefor, in direct contravention and violation of the said contract of October 12, 1888, and of the rights thereunder. That thereby irreparable injury has been done and is threatened to complainant, for which there is no adequate remedy at law. To the bill framed on these general lines the defendants have demurred, assigning as causes of demurrer: First, want of any equity in the bill, entitling the complainant to the relief sought; and, secondly, that the bill is multifarious.

I do not think that the demurrer can be sustained, but do not wish to express an opinion at large as to all the grounds urged in argument, either for or against the demurrer. To do so might prejudice

the case at final hearing. It will be sufficient to say, however, that the bill alleges a sole and exclusive grant to the complainant of the right to use and sell, etc., within the territory named. The instrument by which this exclusive right was conferred by the complainant is not set out in the bill. Profert, however, is made of the same, and, as the defendants have demurred without craving oyer, we must take the statements of the bill in regard thereto as correctly describing the purport of the said contract. In these it has been sufficiently alleged, at least for the determination of this demurrer, that the said contract contained an implied negative covenant not to sell or deal in the articles or matters in regard to which the said exclusive right was granted, and that the defendant Thomas A. Edison owned and controlled the defendant companies, and that he and they succeeded to the rights and responsibilities of the North American Phonograph Company in regard to the contract in question. This is not a bill for infringement of the patents under which complainant was a licensee, but is one that seeks to restrain those who are alleged to be acting under the original licensor from violating the negative covenants contained in said license contract. The allegations of identity of interest among the co-defendants and of general conspiracy are too positive and clear to be ignored. Whatever may be the result at final hearing of the attempt to support the allegations of the bill, the allegations themselves are of such a character as preclude the court from an allowance of the demurrer on the ground stated.

Neither do we think that the other ground, as to multifariousness, is of greater merit. The injury alleged is attributable to the joint action of all the defendants. The wrong complained of is a single one, and all the defendants are alleged to have participated therein.

For the reasons stated, the demurrer must be overruled.

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MASSACHUSETTS LOAN & TRUST CO. v. KANSAS CITY & A. R. CO.  
(PAINE et al., Interveners).

(Circuit Court of Appeals, Eighth Circuit. May 13, 1901.)

No. 1,584.

**APPEAL—APPEALABLE ORDERS—DENYING LEAVE TO INTERVENE.**

Where an order granting conditional leave to intervene is set aside before the condition has been complied with, the case stands the same as though the application had been denied in the first instance; and when the showing made by the petition is such that the granting or refusing of leave to intervene was discretionary, the petitioner not being entitled to such leave as a matter of right, the order refusing leave is not appealable.

Appeal from the Circuit Court of the United States for the Western Division of the Western District of Missouri.

On motion to dismiss appeal.

C. H. Nearing, for appellants.

Solon T. Gilmore, for appellee.

Before SANBORN and THAYER, Circuit Judges, and ADAMS, District Judge.

THAYER, Circuit Judge. This is a motion to dismiss an appeal which was taken by Arthur C. Paine and Henry E. Bullard from an order made by the circuit court of the United States for the Western division of the Western district of Missouri, denying the appellants leave to intervene in a case entitled as above, the Massachusetts Loan & Trust Company, complainant, against the Kansas City & Atlantic Railroad Company, defendant, which was an action to foreclose a mortgage on the property of the railroad company. The record shows that on October 29, 1900, Paine and Bullard, hereafter termed the appellants, applied to the circuit court for leave to intervene in the cause, and that on said day the circuit court made an order that "on filing with the clerk of this court, to be approved by the clerk, an undertaking to secure the costs of the litigation consequent upon this intervention, they have leave to intervene." This order, as will be seen, was in its terms conditional, in that it required the petitioners to file a bond before their intervening complaint would be entertained. Before the petitioners had complied with the terms of the order by filing a cost bond, the Massachusetts Loan & Trust Company and the Kansas City & Atlantic Railroad Company each filed a motion to vacate the conditional order last aforesaid, inasmuch as that order had been obtained *ex parte* without notice to either of the parties to the cause. On the hearing of the latter motion to vacate the conditional order of October 29, 1900, it was sustained, the conditional order was vacated, and the appellants were denied leave to intervene.

It is contended by counsel for the appellants that they became parties to the suit because they offered to file their cost bond and to comply with the conditional leave, which they obtained, and that they were prevented from so doing by the subsequent direction of the court alone. The truth is that before they had filed their bond or their petition in intervention under the conditional leave which they had obtained, the court stayed further proceedings on their part until it could more carefully consider whether or not it would permit them to comply with its order, and become parties to the suit, and in this way it effectually prevented them from ever becoming such. It is apparent, therefore, that the appellants never acquired a standing in the case as parties to the litigation, because of their failure to file a stipulation for costs before further proceedings were stayed, and this fact distinguishes the case in hand from the case of *Hamlin v. Trust Co.*, 47 U. S. App. 422, 24 C. C. A. 271, 78 Fed. 664, 36 L. R. A. 826, on which the appellants principally rely to sustain their right to have the order of the lower court reviewed on appeal. In *Hamlin v. Trust Co.* the petitioners were by an order of court permitted to intervene, and to file both an answer and a cross bill, which pleadings they subsequently filed, in accordance with such leave. Thereafter a motion was made by the other parties to the cause to strike the answer and the cross bill from the files, and upon the hearing of that motion it was sustained. On the hearing of that motion the trial court considered the merits of the claim, which was interposed by the interveners both in their answer and in their cross bill, and an order was made denying leave to intervene, and denying



leave to file an answer or other pleading, for the reason that the claim sought to be interposed was not well founded. It is obvious, therefore, that such an order, based as it was upon an adjudication concerning the merits of the interveners' claim, was a final decree, from which an appeal would properly lie. The case at bar is essentially different from the one cited and relied upon by the appellants, in that the appellants in the case in hand never did become parties to the proceeding, and in that the merits of their claim have not been considered or adjudicated. The case at bar must be viewed precisely as it would have been if the circuit court had denied the petitioners' motion for leave to intervene on October 29, 1900, when it was first preferred. Such being the fact, it is obvious, we think, that the order from which this appeal was taken is in no sense a final order from which an appeal will lie. The action of the lower court in denying leave to intervene cannot be regarded as an adjudication upon the merits of the appellants' claim, because the lower court did not permit them to become parties to the proceeding, and they cannot be held bound by an order made in a cause to which they were not parties. They are still at liberty to assert their rights, whatever they may be, by an independent bill. Moreover the action of the lower court in denying leave to intervene was purely discretionary, for the reason that the right which the appellants assert is not one for the protection of which they were bound to intervene. On the contrary, it is a right which can and ought to be asserted in an independent proceeding. The trial court wisely exercised its discretion in refusing to permit a new issue, affecting third parties, to be injected into the pending suit in the form of an intervention. It is well settled that when the action of the trial court in refusing leave to intervene in a pending cause is purely discretionary, the petitioner not being entitled to such leave as a matter of right, an order made refusing such leave is not an order from which an appeal will lie. *Credits Commutation Co. v. U. S.*, 62 U. S. App. 733, 34 C. C. A. 12, 91 Fed. 570; *Credits Commutation Co. v. U. S.*, 177 U. S. 315, 20 Sup. Ct. 636, 44 L. Ed. 782; *Hamlin v. Trust Co.*, 47 U. S. App. 422, 24 C. C. A. 271, 78 Fed. 664, 36 L. R. A. 826; *Ex parte Cutting*, 94 U. S. 14, 24 L. Ed. 49; *Minot v. Mastin*, 37 C. C. A. 234, 95 Fed. 739.

For these reasons the motion to dismiss the appeal must be sustained, and it is so ordered.

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BERLINER GRAMOPHONE CO. v. SEAMAN.

(Circuit Court of Appeals, Fourth Circuit. July 6, 1901.)

No. 403.

1. APPEAL—DISMISSAL OF BILL ON APPEAL FROM INTERLOCUTORY ORDER.

On an appeal from an interlocutory order granting or continuing an injunction, the court may determine the suit on its merits, and dismiss the bill, where the case stated is one which a court of equity will not entertain.

**2. SPECIFIC PERFORMANCE—CONTRACT ENFORCEABLE—CONTINUOUS CONTRACT.**

A court of equity will decree specific performance of a contract only when it can dispose of the matter by an order capable of being enforced at once. Where the contract is one establishing business relations between the parties, containing mutual covenants to be performed by each, and having several years to run, the court will not undertake to supervise its performance by enjoining its violation by one party at the instance of the other.

Appeal from the Circuit Court of the United States for the Western District of Virginia.

Marshall McCormick and Wm. Gordon Robertson (Albert B. Weimer and Frederick M. Leonard, on the brief), for appellant.

Waldo G. Morse and John T. Harris, for appellee.

Before SIMONTON, Circuit Judge, and BRAWLEY and WADDILL, District Judges.

SIMONTON, Circuit Judge. This case comes up on appeal from an interlocutory decree of the circuit court of the United States for the Western district of Virginia, continuing an injunction theretofore granted. 108 Fed. 714. The bill was filed by Frank Seaman against the Berliner Gramophone Company, and seeks practically specific performance of a contract made by it with him, and damages for a breach thereof, with prayer for injunction against any further breaches of the contract.

The Berliner Gramophone Company, a corporation of the state of Virginia, by reason of certain contracts made with persons interested therein, had secured the exclusive right to manufacture, vend, and use in the United States, under the patents and rights of Emil Berliner, a certain invention, device, or machine known and described in the patents and in commerce as the gramophone. On October 10, 1896, the Berliner Gramophone Company, being thus in control of these patents, invention, or machine, entered into a contract in writing with Frank Seaman, the main features of which, or at least the features with which this discussion is most concerned, are these: The Berliner Gramophone Company, in consideration of money paid and covenants to be performed by Frank Seaman, and subject thereto, grants to him the exclusive license to buy, sell, and deal in, throughout the United States, except the District of Columbia, gramophones and gramophone goods, embodying said inventions, and all improvements therein that may come into the control of said gramophone company, except recording apparatus, for a period of 15 years from the said date of the agreement; these gramophones and gramophone goods, and parts for the repair of them, to be furnished by the said gramophone company to the said Seaman upon his orders, at stipulated prices. The said gramophone company binds itself by covenant, so long as Seaman punctually performs his covenants, not to sell or deliver to any other person or corporation the gramophone or gramophone goods aforesaid in the territory aforesaid, except to the officers, directors, and stockholders of said gramophone company, and in that case only in reasonable quantity, for their own use, or to be given away, but not to be sold

for profit. Besides this, the said gramophone company also covenants that so long as Seaman punctually performs his covenants, it will fill with reasonable promptness and dispatch all orders of Seaman for gramophones and gramophone goods, and agrees that, if it shall make default, Seaman may, after notification in writing to the gramophone company of his intention so to do, supply the gramophones, gramophone goods, and parts for the repair thereof necessary to fill the orders defaulted on, provided that said gramophones, gramophone goods, and parts for repair shall be equal in quality to those supplied by the company, and at a certain price. The agreement authorizes Seaman to cause one or more corporations to be created, with such powers and capital as said gramophone company may approve, and after such approval Seaman can assign to such corporations all the rights granted him in this agreement, provided that such corporations undertake the performance of covenants of Seaman, who will then be relieved from further obligations thereunder. On his part Seaman covenants to pay for the gramophone and gramophone goods furnished, to use his best efforts to promote the gramophone business in the United States, to advertise gramophones and gramophone goods prominently and freely as Berliner gramophones and Berliner gramophone goods, and not to manufacture, buy, sell, or use gramophones or gramophone goods, or any parts thereof, or other talking machines or parts thereof, except such as he buys from the Berliner Gramophone Company. Both parties agree that their books shall at all times be exhibited to the other of them, in order to determine any question in dispute under the agreement. Provision is also made for the appointment of a disinterested arbitration to settle any dispute regarding the interpretation of the contract, and the right is reserved to the gramophone company to rescind the contract after notice, in case Seaman commits any breach of his covenants, and does not remove the cause of complaint. Gramophone goods are matrices or dies from which the disks are obtained, known and designated in the contract as "records." The agreement thus defines the term:

"The phrase 'gramophones and gramophone goods,' as used in this agreement, shall be held to include not only the machines and mechanical devices constituting the inventions hereinbefore mentioned, and all the improvements in the said inventions that may come into the licensor's control (except recording apparatus), but also all motors (except electric batteries) that may be adopted for driving the said machines and mechanical devices, as well as all other mechanism, appliances, and accessories that may be adopted as necessary or useful in handling, operating, or using the machines or mechanical devices which constitute the said inventions or improvements; for it is the intention hereof to refer by the phrase aforesaid to the complete sound-producing machine, which may embody the said inventions and improvements and all parts of the said machine, notwithstanding the fact that other inventions may also be embodied therewith in the said machine."

This agreement having been made, the parties acted under it, Seaman using a corporation called the National Gramophone Corporation as his agent for selling the gramophones and gramophone goods. The business was large and profitable. Differences having arisen, Seaman filed this bill. He charges a breach of the contract on the part of the gramophone company, in that during the year

1899 it failed and refused to supply and deliver to him gramophones, records, and gramophone goods with reasonable dispatch, whereby he was unable to fill the orders he then had and subsequently received, and the amount of his sales was greatly lessened. That in May, 1900, he ordered a large number of records from the gramophone company, and that the company wholly failed and refused to deliver the same, and still refuses, and that the gramophone company has refused to fill his orders for large numbers of the machines and records, said orders having been given under said contract, and that the gramophone company has refused to submit their differences to arbitration. The bill prays damages for these breaches of the contract, and an injunction against further violation of it. The bill having been filed, an injunction was granted dated June 22, 1900, restraining the gramophone company from selling, delivering, or otherwise disposing of, and likewise from permitting or allowing any such selling, delivery, or disposing of, within the United States of America, any of the gramophones, records, matrices, or goods referred to in the contract of November 10, 1896. On August 6, 1900, the Berliner Gramophone Company filed its answer, admitting its refusal to fill orders of Seaman, partly because those orders were for gramophone goods and not gramophones, and chiefly and especially because he had violated the covenants on his part, and had betrayed, and was assiduous in betraying, the interests of the Berliner Gramophone Company to competing and infringing corporations. The case was heard on bill and answer as affidavits, and a very large number of affidavits on both sides, which swell the record to an unusual extent. At this hearing the circuit court continued the injunction theretofore ordered, and a bond for \$5,000 was required from the complainant. Leave to appeal was granted, and the case is here on assignments of error.

The present appeal is from an interlocutory order continuing an injunction. It is now well settled by the supreme court, after citation and review of all the cases upon the subject, that the court, in passing upon an appeal of this character, may consider and decide the case on the merits, and may thereupon render or direct a final decree dismissing the bill. *Smith v. Iron Works*, 165 U. S. 518, 17 Sup. Ct. 407, 41 L. Ed. 810. The gravamen of this bill is a breach of a contract, and the loss of money therefrom. The first question, therefore, is, has the complainant a plain, adequate, and complete remedy at law. That compensation may be had in damages for the breach already charged is shown by the prayer of the bill seeking such compensation. So the nature, character, and amount of such damages can be ascertained. Even were it the case that there is not "any rule by which these damages can be estimated with precision, this is not a conclusive objection against the resort to a court of law." "It is very well known that in all judicial proceedings for injuries inflicted by one party on another, whether arising out of tort or out of contract, the relief given by way of damages is never the exact sum which compensates for the injury done; but, with all the rules which have been adopted for the measurement of damages, the relief is only approximately perfect." *Miller*,

J., in *Texas & P. R. Co. v. City of Marshall*, 136 U. S. 405, 10 Sup. Ct. 849, 34 L. Ed. 390.

There is another question in the case. The duration of this contract in question, if it be not rescinded under one of its terms, is 15 years from October 10, 1896. The obligation of its covenants is interdependent,—that is to say, each party is bound for his covenants, if the other party performs its. The complainant now charges a breach of covenant on the part of the gramophone company, prays compensation for that, and an injunction against any future breach. It is a continuous contract. The act to be done by the defendant is not a single act, but a series of acts, to be performed at many times. In *Chicago & A. Ry. Co. v. New York, L. E. & W. R. Co.* (C. C.) 27 Fed. 521, the court says:

"In many cases where the act to be done by the delinquent party was not a single act, to compel which a single decree of the court would be sufficient, but a series of acts, which would call for the frequent interposition of the court during a protracted period of time, by successive decrees or orders, the inconvenience of the remedy of specific performance has been deemed so great that the courts have refused to interfere, and have left the party aggrieved to his remedy at law."

Were the court to assume supervision of this continuous contract now, and enforce its performance by its injunction, it must continue this supervision, and see to it during the whole existence of the contract that both parties fulfill their mutual obligations. This has been repeatedly declared to be outside of the functions of a court of equity. *Strang v. Railroad Co.*, 41 C. C. A. 474, 101 Fed. 511; *Marble Co. v. Ripley*, 10 Wall. 339, 19 L. Ed. 955; *Texas & P. Ry. Co. v. City of Marshall*, supra; *Ross v. Railway Co.*, Fed. Cas. No. 12,080. In this last-named case Mr. Justice Miller says:

"If the act to be done by the delinquent party, whether plaintiff or defendant here, were a single act, to compel which a single decree of the court would be sufficient, a case would be presented very unlike that before us. Years must elapse before this work can be done and paid for. At every step of its progress, the interposition of the court, either by orders in this case or by decrees in successive cases, may be invoked, if we are at this time to lend the aid of chancery to either of the parties. It is not difficult to foresee the mischief of such a course. The rule is settled, even in the English chancery, where the jurisdiction is greatly extended in all such cases, that it will decree specific performance only when it can dispose of the matter by an order capable of being enforced at once; that it will not decree a party to perform a continuous duty, extending over a number of years, but will leave the opposite party to his remedy at law."

Considering the whole case, we are of the opinion that there was error in the judgment of the court below. Let the case be remanded to the circuit court, with instructions to dismiss the bill for want of jurisdiction, without prejudice.

SOUTHERN BUILDING & LOAN ASS'N OF KNOX COUNTY, TENN., v.  
MILLER et al

(Circuit Court of Appeals, Fourth Circuit. July 6, 1901.)

No. 400.

## MORTGAGES—INSURANCE BY MORTGAGEE—INSOLVENCY OF COMPANY.

A mortgage contained a covenant by the mortgagors to insure for the protection of the mortgagee, and a further provision that if they failed to insure the mortgagee might do so, and charge the premium paid to them. They did not insure, and the mortgagee procured a policy, the loss payable to itself, and rendered a bill for the premium paid to the mortgagors, who, after some delay, paid it. The property subsequently burned, and the insurance company proved insolvent, although the mortgagee had no knowledge of such fact, and was not chargeable with negligence in that regard. *Held*, that such facts constituted no defense to the enforcement of the mortgage debt, the provision of the mortgage not being a covenant to insure on the part of the mortgagee which the mortgagors could bring into force by their own default, but merely an option, in the exercise of which the mortgagee acted as agent for the mortgagors, and its action was ratified by the repayment of the premium without objection to the company selected, of which the mortgagors were chargeable with notice if they failed to make inquiry.

Appeal from the Circuit Court of the United States for the Western District of Virginia.

This case comes up on appeal from the circuit court of the United States for the Western district of Virginia. On 27th January, 1897, Linda H. Johnson filed her bill against the Southern Building & Loan Association of Knox county, Tenn., in behalf of herself and all other stockholders in, and creditors of, the said building and loan association. This bill averred the insolvency of the association, and prayed the appointment of a receiver to collect and administer its assets in the Western district of Virginia. The bill was intended as ancillary to a bill filed or to be filed for a similar purpose in one of the courts of Tennessee. Upon filing the bill, the circuit court for the Western district of Virginia appointed J. R. Miller temporary receiver, and by a subsequent order made his appointment permanent. Answer having been filed, the court proceeded to an examination of the several claims against the defendant association and to the ascertainment and realization of its assets. Among other assets of the association was a bond executed by J. R. Miller and J. K. Warden, who had been conducting business under the name of Miller & Warden, in the town of Pulaski, Va. The bond was dated 1st February, 1892, and was secured by a conveyance by both of them of a lot in Pulaski in the nature of a mortgage of same date to J. E. Moore, trustee for the Southern Building & Loan Association of Knoxville, Tenn. The bond was for \$10,000, and was given to secure a loan of that amount on 100 shares of the said association standing in the name of J. R. Miller. Miller had been the agent of the association in Pulaski. It seems that on 1st January, 1892, the co-partnership between Miller and J. K. Warden was dissolved, and A. J. Miller and Clyde Miller, sons of J. R. Miller, took his place in the firm, which was thereafter conducted under the same firm name of Miller & Warden. On 21st January, 1892, J. R. Miller and wife conveyed in fee unto A. J. Miller and Clyde Miller the one-half interest in this same lot mentioned in the deed of trust to J. E. Moore, trustee, in consideration of the payment by them of Miller's share of unpaid purchase money, and of one-half the loan to be made to Miller & Warden by the Southern Building & Loan Association. This arrangement seems to have been known to and acquiesced in by agents of the building and loan association. The bond of Miller, however, was not canceled or released. The lot of land embraced in the deed of trust was on Commerce street, in the town of Pulaski, and the loan was effected in order to erect a building upon it. That building was in course of erection, but was

not finished until some time late in March, 1893. It was damaged by fire on 6th August, 1893, to the extent of over \$6,000. An effort having been made to recover on the bond as a part of the assets of the association, the circuit court appointed G. E. Cassel as special receiver to prosecute the claim, because of the connection therewith of J. R. Miller, the permanent receiver, Miller & Warden denying any responsibility on this bond for the reasons stated hereafter.

The deed of trust by Miller & Warden to J. E. Moore, trustee, given to secure this bond, had, among other covenants by the makers of the deed, these: "(2) That they will keep the buildings on said real estate insured in some solvent company, in such sum as said association shall require, not to exceed \$5,000, for the benefit of this trust, and that they will assign the policy or policies of insurance to said trustee as further security in the premises. (3) That they will promptly pay all premiums of insurance on said property, as well as all taxes and assessments upon the same, and should they fail to insure the said property, or to pay any premiums of such insurance, or taxes and assessments, as the same may become due, then the said trustee or said association may take out such insurance, and pay any premiums of such insurance or taxes and assessments, as the same may become due, and any sum so paid shall, with interest from the day of such payment, become a part of the debt secured in this deed, and be due and payable with the next and ensuing monthly payment."

No insurance was put on the building by Miller & Warden up to February 13, 1893. The excuse given for this is that, the building being incomplete, a builder's policy was not contemplated in the deed, and, besides this, that John P. Heap, agent for the building and loan association, had agreed early in 1893 that Miller & Warden might have time to complete the building before placing insurance thereon. On the 13th February, 1893, the Southern Building & Loan Association caused the building to be insured in the Wytheville Insurance & Banking Company in the sum of \$5,000. This policy was made out in the name of Miller & Warden, loss, if any, payable to the association. The association paid the premium, and then at once demanded its repayment by Miller & Warden. After several applications to this end, Miller & Warden paid the premium to the association on 11th July, 1893. Miller & Warden had been making arrangements to insure the building when completed in a company of their own selection, for \$10,000. When they were notified that the association had effected insurance they abandoned this purpose. They deny all knowledge of the name of the insurance company in which insurance had been effected by the building and loan association, the premium upon which they had reimbursed to the association. The fire having taken place, proofs of loss were made and application sent in to the Wytheville Banking & Insurance Company for the loss. After negotiating and waiting, the insurance company proved insolvent and the loss was not paid. The contention is that the Southern Building & Loan Association was bound by covenant to insure the property in a solvent company, if Miller & Warden had not fulfilled their covenant to do so; that, having insured in a company not solvent, they must incur the loss, and thus Miller & Warden are exonerated. This view was taken by the special master, and was confirmed by the court. To this the appeal is directed.

R. M. Page (Jerome Templeton, on the brief), for appellant.

I. H. Larew, for appellees.

Before SIMONTON, Circuit Judge, and MORRIS and BOYD, District Judges.

SIMONTON, Circuit Judge (after stating the facts as above). When a case comes by appeal into this court, in which there are questions of law depending, more or less, on questions of fact, we examine into the findings of fact made by the master in which the court below has concurred, and give them great weight in reaching our conclusion. We regret to say that in this case we get no as-

sistance whatever from the findings of the master. His whole report of his actions shows a marked bias in favor of Miller & Warden,—a bias so strong that his report and conclusions impress us as those of an advocate, rather than of a disinterested officer of the court conducting a judicial inquiry. Nowhere is this more evident than in that most remarkable statement of what took place when the counsel for the Southern Building & Loan Association presented himself to represent his client's interest, and was excluded by the special master, who affected the air and assumed the power of an offended chancellor, until counsel should comply with terms imposed by the master, and which counsel could not have assented to except in dereliction of his duty to his client, and a betrayal of the relations between them.

We will inquire what was the connection of the Southern Building & Loan Association with the insurance on this property. The theory upon which the decree below proceeds is that Miller & Warden and the trustee, Moore, with the Southern Building & Loan Association, were bound by mutual covenants to insure; that Miller & Warden covenanted to insure the property in some solvent insurance company for the protection of the money loaned, and that the trustee and the association covenanted, if Miller & Warden did not so insure the property, to do it themselves in some solvent insurance company; that Miller & Warden did not fulfill their covenant, and that, therefore, the obligation fell on the trustee and the association; and that, these having insured in a company which proved to be insolvent, they must bear the loss, and Miller & Warden are discharged from the debt. If this theory be correct, then all that Miller & Warden need do was to commit a breach of the covenant, and by this act—because of this act—throw upon the covenantee, the creditor, the whole responsibility of effecting the insurance they had bound themselves to effect, and to assume the risk of obtaining solvent insurance. This would be a most liberal construction of the deed in favor of the debtor, enabling him to profit by his own default.

The contract is not capable of such a construction. It is a deed poll, and not an indenture. The covenant is stated to be the covenant of the parties of the first part, the makers of the deed. There are four clauses to this covenant of the parties of the first part: (1) That they will promptly pay all monthly dues, fines, and interest by the terms of the bond, or the laws, rules, and regulations of the said association; (2) that they will keep the buildings on said real estate insured in some solvent company, in a sum not exceeding \$5,000, for the benefit of the trust, and will assign the policies to the trustee as further security in the premises; (3) that they will promptly pay all premiums of insurance on said property, as well as all taxes and assessments thereon. These are three covenants based upon consideration of the loan. Then it is provided that, in case they fail to observe these covenants, then the trustee or the association may—that is, will have the option, if they wish—take out such insurance, and pay such taxes and assessments, and, if they do so, any sum so paid, with interest from the day of payment, will become a part of the debt secured by the deed, and be payable with



next ensuing monthly payment. Now, this option on the part of the trustee and the association to insure the property to the amount of their debt was not dependent upon, nor derived from, the deed. They had an insurable interest, and could, of their own volition, insure it, without asking or needing the consent of the debtors. But in no event could they insure but for the amount of their debt. *Carpenter v. Insurance Co.*, 16 Pet. 495, 10 L. Ed. 1044; *Foster v. Van Reed*, 70 N. Y. 19, 26 Am. Rep. 544. Having this right apart from this deed, the only meaning and purpose of this third covenant of the debtors was that, if they chose to exercise this right to insure, all the expenses to which they were put in such event were to be reimbursed by the debtors, and the reimbursement, with interest, was to be secured by the deed, on a footing with the original debt. This evidently was the view taken of the transaction by Miller & Warden before the loss by fire occurred. They were promptly notified of the payment of the premium of insurance by the association, and the repayment was at once demanded. After some delay, not because it was not authorized or because the insurance was disapproved of, but from some excuse or other explanatory of the delay, their money was returned by Miller & Warden, and the transaction was recognized and affirmed.

This conclusion is strengthened by the case of *Wheeling v. Insurance Co.*, 101 U. S. 439, 25 L. Ed. 1055. In that case the mortgagor had executed successive mortgages on his plantation, buildings, machinery, and stock, securing the payment of certain notes. In two of these mortgages the mortgagor covenanted to insure the building, machinery, and stock, and to transfer the policies to the mortgagees, or, in default of this, that the mortgagees could insure at his expense. No such policy was effected by the mortgagor, nor did the mortgagees exercise their right to insure. But there had been effected on the same buildings, machinery, and stock an insurance prior to the mortgages by a creditor of the mortgagor. A fire occurred, and the amount of insurance paid exceeded the debt of the creditor, who insured, leaving an amount payable to the owner, the mortgagor. The supreme court held that the mortgagee, with whom the mortgagor had covenanted to insure the property and did not do so, had an equity to be paid out of the residue coming to the mortgagor. The court says:

"It is undoubtedly the general rule that a mortgagee has no right to the benefit of a policy taken by the mortgagor, unless it is assigned to him. But it is settled by many decisions in this country that if the mortgagor is bound, by covenant or otherwise, to insure the mortgaged premises for the better security of the mortgagee, the latter will have an equitable lien upon the money due on a policy taken out by the mortgagor, to the extent of the mortgagee's interest in the property destroyed."

This decision could not have been rendered if there was a binding contract on the mortgagee to insure if the mortgagor did not, so that if the mortgagee did not effect valid insurance the loss would have fallen on him.

Even if we treat the association as the agent of the debtors in effecting this insurance, we can see no reason for holding them re-

sponsible for the loss occasioned by reason of the failure of the insurance company. As such agents they were liable only for ordinary care. They had no notice or knowledge that the Wytheville Banking & Insurance Company was insolvent. On the contrary, the person charged with the insurance of the association stated at the time the insurance was effected: "We [the association] had reason to believe that the company was perfectly solvent, in fact their report issued at the time showed them to be solvent, and we [the association] had no means of knowing that the bonds, which were part of the assets, were worthless, or that they had been sold to the company by the president." Heuser, through whom the insurance was effected, never heard the solvency of the company questioned, and at that time felt perfectly satisfied that it was solvent. He had his office and discharged the duties of agent of the insurance company in the town of Pulaski, the residence of J. R. Miller and of Miller & Warden. Indeed, the witnesses who speak to the insolvency of the insurance company and its reputation refer to a period several months after this insurance was effected, and very clearly the company was not notoriously insolvent. Even J. R. Miller, deeply interested as he was in this whole matter, betrayed no question of the insolvency of the insurance company after the fire. At all events, Miller & Warden were notified of the insurance, and after some delay, occasioned in no sense by objection to the insurance, they paid the premium advanced by the association. They deny that they knew the name of the company in which the insurance was effected. It is difficult to believe that between February and July, the date of the insurance and the period during which they were dunned to repay the premium and the date at which they repaid it, J. R. Miller, who was in constant correspondence with the association, and Miller & Warden, who had a deep interest in the policy of insurance, remained in ignorance of the name of the company in which the insurance was effected. At all events, they had the means of knowledge. They knew that the association had effected insurance, that it had paid the premium, that it expected them to return it, and that it demanded persistently this return. This put them on inquiry. They are affected with notice of all that would have been discovered upon such inquiry. *Coal Co. v. Doran*, 142 U. S. 417, 12 Sup. Ct. 239, 35 L. Ed. 1063; *Shauer v. Alterton*, 151 U. S. 607, 14 Sup. Ct. 442, 38 L. Ed. 286.

Miller & Warden seek to hold the association to the loss, because, having made arrangements for effecting an insurance on the property for \$10,000, they abandoned it when they learned that the association had placed upon it a policy for \$5,000. Incidentally, this would appear to be complete recognition, affirmance, and adoption of the action of the association in insuring the property for them. Apart from this, the insurance effected by the association was for \$5,000, payable exclusively on their debt, as additional security to it. The insurance proposed to be effected by Miller & Warden was on a wholly different insurable interest, the property itself, admitted to be worth more than \$6,000. Both policies could have been effected. "A mortgagee can insure only to the amount of his debt,

but the mortgagor can insure to the full value of the property, notwithstanding the incumbrances." *Carpenter v. Insurance Co.*, supra.

Upon the whole case, we are of opinion that there was error in the conclusion reached by the court below. Its decree is reversed, and the case is remanded to the circuit court for such further proceedings as may be consistent with the conclusion of this court.

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KELSEY v. REPUBLIC SAVINGS & LOAN ASS'N.

(Circuit Court, D. Delaware. May 17, 1901.)

No. 221.

FOREIGN CORPORATION—INSOLVENCY—RECEIVERS—ASSETS IN HANDS OF STATE TREASURER.

The Republic Savings & Loan Association, a corporation of New York, having become insolvent, proceedings were there instituted for its dissolution, and the forfeiture of its rights, franchises and privileges, in the course of which proceedings temporary receivers were appointed. Subsequently the temporary receivers were appointed by this court ancillary receivers for Delaware, and applied for a rule on the state treasurer of Delaware to show cause why he should not be authorized and directed to assign to them certain securities, to be held subject to the order of the court. These securities had been assigned to the state treasurer pursuant to an act of the general assembly as the condition on which the corporation should be permitted to transact business in Delaware. By the act it was provided that such securities were to be held "for the benefit of the shareholders \* \* \* residing in this state"; that they were to remain with the state treasurer "in trust to secure any judgment" which should be obtained against the corporation upon which execution might lawfully be issued against it; and that the state treasurer and his successors in office should "receive and thereafter retain such deposit under this act in trust for the purpose hereof," with power in the corporation to withdraw such securities only on "substituting therefor others of equally good character and value to the satisfaction of the state treasurer." It did not appear that the corporation had been dissolved. *Held*, that the application for the rule must be denied.

(Syllabus by the Court.)

In Equity.

Andrew C. Gray, for receiver.

BRADFORD, District Judge. This is an application by the ancillary receivers, appointed for Delaware, of the Republic Savings & Loan Association, a corporation of the State of New York, for a rule on the state treasurer of Delaware to show cause why he should not be authorized and directed to assign to them certain bonds and mortgages and all papers relating thereto, to be held subject to the order of the court. It appears from the petition for the rule, in connection with the record of the suit in which the ancillary receivers were appointed, that the defendant was organized in 1890 under the laws of New York for the purpose of carrying on the business of a savings and loan association, and thereafter conducted such business in Delaware and elsewhere; that, the defendant becoming

insolvent, proceedings were instituted in June, 1900, in the supreme court of New York by the attorney general of that state for the dissolution of the defendant and the forfeiture of its rights, franchises and privileges, in the course of which proceedings temporary receivers of the defendant were appointed, who are the same persons as the ancillary receivers; and that subsequently the present petitioners were appointed and qualified as ancillary receivers for Delaware. The petition alleges that among the assets of the defendant in Delaware are the bonds and mortgages in question. One of these mortgages covers land in New Jersey, and the others, being two, land in New York. It further appears from the petition that these bonds and mortgages, amounting in the aggregate approximately to \$80,000, were in the early part of 1900 assigned by the defendant to the state treasurer of Delaware pursuant to section 6, c. 274, 21 Del. Laws. That section is as follows:

"Section 6. That every building and loan association doing business in this State and created by the laws of any other State, Territory or the District of Columbia, which shall not have more assets in this State than its liabilities to its shareholders residing in this State shall be required to deposit with the State Treasurer good interest bearing or dividend paying securities whose market value shall equal or exceed the liability of such building and loan association to shareholders residing in this State, to be held for the benefit of the shareholders of such building and loan association residing in this State; said securities deposited with said State Treasurer shall remain with him in trust to secure any judgment which shall be obtained against such building and loan association upon which execution may lawfully be issued against such association, said State Treasurer and his successors in office being hereby directed to so receive and thereafter retain such deposit under this Act in trust for the purpose hereof, such association, however, at all times to collect the interest, dividends and profits on such securities, and from time to time withdraw said securities or portions thereof, substituting therefor others of equally good character and value to the satisfaction of the State Treasurer, and such securities and substitutes therefor shall at all times be exempt from and not subject to levy under any writ of attachment, and shall not be subject to any process against such association without at least thirty days notice to such association, specifying the time, place and manner of the sale thereof and the process under which and the purpose for which said securities are to be sold, accompanied with a copy of such process."

It is further alleged in the petition that the assignments to the state treasurer were recorded in the respective record offices and "now stand of record in the name of the State Treasurer of Delaware"; that "the assignments were never formally accepted" by him; that they were executed in an unsuccessful attempt to meet the requirements of the Delaware statute; that there are in Delaware no judgments against the defendant; that the interest on the several mortgages is in arrear; that the principal sum secured by the largest of the mortgages is in danger of loss through the threatened foreclosure of a prior mortgage, unless immediate attention be given the matter by the petitioners; and that "an immediate transfer of these securities to the receivers is absolutely necessary for their protection." This case presents an element of hardship, but I have failed to discover any ground on which, consistently with the principles and procedure observed by this court when sitting in equity, the awarding of the rule prayed for could be justified. It is true that where the

property of an insolvent corporation has been taken out of the custody of its receiver the court has full power by summary procedure to compel its restoration. The custody of the receiver is the custody of the court, and its violation calls for and will receive speedy redress. So, whenever a person withholding the assets of a corporation from its receiver is a party to the cause in which the receiver is appointed, and is consequently bound by the decree directing delivery of possession of such assets to the receiver, should he fail to comply, obedience may be enforced in a summary manner. And equally, where property of an insolvent corporation is withheld from the possession of its receiver by one of its officers in disregard of the decree appointing the receiver and directing the delivery of such property to him by the corporation, its officers and agents, a summary remedy may be resorted to. Here, however, the state treasurer was not a party to the cause nor an officer or agent of the corporation, nor did he take the securities in question out of the receivers' custody. The circumstances, under which a third person may summarily be compelled to deliver property in his possession, alleged to belong to an insolvent corporation, to its receiver, do not here exist. But, further, the defendant, before any proceedings resulting in the appointment of receivers had been instituted against it either in New York or Delaware, assigned the bonds and mortgages to the state treasurer. Thenceforth by express provision of law that official was required to hold the securities "for the benefit of the shareholders \* \* \* residing in this State", and they were to "remain with him in trust to secure any judgment" which should be obtained against the defendant upon which execution might lawfully be issued against it; the "State Treasurer and his successors in office being hereby directed to so receive and thereafter retain such deposit under this act in trust for the purpose hereof", with power in the defendant to withdraw such securities only on "substituting therefor others of equally good character and value to the satisfaction of the State Treasurer." It nowhere appears in the petition or the record that the defendant has been dissolved. Non constat, so far as the facts are disclosed, that the defendant will not hereafter continue the business in Delaware which it has heretofore carried on. Yet it is now sought to compel, through a mere rule to show cause, the state treasurer to permit the withdrawal of the securities without the substitution therefor of others "of equally good character and value", or, indeed, of any other security whatever. If under the circumstances this could be accomplished by a plenary suit in which Delaware shareholders might have the opportunity of joining or intervening as parties,—a point which it is unnecessary to discuss,—it cannot, in my opinion, be effected in the summary mode proposed.

**The application for the rule is denied.**

## HOOVER v. SALLING.

(Circuit Court of Appeals, Seventh Circuit. June 25, 1901.)

No. 764.

## PUBLIC LANDS—CASH ENTRY OF TIMBER LANDS—CONSTRUCTION OF STATUTE.

Under Act June 3, 1878 (20 Stat. 89), extended by Act Aug. 4, 1892 (27 Stat. 348, c. 375), permitting the sale to citizens of the United States of public timber lands, not exceeding 160 acres to one person, on the filing by the applicant of a declaratory statement under oath setting forth that the land is unfit for cultivation, and is chiefly valuable for timber, etc., and on proof of such facts after notice given, an applicant is not required to make a personal inspection of the lands before filing the initial statement, so as to be able to verify the same from personal knowledge; nor is there any ground for refusing to permit a purchase to be made by a married woman because she procured the money with which to make payment for the land from her husband.

Appeal from the Circuit Court of the United States for the Western District of Wisconsin.

The bill was by the appellant, a citizen of the state of Wisconsin, against the appellee, a citizen of the state of Michigan, to have it decreed that appellee had no right, title, interest or claim, in certain lands in Bayfield county, Wisconsin, in the bill described, but that the same should be decreed to have been held by him in trust for the appellant; and for an injunction against the sale of the same, or waste of the timber thereon.

The bill alleges that on the 13th of April, 1894, the lands in question were surveyed public lands of the United States not included within any military, Indian or other reservation, and chiefly valuable for timber; that they had not been offered at public sale; did not constitute any mining claim under the laws of the United States; did not contain gold, silver, cinnabar, copper or coal; did not include the improvements of any bona fide settler; had not been selected by any state under the laws of the United States, donating lands for internal improvement, education or other purposes; and were lands proper to be entered as public lands under the provisions of the Act of Congress of June 3rd, 1878, as extended by the Act of August 4th, 1892.

The bill further alleges that on the date above named appellant, being then entitled to enter such lands, filed with the register of the land district at Ashland, Wisconsin, a written statement in duplicate, designating by legal subdivision the lands in question; and setting forth that the same were then unfit for cultivation; were uninhabited, and chiefly valuable for their timber; and contained no mining or other improvements. The statements further set forth that the appellant had made no other application under the act of Congress; that the proposed purchase was not for speculation, but was in good faith, and to be appropriated to her own exclusive use; that she had not directly or indirectly made any contract in any way or manner with any person by which the title she might acquire should enure, in whole or in part, to the benefit of any person except herself; and that the lands, as she verily believed, contained no valuable deposits of gold, silver, cinnabar, copper or coal. This statement was duly verified by the oath of the applicant before the register of the land office.

The bill avers that all the allegations of this statement were true; that after publication of the requisite statutory notice the appellant appeared at the land office, and submitted her proofs, requesting that her claim be allowed, and offering, then and there, to pay the price provided for in the act of Congress; but that one Toole (who had subsequently made an application for the same lands, but had, for a valuable consideration, relinquished the same to the appellant) filed a protest, setting forth that appellant had never been upon or seen the lands, or any part thereof, at the time of her application, and that he, said Toole, had filed an application under the act of Congress for said lands. The bill avers, further, that appellant furnished

to the register of the land office satisfactory evidence that the notice had been duly published as required by the act of Congress; and that the land was of the character contemplated in the act, was unoccupied and without improvement, and contained no valuable deposit of gold, silver, cinnabar, copper or coal.

The bill further avers that such proceedings were thereafter had in the land office, and in the general land office of the United States, that appellant was "erroneously and unlawfully held not entitled to enter the lands," upon the reason stated that she had not, before making her application, made a personal examination of the land, and that she did not offer to pay for the same with her own money, but obtained such money from her husband.

Subsequently, as the bill avers, a patent for the land was issued to Toole, and the title went through mesne conveyances from him to the appellee, each grantee having full notice of the right and interest of appellant in the lands, and not being a bona fide purchaser thereof for value.

To this bill a demurrer was filed and sustained, and the bill dismissed (102 Fed. 716), and from this decree the appeal is prosecuted.

The assignment of error is that the Circuit Court erred in sustaining the demurrer, and in dismissing the bill.

A. L. Sanborn, for appellant.

Wm. F. Shea, for appellee.

Before WOODS, JENKINS, and GROSSCUP, Circuit Judges.

After the foregoing statement of the facts, GROSSCUP, Circuit Judge, delivered the opinion of the court as follows:

The provisions of the act of Congress relevant to this case are as follows:

"That surveyed public lands of the United States \* \* \* not included within military, Indian, or other reservations of the United States, valuable chiefly for timber, but unfit for cultivation, and which have not been offered at public sale, according to law, may be sold to citizens of the United States, or persons who have declared their intention to become such, in quantities not exceeding one hundred and sixty acres to any one person or associations of persons, at the minimum price of two dollars and fifty cents per acre; the lands valuable chiefly for stone may be sold on the same terms as timber lands: Provided, that nothing herein contained shall defeat or impair any bona fide claim under any law of the United States, or authorize the sale of any mining claim, or the improvements of any bona fide settler, or lands containing gold, silver, cinnabar, copper, or coal, or land selected by the said states under any law of the United States donating lands for internal improvements, education or other purposes."

Sec. 2. "That any person desiring to avail himself of the provisions of this act shall file with the register of the proper district a written statement in duplicate, one of which is to be transmitted to the General Land Office, designating by legal subdivisions the particular tract of land he desires to purchase, setting forth that the same is unfit for cultivation, and valuable chiefly for its timber and stone; that it is uninhabited; contains no mining or other improvements, except for ditch or canal purposes, where any such do exist, save such as were made by or belonged to the applicant, nor, as deponent verily believes, any valuable deposit of gold, silver, cinnabar, copper or coal; that deponent has made no other application under this act; that he does not apply to purchase the same on speculation, but in good faith to appropriate it to his own exclusive use and benefit; and that he has not, directly or indirectly, made any agreement or contract, in any way or manner, with any person or persons whatsoever, by which the title which he might acquire, from the Government of the United States should inure, in whole or in part, to the benefit of any person except himself; which statement must be verified by the oath of the applicant before the register or receiver of the land office within the district where the land

is situated; and if any person taking such oath shall swear falsely in the premises, he shall be subject to all the pains and penalties of perjury, and shall forfeit the money which he may have paid for said lands, and all right and title to the same. \* \* \*

Sec. 3. "That upon the filing of said statement, as provided in the second section of this act, the register of the land office shall post a notice of such application, embracing a description of the land by legal subdivisions, in his office, for a period of sixty days, and shall furnish the applicant a copy of the same for publication, at the expense of such applicant, in a newspaper published nearest the location of the premises, for a like period of time; and after the expiration of the said sixty days, if no adverse claim shall have been filed, the person desiring to purchase shall furnish to the register of the land office satisfactory evidence, first, that said notice of the application prepared by the register as aforesaid was duly published in a newspaper as herein required; secondly, that the land is of the character contemplated in this act, unoccupied and without improvements, other than those excepted, either mining or agricultural, and that it apparently contains no valuable deposits of gold, silver, cinnabar, copper, or coal. \* \* \*: Provided, That any person having a valid claim to any portion of the land may object, in writing, to the issuance of a patent to the lands so held by him, stating the nature of his claim thereto; and evidence shall be taken, and the merits of said objection shall be determined by the officers of the land office, subject to appeal, as in other land cases. Effect shall be given to the foregoing provisions of this act by regulations to be prescribed by the Commissioner of the General Land Office." Act of June 3, 1878 (20 Stat. 89) as extended by act of August 4, 1892 (27 Stat. 348, c. 375).

Under these provisions of the law, the appellant, a citizen of the United States, entitled, along with the other citizens of the United States, to enter timber lands, filed with the land office the requisite statutory statement, verified by oath, which, if subsequently sustained by the proofs, entitled her to the entry sought. It is admitted that the averments of the statement were, in fact, true. The entry was refused, not because the land was not subject to entry, nor because the statement, wholly or in part, was untrue, nor because of any attempted imposition or fraud upon the land office; but solely because it transpired upon the hearing that in making the statement the appellant did not speak from knowledge acquired by personal inspection, and did not offer to pay from monies belonging to herself. The first question in this case, therefore, is: May an applicant for entry under this statute make the statutory initial statement upon knowledge or information other than that of personal observation?

It will be noted that the statute requires no residence upon the land by the applicant, either at the time, or subsequently; nor does it require him, either presently, or in the future, to utilize the land, by either cutting the timber, or quarrying the stone. There is in the statute no purpose nor requirement, in these respects, such as the homestead laws embody.

The purpose of the act seems to have been of an entirely different character. It was based manifestly upon the possibility that much of the timber and stone on these lands would not be needed for years to come, though, with the passage of time, their value would increase; and it was meant that the opportunities thus afforded for increased valuation should not be monopolized by a few, but should be open equally to all, so that the increment, whatever it was, might be shared widely by the people of the United States. The act was, in a sense,



an attempt to widely distribute and popularize the ownership of these lands.

We cannot conceive that Congress meant, in the promotion of such a purpose, to shut out citizens of the United States who lived at great distances, or were physically incapacitated to explore the woods, or citizens who, for any reason, could not personally inspect the lands. The invitation was to all, wheresoever they resided, and whatsoever their means of acquiring information, who could comply with the procedure laid down by the statute.

This procedure embraced, first a statement, verified by oath, of the character of the lands, the right of the applicant to enter, and the purpose of his proposed entry; and then, after notice, a hearing, either *ex parte* or upon contest—but in either event a hearing—at which, and before allowance of the application, the statement must be supported by satisfactory proof. It is clear to us, in view of this, that the statement is meant simply as an initial paper—the claim or pleading—upon which the machinery of the land office is to be set in motion. The statement is not accepted as proof, and it does not perform the office of proof; that must come at the hearing. It is in the nature of a petition to the land department, setting forth all the material facts upon which action is invoked, and is, in this general respect, analogous to verified petitions, or bills, in courts of chancery.

It is common knowledge that, while many initial pleadings in a court of chancery, in cases where verification is required, must be verified upon the personal knowledge of the petitioner, many others may be verified on knowledge acquired through information, accompanied by bona fide belief upon the part of the petitioner. The distinction depends upon the nature of the subject-matter, and of the relief asked. If the application is such, that the party should, from the nature of his position, or the character of the relief asked, have personal knowledge of the facts set forth, then knowledge through information from others will not suffice. But if the determination of the case depends, not upon what facts were within the personal knowledge of the applicant, but upon the existence of the facts themselves, extrinsic of his personal knowledge; and if the position of the petitioner is such, that personal knowledge on his part cannot be reasonably expected, courts will proceed upon statements founded upon information and belief, though, by statute, there be a requirement that the petition or bill be verified. *Carpet-Lining Co. v. Chipman*, 146 Mass. 385, 16 N. E. 1.

Section 2 of the act provides that the statement shall be verified by oath, but it does not, in terms at least, provide that the verification shall be on personal knowledge only, and shall not, in any of its particulars, be upon information and belief. We think we should apply to this section of the statute the rules adopted in analogous pleadings where verification is required; and, so doing, we cannot see why that portion of the statement relating to the character of the lands—that it is uninhabited, is unfitted for cultivation, and valued chiefly for timber or stone—may not be predicated upon information and belief. Any other interpretation, would, in our opinion, import into the procedure a restriction not to be found in the procedure of

the courts in analogous inquiries; and would defeat one of the main purposes of the act.

We hesitate, of course, to interpret a statute contrary to the construction put upon it by the Interior Department, and to the rules and regulations adopted by the department to carry out its provisions; but when the construction of the department is clearly wrong, and its rules and regulations have the effect of distinctly changing rights created under the statute, amounting to a denial to the appellant of one of her rights, the occasion for hesitation ceases. *Morrill v. Jones*, 106 U. S. 466, 1 Sup. Ct. 423, 27 L. Ed. 267.

We are of the opinion that the rules and regulations of the department, as applied to the case under consideration by the land office, and upheld by the Circuit Court, have had the effect of depriving the appellant of one of her rights under the law, and are, therefore, in that respect, contrary to law and erroneous.

No attempt was made at argument, or in the briefs, to sustain the ruling based upon the appellant's failure to offer payment from monies belonging to herself, except that such ruling was in accordance with one of the rules of the land office. We can find no basis, either for the regulation, or for the court's decree, in that respect, in the provisions of the act.

The decree of the Circuit Court will be reversed, and the cause remanded, with instructions to proceed further in accordance with this opinion.

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EDWARD P. ALLIS CO. v. STANDARD NAT. BANK OF CITY OF NEW YORK et al.

(Circuit Court, S. D. New York. June 28, 1901.)

**EQUITY—SUIT FOR FRAUD—EVIDENCE CONSIDERED.**

Evidence held insufficient to establish fraud on the part of defendant national bank in the organization or operation of a corporation which was formed by complainant and the bank's co-defendants, who were its stockholders, to take over the property of two insolvent lumber companies, of which both complainant and the bank were creditors, which would afford the basis for any equitable relief against the bank.

In Equity. On final hearing.

William E. Carter, for complainant.

Henry H. Bowman, for defendants Standard Nat. Bank, Burrows, Brown, and New York Lumber Co.

COXE, District Judge. The complainant is a Wisconsin corporation. The defendant the Standard National Bank is a banking corporation, organized under the national bank act, doing business in the city of New York. The New York Lumber Company is a Florida corporation. The defendant Brown is a citizen and resident of New Jersey and the defendant Burrows is a citizen and resident of New York. Both Brown and Burrows are stockholders, directors and officers of the Standard National Bank, the former being vice president and the latter cashier. In the early part of 1896 the complainant was the owner and in possession of a sawmill plant

at Chatterton, Fla. This plant had formerly been occupied by the C. T. Snowden Cypress Mill Company, a corporation, which had abandoned it and conveyed it to the complainant. The Snowden Company had theretofore entered into a contract with a New Jersey corporation, known as the Withlacoochee Lumber Company, by the terms of which the Snowden Company had agreed to remove to its mill and convert the same into marketable lumber the standing trees which the lumber company owned or represented that it owned for an agreed price per thousand feet. Both companies became financially embarrassed and the Snowden Company transferred its property to the complainant as above stated in payment for the mill plant and machinery which had been furnished by the complainant. The defendant the Standard National Bank had, prior to this time, become a creditor in the sum of about \$15,000 of the lumber company for which debt it held no available security. Upon investigation it was discovered that the lumber company was without assets, the title to the lands which it was supposed to own being in one Paul of Philadelphia. The bank was also a creditor of the Snowden Company. In these circumstances the defendant the New York Lumber Company was organized with the expectation and hope that by a reorganization of the business with additional capital it might prove successful and thus enable all the creditors, the complainant included, to make themselves whole in the future. The stock of the new company was to be apportioned among the creditors, and it was a part of the plan, assented to by the complainant, that its sawmill and plant was to be leased and used by the new company in carrying on its business by converting into marketable lumber the cypress timber obtained from the said Paul. To attempt a statement of the various transactions in detail would subserve no useful purpose. Generally speaking it may be said that when the agreements between the parties were made the situation in Florida was desperate. Both the complainant and the defendants had invested large sums of money there. Their debtors had failed, the title to the timber was in dispute, the sawmill had been shut down, there was no money to work the plant, and unless some effort was made to put new life into the situation nothing but total loss confronted the creditors. The complainant was the largest creditor of the Snowden Company and it held a judgment of \$10,000 against the Withlacoochee Company. It, therefore, had at least as much interest in the plan and its success as did the defendants. The complainant's mill was of little value unless it could obtain timber to saw. The court has searched the testimony in vain for any evidence of fraud or conspiracy. The complainant, through its agent, was consulted as to each step in the proceedings. Nothing was done in the dark; there were no false representations; All of the principal agreements were reduced to writing after full discussion and although the plan was unsuccessful the complainant fared far better than the other creditors. It received \$7,000 from the New York Lumber Company and subsequently sold its plant for nearly \$20,000. The Standard National Bank, on the contrary, in attempting to finance the new company advanced \$36,601, which has not been paid, which sum,

in addition to its original claim, makes its total loss in the transaction \$51,501. The theory of the bill seems to be that the Standard National Bank conceived a scheme to defraud the complainant; that the New York Lumber Company was only "an assumed name" for the bank and that the bank manipulated its puppet in its own interest and against the interest of the complainant. There is no agreement, oral or written, in the name of the bank, and the proof, as before stated, utterly fails to substantiate any of the charges of fraud or conspiracy.

The relief demanded in the bill of complaint is as follows: First. That the defendants be adjudged and decreed to reassign to the complainant a judgment obtained by it against the Withlacoochee Lumber Company and transferred to the defendants Brown, Mayer and Lynch September 29, 1896. Second. That an accounting be had between the complainant and defendants for rentals, taxes and insurance due under the lease of the sawmill plant to the New York Lumber Company and for damages occasioned by the improper care of the said plant. Third. That the defendant Brown, who, in consideration of an extension by the complainant of the time of payment of the rent due August 1st and the months following, agreed to pay \$5,000 of the amount so extended on or before January 1, 1898, be adjudged and decreed to pay said amount and interest thereon. Fourth. That the defendant the Standard National Bank "by and through its said creature said New York Lumber Company" may be adjudged and decreed to convey to the complainant all interest which the said bank or lumber company have obtained or will obtain in the 15,000,000 feet of cypress timber agreed to be conveyed by said Paul. Fifth. That the defendants Brown, Mayer and Lynch be "decreed and directed to cause the said defendant Burrows to forthwith turn over to your orator the said \$60,000 in stock so placed in his hands as above stated."

The demand for relief as stated in the complainant's brief differs somewhat from the statement in the bill. In the brief it resolves itself into a money demand for the balance of unpaid rent due the complainant upon the lease of its property to the New York Lumber Company, dated November 9, 1896, for \$10,020, the value of three pull boats destroyed or lost by the lessee and some other small items of damage. The inconsistency between the two may perhaps find its origin in the impossibility of discovering a plausible theory upon which to base an equity action. As the evidence fails to establish any agreement or obligation on the part of the bank which renders it liable to the complainant it is unnecessary to consider what would be the situation if the bank had done or attempted to do the acts alleged in the bill. The court is unable to discover any property of the complainant in the possession of the bank for which it should account. It is very clear that a national bank cannot operate a sawmill in Florida or conceive and carry out a scheme for carrying on such business through a dummy corporation which is the bank under another name. Such acts are ultra vires, unauthorized by the United States statutes and forbidden by law. *Bank v. Kennedy*, 167 U. S. 362, 17 Sup. Ct. 831, 42 L. Ed.

198; *McCormick v. Bank*, 165 U. S. 538, 549-551, 17 Sup. Ct. 433, 41 L. Ed. 817. The obligation of the defendant Brown to pay \$5,000 under his agreement with the complainant of August 3, 1897, would seem to be valid and enforceable, but it is difficult to perceive what jurisdiction a court of equity has in the matter. It is a simple-contract debt for which an action at law will lie. If the complainant held the overdue promissory note of Brown for \$5,000 it will hardly be pretended that an action in equity could be maintained on the note, but in legal effect the situations are the same. If the complainant brings an action at law upon the agreement of August 3, 1897, the court feels reasonably confident that Brown will not be able to escape liability upon the plea that equity alone has jurisdiction. The demand that the defendants "or whichever of them now has or claims to have nominal title thereto" may be decreed to reassign the judgment obtained by the complainant against the Withlacoochee Lumber Company is not discussed in the defendants' brief, but as the court recalls the oral argument no serious objection to this being done was advanced and the court is unable to see how the rights of the defendants can be jeopardized by the transfer. Unless some reason is advanced which has not already been brought to the attention of the court the decree may provide for the assignment to the complainant by the present owner of the judgment. The title appears to be in the New York Lumber Company, but as this is not entirely clear from the record the matter may be continued until the settlement of the decree. In all other particulars the bill is dismissed.

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McCORMICK v. McDONALD et al.

(Circuit Court, S. D. New York. July 3, 1901.)

EQUITY JURISDICTION—SUIT TO DECLARE CONTRACT—IMPOSSIBILITY OF GRANTING SUBSTANTIVE RELIEF.

A court of equity has no jurisdiction to decree that a complainant is entitled, under an agreement with defendant, to a certain per cent. of the net profits of a contract which is being executed by defendant, and to declare a trust therein in his favor, where the work under the contract has not been completed, and it is not alleged that defendant has been guilty of any fraud or mismanagement or is insolvent; such court having no power to entertain a suit to determine the fact whether or not the agreement to share profits was made, which is cognizable at law, nor to declare the status of the parties with reference to the contract, where no ground is shown which would warrant the granting of any substantive relief.

In Equity. On final hearing.

Edward B. Hill, for complainant.

E. Parmalee Prentice and Charles P. Howland, for defendants.

COXE, District Judge. This is an action in equity to establish the right of the complainant to participate, to the extent of certain commissions alleged to be due him, in the profits growing out of the construction of Jerom  Park reservoir by the defendants. McDonald, who is the only defendant against whom a personal judg-

ment is demanded, entered into a contract with the board of aqueduct commissioners of New York to build for the city the so-called Jerome Park reservoir and arranged with the Drake & Stratton Company to do the work. In connection with the work the Drake & Stratton Company purchased a tract of land containing about 225 acres, bordering on Long Island Sound, for \$465,000; \$80,000 of this sum was paid down and a purchase-money mortgage was given for the balance. The title to the property was taken in the name of Pierre W. Briggs who held it for the purchasers. The object of the purchase was to enhance the value of the land, some of which was under water, by dumping there the earth excavated from the reservoir. The Drake & Stratton Company proceeded with the construction until April, 1897, when Mr. Drake, its president, died and it was unwilling to continue the work. In these circumstances the complainant asserts that McDonald applied to him for assistance and it was agreed between them that if the complainant succeeded in securing some one who would undertake to complete the construction under the Drake & Stratton contract, McDonald would give him a reasonable share of the profits of the enterprise. The bill alleges that through the efforts of the complainant the defendant Onderdonk was induced to undertake the performance of the contract to construct the reservoir for a compensation of  $42\frac{1}{2}$  per cent. of the net profits and thereupon McDonald agreed that the complainant's interest in the contract should be  $17\frac{1}{2}$  per cent. of the net profits. The bill alleges further that it was agreed that complainant should pay one-half of the \$100,000 invested by the Drake & Stratton Company in the said 225 acres of land and one-half of such other moneys as might be necessary to insure the ownership and maintenance of said land and that the profits arising from the said land should be equally divided between McDonald and complainant. The complainant has at all times been ready to carry out the agreement as to the said lands. The bill alleges further that McDonald and Onderdonk have formed a partnership, which is financed by the defendant Mills, and are engaged in carrying out the contract for the completion of the reservoir and for the purchase and maintenance of the land, and have received and are receiving various sums pursuant to the provisions of the said contract; that the defendant has refused to recognize any claim on the part of the complainant to profits arising from the contract or the said land.

The relief demanded is: First. That it may be decreed that the complainant has an interest of  $17\frac{1}{2}$  per cent. in the profits arising from the aqueduct contract and one-half the net profits arising from the purchase, maintenance and sale of said lands. Second. That McDonald and Onderdonk be declared trustees of the complainant to the amount of  $17\frac{1}{2}$  per cent. of the said profits "as and when the same are or shall be realized and that they further account for and pay over to him  $17\frac{1}{2}$  per cent. of any profits heretofore realized from said contract." Third. That Mills and McDonald be declared to be trustees for the complainant of one-half of the profits arising from the management of the said lands and that they account for

and pay over to the complainant one-half of the profits which they have derived or may hereafter derive therefrom.

The answer of the defendant McDonald denies that he ever made or entered into any agreement with the complainant whereby he was to have a share in the profits of either of said enterprises. The other defendants deny all knowledge of any agreement giving the complainant a share in the profits. The defendant Onderdonk admits that the complainant called upon him and conversed upon the subject of the construction of the reservoir, but he denies that he was induced to enter into the business or participate in the contract by the representations of the complainant.

The questions to be decided are: First. What, if any, agreement was made between the complainant and the defendant McDonald? Second. Should the court find that McDonald agreed to pay the complainant a percentage of the profits of the enterprise is it a contract that can be enforced in equity? Third. Is the failure to allege and prove that the amount in controversy exceeds \$2,000 fatal to the jurisdiction?

The court has no difficulty in reaching the conclusion that the complainant rendered services for the defendant McDonald at his request which were valuable and for which he should pay. In order to test the question of jurisdiction let it be assumed that the court finds that the defendant agreed to pay the complainant for his efforts in inducing Onderdonk to enter upon the work, 10 per cent. of the profits of the aqueduct contract. What then? Is the interposition of a court of equity necessary in order that this finding of fact shall be made? It is thought not and yet what more can the court do? A judgment merely announcing that such an agreement exists would be unprecedented, a mere *brutum fulmen*. But at this time the court is powerless to do more. The complainant in his testimony, and counsel in the brief, disclaim all intention to seek affirmative relief against Onderdonk and Mills "and the case therefore stands, for all purposes of the decision, as if McDonald were the only defendant." No ground for equitable relief is alleged or proved. An accounting is not demanded and no facts are proved which at present will justify an accounting. There is no allegation or proof of fraud or mismanagement in the work or failure to keep proper books. It is not pretended that any profits have been made and divided or that any money available for profits has been alienated or wasted. It is not alleged that McDonald is irresponsible or that there will be any difficulty in recovering the amount due in case the complainant finally succeeds. In short, nothing appears in the record of which to predicate an injunction, an accounting, a discovery, a receiver, or any relief which a court of equity is organized to grant. As the controversy now stands a perfectly responsible person has, from the complainant's point of view, promised to pay him a percentage (say 10 per cent.) of the profits of an enterprise, now under way, as soon as the work is completed and the profits are ascertained. It is clear that equity has no occasion to meddle with a simple contract obligation of this kind. The bill contains no averment that the amount involved is over \$2,000. It is said that this defect may be cured

by an amendment conforming the pleading to the proof, but one serious obstacle is that the proof is as silent as the bill as to the amount of the complainant's claim. Nowhere does it appear that the requisite amount is involved. *Vance v. W. A. Vandercock Co.*, 170 U. S. 468, 18 Sup. Ct. 645, 42 L. Ed. 1111; *Transfer Co. v. Pendergrass*, 16 C. C. A. 585, 70 Fed. 1. However, as an amendment in this respect will not cure the other defects pointed out, not only in the bill but in the proof, it is unnecessary to decide whether an amendment should be granted. The difficulty is that in the present status of the case the court cannot grant any relief whatever, much less any equitable relief. In these circumstances it would seem the duty of the court, sua sponte, to dismiss the bill. *Lewis v. Cocks*, 23 Wall. 466, 23 L. Ed. 70; Act March 3, 1875, c. 137, § 5. Even were it possible to amend the bill generally so as to state a case of equitable cognizance it would be an amendment so radical that it could only be made upon terms that would offer no advantages over the commencement of a new suit. It follows that the bill must be dismissed with costs, but without prejudice to any action which the complainant may bring in the future.

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AMERICAN ORE MACHINERY CO. v. ATLAS CEMENT CO.

(Circuit Court, D. New Jersey. March 7, 1901.)

**DISCOVERY—GROUNDS—SUFFICIENCY OF PLEADING.**

A complainant is not entitled to a discovery on a bill setting out a contract, and alleging an indebtedness from defendant thereunder, where the contract is on its face unilateral, and no facts are alleged to show any consideration for such indebtedness.

In Equity. On demurrer to bill.

Frederick A. Duncan, for the motion.

Timothy D. Merwin, opposed.

KIRKPATRICK, District Judge. The complainant's bill of complaint in this cause sets forth that a contract was entered into between the complainant and the defendant, "for a good and valuable consideration," in and by which the defendant agreed to build one Nerod mill, and place it in its Atlas Cement Works, at Copley, Pa., and "after satisfactory test has been made, and we find that it will grind Portland cement satisfactorily to that extent as to warrant us to adopt it for our own use, we will pay you [the complainant] one thousand dollars. We will then go on and build five more mills. We will also incorporate same mills in our plans of the Standard Portland Cement Company's works. For each of said mills so built for our use we will pay you one thousand dollars royalty." The bill then alleges that the defendant built the Nerod mill for its own use at Copley, Pa., and that it afterwards built for its own use and the use of the Standard Portland Cement Company a number of said mills, whereby it became liable to pay the complainant a large sum of money. The bill prays an accounting by



defendant to show how many mills of the character described it had so built and used, and a decree requiring the defendant to pay the amount found to be due. To this bill the defendant demurs, alleging that it is defective, in that it fails to set out any consideration for the contract, and that, inasmuch as the contract shows a condition precedent, the complainant must allege the performance of such condition. While, as has been suggested by the defendant, this is not an action at law for damages for the breach of contract, nor yet a bill in equity for its specific performance, yet the complainant will not be entitled to the discovery sought, except in aid of the enforcement of the contract, nor to a decree for the payment of the money he claims, unless the contract be a valid one. It may be true, as alleged in the bill, that the defendant has built and used Nerod mills, but no obligation rests on it to pay therefor unless it be shown that, for a valuable consideration, it has agreed so to do. The agreement set out at length in the bill upon its face is unilateral and lacks mutuality. Defendant was at its own expense to build mills in which complainant was not shown to have had any interest, and to pay complainant for so doing. Apparently the complainant gave nothing in return. In order to establish the right of the complainant to recover, it is essential that consideration be shown, and, as the facts are within the knowledge of complainant, they ought to be alleged in the bill particularly and with precision. It is not sufficient to say that the contract was entered into for a "good and valuable consideration." It is urged that the bill is merely for a discovery of the number of mills built and used by the defendant. Equity will only grant an order for discovery in aid of the enforcement of a contract, and before such order can be made it must be shown that the complainant has contractual rights which can or ought to be enforced. The bill is defective in that it fails to state any consideration for the contract, and judgment on the demurrer must be for the defendant.

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FULTON v. COLWELL et al.

(Circuit Court, D. New Jersey. March 4, 1901.)

**REFORMATION OF CONTRACT—GROUNDS—MISTAKE.**

A written contract made after long negotiation, and the terms of which, after it was written, were fully considered and discussed before it was signed, cannot be reformed by a court of equity, in the absence of fraud, to express an intent different from that which its language imports, unless it is clearly shown to have been the intent of both parties, and that the mistake was mutual.

In Equity. Suit for reformation of contract.

R. V. Lindabury, for complainant.

D. J. Pancoast, for defendants.

KIRKPATRICK, District Judge. The bill of complaint in this cause alleges that a mutual mistake was made by the parties in the preparation and execution of a certain contract therein set out, in that while it was the intention of the parties that there should be

given to the complainant a mere option to purchase a certain mortgage therein described, without any personal obligation in case he should elect not to take the same, yet some of the words and phrases contained in said agreement seem to indicate a contrary intention. The prayer of the bill is that the contract be reformed so as to clearly express the intention of the parties as above set forth. It appears from the testimony in the case that the defendant Charles R. Colwell was the owner of a tract of land in the county of Atlantic, in the state of New Jersey, and also the owner of a certain bond conditioned to pay the sum of \$340,000, which said bond was secured by a mortgage upon another tract of land in said state. This mortgage, however, was not a first lien on the said lands described therein, but subject to the lien of another mortgage given to secure the sum of \$150,000, with interest. On the 5th day of July, 1892, an agreement was made and entered into between Elisha Fulton, the complainant, and Charles R. Colwell, the defendant, in regard to the said \$340,000 mortgage, in and by which said Fulton agreed to purchase the same at about one-half of its face value, if so much should be realized from sales of the mortgaged premises, and applicable to the payment of said mortgage, with a guaranty on the part of said Fulton that the amount of such sales should not fall short of the sum of \$100,000, and which said amount should be paid within 10 years from the date of said agreement. There was also a provision in said agreement that said Fulton should pay the sum of \$6,000 per annum in equal monthly installments, being interest on said \$100,000, with an adjustment of the amount in case payment of the said sum of \$100,000, or any part thereof, should be anticipated. This agreement also provided for releases of parts of the mortgaged premises from time to time, the sale of 2,500 acres of land near Hammonton, N. J., at \$6 per acre, and the transfer to Fulton of \$400,000 of stock in the Industrial Land Company. It was expressly understood and agreed that the amount to be received by said Colwell for his mortgage should not in any case be less than \$100,000 and interest at 6 per cent. per annum, nor more than one-half of the amount secured by said mortgage. The said Colwell was to be protected from all loss or damage of any kind that might arise on account of the first mortgage of \$150,000. On the same day, July 5, 1892, it was agreed between the parties that the agreement above recited should be placed in the hands of Samuel Fulton, a brother of the complainant, in escrow, to be delivered and become operative when and as soon as Elisha M. Fulton should have made with the Industrial Land Development Company and its stockholders and Peter Garrahan such arrangements for the control of the stock of said company and the management of its business as would, in his judgment, justify him in taking an interest in or entering upon the management of said company. It was understood, however, that the said E. M. Fulton might, without such arrangement, elect to make said agreement operative, and he might so notify said Charles R. Colwell, and the said Samuel Fulton should be thereupon authorized to deliver the said agreement. On the 18th July, 1892, the following "memo." was made:

"One copy of the within contract delivered by me to C. R. Colwell, with notice that E. M. Fulton elected to proceed with the purchase without waiting for the conclusion of the deal with the land company, and authorized Colwell to employ General Wright and Mr. Abbott to prepare the necessary papers at E. M. Fulton's cost. Said papers to be submitted to Ed. A. Day for approval.  
S. Fulton."

The agreement of July 5, 1892, above referred to, seems to have been submitted to Mr. Abbott and Mr. Day with the request that each of them should prepare a more formal contract to be executed by the parties, which should bind them to carry out the terms of the agreement of July 5th. Such papers were accordingly prepared, and on the 18th day of August, 1892, they were brought to the office of E. M. Fulton, Jr., in the city of New York, where were present E. M. Fulton, E. M. Fulton, Jr., Samuel Fulton, and Edward A. Day, their attorney, and Samuel R. Colwell. Both of said agreements prepared by Mr. Abbott and Mr. Day were drawn upon the lines of the agreement of July 5, 1892, and provided for the purchase of said mortgage of \$340,000 by said Fulton; but, when they were presented to said Fulton for execution, he refused to sign either of them, because he said that he had not understood that he was to be personally bound to pay any specific sum for said mortgage. Colwell was unwilling to accept any agreement which did not provide for the personal obligation of said Fulton to make such payment. As a result, the day was spent in fruitless negotiations. At one stage of the proceedings Fulton, the complainant, authorized his attorney, Mr. Day, to offer Colwell, the defendant, \$100,000 in cash for his mortgage. Mr. Day testifies that he accordingly made the offer to Colwell, and urged upon him its acceptance, but Colwell refused. At the close of the business day the parties adjourned to the residence of Mr. Fulton, at Rye, where the negotiations were continued between Mr. Day, representing Fulton, and Colwell personally, so that at a late hour in the night it was announced by Mr. Day that an agreement had been practically reached. There was no statement of its terms. Mr. Day undertook to prepare the papers, and on the morning of the next day did so. The agreement now brought into court is the result.

It is obvious that there can be no question of fraud respecting either the preparation or execution of this contract. It was drawn by Mr. Day, the attorney of the complainant, and was executed in his presence. The testimony shows that the contract was read to and discussed by the parties, paragraph by paragraph. Alterations and additions were made at the suggestion of one or the other of the parties, and the whole as amended approved by both. The certificate of Mr. Day, as a master in chancery, annexed to said agreement, sets forth that, he having first made known to the parties the contents thereof, they and each of them acknowledged that they signed, sealed, and delivered the same as their voluntary act and deed. The contract was fairly made, deliberately entered into by the parties, with full opportunity to become acquainted with its contents. It is a well-settled rule that in the absence of fraud the court cannot make any change in, nor direct the reformation of, a contract, unless the proof be clear that by reason of a mutual mistake the real intention of the

parties has not been expressed (Pope v. Hoopes, 33 C. C. A. 595, 90 Fed. 451), and that the burden of proof to show an intent contrary to that expressed in the agreement rests on the complainant (Harrison v. Insurance Co. [C. C.] 30 Fed. 863). The mistake must have been a mutual one, and the intent which the agreement fails to express must have been the intent of both parties at the time of execution. Not only must the mistake be uncontrovertibly proved, but the party alleging it must be able to show the form to which the agreement should be brought, in order that it may be set right according to what was intended by the parties. Ramsey v. Smith, 32 N. J. Eq. 31. "The rule," says Vice Chancellor Bird in Henderson v. Stokes, 42 N. J. Eq. 586, 8 Atl. 718, "is thus inexorable to save the court from the danger of making contracts for the parties." The only persons present when the agreement was made and executed were the complainant and his counsel and the defendant Charles R. Colwell. The complainant swears he thought he was taking a mere option to purchase the \$340,000 mortgage, and incurring no personal liability. The defendant testifies that he considered that he was selling him the same mortgage at a fixed price, which the complainant bound himself to pay. Mr. Day thinks the agreement as drawn expresses the intention of the parties as he understood it; that it practically provides for an option, though the language employed in several instances is not quite what he understood the intention of the parties to be; and he points out that "almost all of the first and second pages of the agreement fails to express an option, but apparently as if it were an absolute sale," and that to the same effect is the clause which provides "that the said party of the first part hereby agrees to sell, assign, and transfer" said mortgage, and also the twelfth clause, binding the parties, their heirs, etc., to the performance of the agreement, and providing for liquidated damages. The last-mentioned clause, Mr. Day says, "was one of Mr. Colwell's clauses,"—"one he particularly insisted upon," to the insertion of which he (Day) assented because he thought it merely provided for a penalty. There is no evidence tending to show that these reasons were made known to Colwell, nor does it appear that Colwell had any reason for "insisting" upon its insertion, other than that the clause seemed to him necessary to express the intention of the parties. The court is not asked to construe the contract, but to reform it so that it may be cleared from all ambiguity, so that it may clearly express the intention of the complainant to take, and the defendant Charles R. Colwell to give, a mere option to purchase said mortgage; and to that end that the court should eliminate all words and phrases, including the twelfth clause, the insertion of which was "insisted" upon by said Colwell and accepted by the complainant, which tend to show a contrary intent. Counsel for complainant was asked, upon cross-examination, to suggest the terms which might have been more suitable to express the agreement between the parties. In reply he says:

"Well, I couldn't take this paper [meaning the agreement] and do that,—work it out. I could dictate another agreement. I should change the whole thing if I were to draw it over again."

To do this is, of course, outside the province of the court. It cannot make a contract for the parties. In this case the parties have themselves carefully and considerably expressed their agreement in writing, and, whatever may be its meaning, the paper must speak for itself. As the case is presented, it is impossible for the court to say that the proof of a mutual mistake is so clear, satisfactory, and free from doubt as to entitle the complainant to the relief prayed for. The bill will be dismissed, with costs.

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**BIMBER v. CALIVADA COLONIZATION CO. et al.**

(Circuit Court, W. D. Pennsylvania. July 6, 1901.)

No. 28.

**CORPORATIONS—SUIT BY STOCKHOLDER—WHEN MAINTAINABLE.**

To entitle a stockholder in a corporation to maintain a suit in equity in a federal court for the cancellation of stock alleged to have been fraudulently issued by the directors, the bill must show a demand on the corporation, or its receiver, where one has been appointed, to sue, and a refusal, as required by equity rule 94, and also that complainant was a stockholder at the time of the transaction complained of, or that his shares devolved on him since by operation of law.

In Equity.

J. H. McCreery, for G. L. Bimber.  
Frank W. Smith, for M. D. Hays.

**ACHESON, Circuit Judge.** The Calivada Colonization Company, one of the defendants, a corporation of the state of Colorado, was organized on March 13, 1895, and on that day elected a board of directors; M. D. Hays, a defendant here, being elected a member and president of the board. On the same day (March 13, 1895) the board of directors adopted the following resolution, which was entered upon the minute book of the company:

"Resolved, that the board of directors of the Calivada Colonization Company, in consideration of the services, efforts, and information acquired and money expended by M. D. Hays in behalf of the company, hereby directs the issue to him of 126,000 shares of the capital stock, at the par value of one dollar each, in compensation therefor."

Soon thereafter M. D. Hays was credited on the stock books of the company with 126,000 shares of full-paid and nonassessable stock, and certificates therefor were issued. At the annual meeting of the stockholders of the company held on March 17, 1896, as appears from the minute book of the company, the following resolution was adopted:

"Moved by F. L. Banta: The members of this company present ratify all the acts of the former boards of directors during the years of 1895, and up to March 17, 1896, at this meeting of the stockholders. Seconded by F. K. Higbie. Carried."

This suit was brought on October 30, 1900, by G. L. Bimber, the owner of 200 shares of the stock of said company, each of the value at par of one dollar. The bill does not state, nor does it oth-

erwise appear, when he became the owner of these shares of stock, but it was certainly after the transactions of which he complains in his bill. On January 2, 1901, F. C. Kohne intervened as a plaintiff herein. He is the owner of 2,600 shares of the stock of said company, each of the value at par of one dollar. He became such owner on July 2, 1896, after the transactions complained of in the bill. The defendants in the bill are the Calivada Colonization Company, A. C. Hays, its receiver, the said M. D. Hays, and a large number of persons who are holders of shares of the above-mentioned stock issue of 126,000 shares, most or all of whom are transferees of said M. D. Hays. The whole capital stock of the company consists of 250,000 shares. The bill alleged that the resolution of the board of directors of March 13, 1895, and the issue of stock thereunder, were without consideration and fraudulent, and also were ultra vires; and the purpose of the bill is to annul this action of the board of directors as fraudulent, and to avoid the entire issue of 126,000 shares of stock to M. D. Hays in his hands, and in the hands of those holding under him. The main prayers of the bill are that the court decree "that each and every share of said stock aggregating 126,000 shares, as scheduled in Exhibit A, be declared invalid, issued without consideration, in violation of law and the rights of bona fide holders and purchasers of the stock of the said company"; that said stock be adjudged canceled; "and that the defendant company be relieved from and absolved from all responsibility for the issue of said stock." M. D. Hays filed an answer for himself, and also an answer as agent for some of his transferees, denying all the material allegations of the bill upon which the supposed rights of the plaintiffs to the relief sought rests. The answer of M. D. Hays, among other things, avers that at the time the resolution of March 13, 1895, was passed, it was agreed to by every person who then owned any stock in said company, and he so testifies.

I do not feel called on to consider or express an opinion upon any question touching the validity of this issue of stock, because it is clear to me that the two stockholders here suing cannot maintain this bill. *Hawes v. Oakland*, 104 U. S. 450, 26 L. Ed. 827; *Dimpfel v. Railway Co.*, 110 U. S. 209, 3 Sup. Ct. 573, 28 L. Ed. 121; *Equity Rule 94*; *Holton v. Wallace*, 39 U. S. App. (third circuit) 326, 23 C. C. A. 71, 77 Fed. 61; *Holton v. Railway Co.*, 138 Pa. 111, 20 Atl. 937; *Cook, Stocks & S.* §§ 646, 740. These authorities sustain the following propositions: These plaintiffs show no individual cause of action or personal injury to themselves, or either of them. If any injury was done here, it was to the whole body of the stockholders. As the alleged wrong was to the entire body of shareholders, and actual fraud is alleged to have entered into the transaction, the right to enforce any cause of action arising therefrom, or to equitable relief, belongs primarily to the corporation. No stockholder has any standing in a court of equity to maintain a bill for relief against such a wrong as is here complained of without averring and showing a demand upon the corporation or upon its receiver to sue, and a refusal so to do. Moreover, he must also allege and show that he was a stockholder at the time of the

transactions complained of, or that his shares devolved on him since by operation of law. These plaintiffs wholly fail to present such a case. It is immaterial that this suit purports to be ancillary to the suit in which the receiver was appointed. This bill must stand or fall upon its own showing and merits. In parties, subject-matter, and purpose, it differs from the former bill, which was simply the ordinary bill against a corporation for the appointment of a receiver. As these plaintiffs cannot maintain their bill, it must be dismissed. And now, July 6, 1901, for the reasons stated in the foregoing opinion, it is ordered, adjudged, and decreed that the bill in this case be, and it is, dismissed, with costs.

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SMITH v. HE-YU-TSE-MIL-KIN.

(Circuit Court, D. Oregon. July 10, 1901.)

No. 2,595.

1. INDIANS—ALLOTMENT OF LANDS—JURISDICTION OF CIRCUIT COURTS.

Act August 15, 1894 (23 Stat. 305), confers on a circuit court of the United States jurisdiction to decree relief to an Indian entitled under the law to an allotment of certain lands, of which right he has been deprived by the rulings of the land department.

2. SAME—RIGHT TO LAND SELECTED—EFFECT OF ERRONEOUS DECISION BY DEPARTMENT.

Complainant was an Indian woman of the Walla Walla tribe, and as such entitled to an allotment of lands under Act March 3, 1885 (23 Stat. 340). After the passage of such act, but before the allotments were made thereunder, she selected certain lands, which she took possession of and improved. Her right to an allotment was denied by the land department, and the lands selected and improved by her were allotted to another member of the tribe, who was put in possession. Such ruling was afterwards reversed, and complainant was allotted other lands, less valuable, which she accepted with the understanding and on the assurance of the agent that it would not prejudice her right to claim the lands selected. *Held* that, her right to an allotment being established, she could not legally be deprived of the lands so selected and improved by her, in favor of another, because of an erroneous decision of the department; her equity being superior to that of the subsequent allottee, who took with notice; nor would her acceptance of the allotment made her create an estoppel, since no one was prejudiced thereby.

In Equity. Suit by Indian to recover lands selected for allotment in severalty.

R. J. Slater and J. F. Hinkle, for plaintiff.

John H. Hall, U. S. Atty., for defendant.

BELLINGER, District Judge. The plaintiff is a full-blooded Indian woman of the Walla Walla tribe, having a white man for her husband. Prior to the allotment of lands on the Umatilla Indian reservation to the confederated bands of Cayuse, Walla Walla, and Umatilla Indians residing thereon, made in pursuance of the act of congress of March 3, 1885, and during the year 1887, plaintiff made selection of the land in controversy, and had the same assigned to her by the reservation agent. She and her husband caused fur-

rows to be plowed around the land so assigned, inclosed the same with a barbed wire fence of two wires, dug a well, and erected some buildings. The entire improvements, according to the finding of the referee, were of the value of from \$700 to \$775. The allotment of lands was made early in the year 1891 by commissioners appointed for that purpose. Some years previous to this a census roll of the tribe to which plaintiff belonged was made up under the direction of the interior department, which did not include plaintiff's name, she being absent from the reservation at the time. A later list was made out, containing the name of plaintiff, among others, and this was forwarded to the department at Washington, whereupon the allotting commissioners were instructed to make inquiry as to the rights on the reservation of the subsequently listed persons. The commissioners took the testimony of the Indians in relation to the rights of these people, and sent that testimony to the commissioner of Indian affairs at Washington, who decided that such Indians were not entitled to lands, and directed that no allotments be made to them. Accordingly the commissioners refused to allot to plaintiff the lands selected and improved by her, but allotted them to the defendant. The decision of the department against plaintiff's right to an allotment of lands was subsequently reconsidered and reversed, upon the advice of the assistant attorney general that his former opinion against plaintiff's right should not be followed, and that the applicant was entitled to an allotment, whereupon other and less valuable lands were allotted to the plaintiff, who accepted the same with the reservation that her act should not prejudice her right to the land in question, and after the agent, in answer to her question, had informed her that, in his opinion, it would not do so. She has leased a part of the land so allotted, and received rental therefor.

The right of the plaintiff to an allotment having been decided in her favor, it does not appear upon what ground the department refused to cancel the allotment made to the defendant of the lands selected and improved by the plaintiff, and to allot such land to the plaintiff. It is contended for the defendant that this refusal is conclusive of the question in this court, under the provisions of the act of March 3, 1885 (23 Stat. 340), which provides, among other things, that the secretary of the interior shall have power to make needful rules and regulations to carry into effect the provisions of the allotting act, "and shall have power to determine all disputes and questions arising between Indians respecting their allotments." But the later act of August 15, 1894 (28 Stat. 305), confers upon the proper circuit courts of the United States "jurisdiction to try and determine any action, suit or proceedings arising within their respective jurisdictions, involving the right of any person, in whole or in part of Indian blood or descent, to any allotment of land under any law or treaty." Under this act jurisdiction has been exercised by a circuit court of the United States, in a case like this, to decree relief, notwithstanding the decision of the question by the land department. *Sloan v. U. S.* (C. C.) 95 Fed. 193. Jurisdiction is by this act conferred in terms that leave nothing to construction. The findings of the special examiner are supported by the testimony



which he reports. It is established by this testimony, and has been decided by the department, that the plaintiff is entitled to an allotment of lands. The act of congress provides that allotments shall be made upon the selection made by the head of the family. The lands claimed were selected by plaintiff, who took possession of them, and made considerable improvements thereon. This possession continued for a number of years, and until she was forcibly dispossessed by the action of the agents of the government. If she was entitled to an allotment of lands, she was entitled to these lands; and but for the decision of the department, subsequently reversed, there is no doubt but that the land claimed would have been allotted to her. If, then, a wrong has been done her, why should she be denied redress? Upon what principle of equity shall she be estopped to claim the relief prayed for, by the subsequent allotment of other lands to her? No one has been misled or prejudiced by that act. It was done in good faith, upon the advice of the agent, and with the understanding that the plaintiff's right in the premises should not be thereby affected. If she has had rental from the allotted lands, it is presumably not more than she would have received from the more valuable land which she selected. It is argued that she is not entitled to relief because she has not offered to surrender the lands allotted her to the United States. No act on her part is necessary to extinguish her right in the allotment made her. The prayer of her complaint authorizes the canceling of such allotment in granting the relief which she asks. The defendant took with notice of plaintiff's rights. The man who reaps where others have sown cannot invoke an estoppel against those whose labor he appropriates. The defendant's consciousness of this is shown by his denial in his testimony that there were improvements of any kind on this land when it was allotted to him, although the fact is otherwise, and there is no question about it. The plaintiff is entitled to the relief prayed for, and it is decreed accordingly.

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HANLEY et al. v. KANSAS & T. COAL CO.

(Circuit Court, W. D. Arkansas, Ft. Smith Division. June 24, 1901.)

1. PERPETUITIES—COMMON-LAW RULE—CREATION OF FUTURE CONTINGENT ESTATE.

A devise over which may not take effect, under the terms of the will, for 200 years, is void, under the rule against perpetuities, although it may take effect, by the prior termination of the precedent estate, at any time; the rule being that, to be valid, the limitation must be so made that the estate not only may, but must, vest within the prescribed period.

2. WILLS—CONSTRUCTION—CONTINGENT DEVISE.

A testator devised lands in trust to be used and occupied by M. and the children of her body and their descendants for a period of 200 years, at the end of which time the lands should vest in the county in which they should then be situated for certain purposes specified. By a subsequent clause it was provided that, if the lands should at any previous time be abandoned by M. and her children and their descendants, the title should vest at once in the county in which they were then situated.

*Held*, that the interest of the county was a contingent and not a vested remainder, and subject to the rule against perpetuities.

**3. SAME—EFFECT OF LIMITATION VOID FOR REMOTENESS.**

The provision of such will which vested the title in the trustee, and limited the power of alienation for 200 years, was also void, and on the death of the testator the equitable, if not the legal, estate in fee in the lands vested at once in M. and the children of her body and their descendants who were then in esse, with the right to compel a conveyance of the legal title from the trustee.

**4. EQUITY JURISDICTION—SUIT FOR POSSESSION OF LANDS—CONSTRUCTION OF PLEADINGS.**

A bill sought to have a trust in favor of complainants declared in lands under the provisions of a will, to have a trustee appointed, and for an accounting for rents and profits from the defendant, who was alleged to be in possession, claiming adversely. The facts alleged, however, showed that, if complainants had any interest in the lands, they were vested with the equitable fee, if not the legal fee, and were entitled to possession. *Held*, that the issues involved under such state of facts must be determined by a court of law, and that a federal court of equity was without jurisdiction of the suit.

**In Equity. On demurrer to amended bill.**

The amended bill in this case shows: That on the 11th day of July, 1870, Elijah J. Woolage died in the county of Sebastian and state of Arkansas, seised and possessed of 320 acres of land situated in that county, and leaving the following will, which was duly probated on the 12th of September, 1870: "In the Name of God, amen! I, Elijah Woolage, of Sebastian county, state of Arkansas, being of sound mind and disposing memory, and calling to mind the uncertainty of life, and being desirous to dispose of all such worldly estate as it has pleased God to bless me with, I give and bequeath the same as follows; that is to say: First. At my death I desire that my body be decently buried, and that all my funeral expenses and all other of my just debts, if any, be fully paid out of my personal property and estate. Secondly. I give and bequeath to my loving wife, Martha Woolage, all the personal property and effects of which I die seised and possessed, subject to the payment of my funeral expenses and just debts, as her own absolute property, in the event that she is living at my death; and, in case that I should survive my said wife, then all my property, after paying all just debts, shall be divided equally among and between my former slave, Mariah Woolage, colored, and the heirs and children of her body then surviving, share and share alike. Thirdly. I give and bequeath all the real estate which I own and possess, or of which I am seised at the time of my death, subject to the dower of my said wife, Martha, in trust to a trustee hereinafter appointed, for the use and benefit of said Mariah Woolage and the children of her body and their descendants, for the period of two hundred years from the date of my death; that is to say, the trustee hereinafter to be appointed and his successors to have a general supervision and superintendence over the farm or farms and lands herein devised, so as to divide the same annually or biannually, or for a longer time if he should deem it advisable, so as to make equitable distribution of the lands for cultivation according to the number and capacity of the different individual beneficiaries herein provided for, and that the said trustee to collect sufficient of the proceeds of the products of said real estate to — the taxes paid up and all the lands herein devised to keep the same in good repair. Fourthly. After the expiration of the period of 200 years aforesaid, all real estate herein devised I bequeath and shall vest in and become the property of the county in which the same shall be situated at the time, and for the purposes and uses following; that is to say, the same to be under the direct supervision and control of the county court of the county in which the same may be situated, to be used exclusively for the use and benefit of the paupers of said county, so to be used forever; and, should said lands and real estate be abandoned by the said Mariah Woolage and

the children of her body and their descendants at any time before the expiration of the 200 years, then as soon as so abandoned the ——— shall vest in the county in which said ——— may be situated, to be used and controlled as and for the purposes hereinbefore directed. Lastly, I do hereby constitute and appoint my friend Caswell B. Neal trustee and executor of this my last will and testament, hereby revoking all former wills or testaments by me heretofore made, and in case my said trustee die, resign, or for any cause fail, refuse to act, or in case any subsequent trustee fail or refuse to act as trustee and executor, then and in that event the county court of the county in which said real estate may be situated may and shall appoint a trustee and executor to carry this will into effect, according to the tenor thereof, who shall be allowed and paid a reasonable compensation therefor out of the proceeds of said lands; the amount to be fixed and allowed by the probate court of the county in which said lands may be situated. In witness whereof, have hereunto set my hand and affixed my seal this 8th day of January, A. D. 1870." That Martha Woolage, his widow, survived him, but died shortly thereafter; that Mariah Woolage also survived him, and afterwards, in 1873, died intestate; and that the plaintiffs in this suit are her children and their descendants. They allege that by virtue of said will they are the owners of an estate in the lands referred to, and are entitled to the rents, profits, and uses accruing and arising from the same, and are entitled to have the possession and enjoyment thereof, and that the said defendant has wrongfully entered into and without right seized possession of said lands for the purpose of digging out and mining coal therefrom, and for a long period of time has continued unlawfully to hold the said lands and mine coal out of the same, and sell and dispose of the same, converting the proceeds arising therefrom to its own use and benefit, and depriving the plaintiffs of the same, and by means of which unlawful acts on the part of the said defendant it is now justly accountable to plaintiffs in a large sum of money, to wit, the sum of \$20,000, and, by means of said unlawful acts of the defendant, plaintiffs are deprived of the use and enjoyment of the said lands, and the said defendant is now continuing its wrongful occupancy and possession of the said lands, and is continuing to take out and remove therefrom large quantities of coal, to the plaintiffs' injury and damage. It is also alleged in the complaint that Caswell B. Neal, who was named and appointed as trustee and executor in the said last will and testament, failed and refused, in his lifetime, to accept the appointment as trustee, and has since departed this life, so that in fact there has never been a trustee to carry into effect the terms and provisions of the said last will and testament. The plaintiffs further allege that the defendant claims to own the said lands, but in what manner, or in virtue of what right, they are unable to state; that, because of the long-continued use of the lands in taking out and mining therefrom coal, large sums of money have been expended by the defendant, and much larger sums have come to the hands of the defendant as proceeds of the sales of coal, the amounts of receipts and expenses being unknown to plaintiffs, but that the net amount due plaintiffs will not be less than the sum above stated, and that, in order to ascertain the correct amount of receipts and expenses, an accounting is necessary. The prayer in the bill is that "the rights and title of the plaintiffs to the possession and use of said lands be established, and that they may have a decree against the defendant accordingly; that a trustee be named and appointed by this court, with full power and authority to carry into effect the provisions of the said last will and testament; that an accounting be had of the issues and profits arising from the said land during the time defendant has held possession of the same, and which have been converted by it to its own use and enjoyment, and of the expenses chargeable against the same, and that the correct balance be ascertained, and that plaintiffs have judgment for the amount thereof against the defendant; and, finally, for such other and further relief as may be warranted by the facts and circumstances, and as may be consistent with the rules, and practice in equity, to the same extent as though specially prayed for." It does not appear from the bill whether there was ever any administration upon the estate of either Elijah J. Woolage or

Mariah Woolage, nor does it appear from the bill who of the children of Mariah Woolage, or descendants of her body, were living at the death of Elijah J. Woolage. The demurrer to the amended bill is on the following grounds: First. The plaintiffs do not state facts sufficient to constitute a cause of action, and have not stated in said bill a case which entitles them, or any of them, to the relief therein prayed. Second. That no right, title, or interest, either in law or equity, accrued to the plaintiffs, or any of them, under and by virtue of the will set forth in the complaint.

Chas. E. Warner, Ira D. Oglesby, and Robert A. Rowe, for plaintiffs.

Hill & Brizzolara, for defendant.

ROGERS, District Judge (after stating the facts). The intention of the maker of this will seems to me manifest. He and his wife were both old, and they had no children. The beneficiaries under the will were his former slaves. They had, no doubt, been faithful while in slavery, and, attached to him, had remained with him after they were freed. They had doubtless enabled him to accumulate this property, and therefore had a stronger claim on his bounty than any one else. He knew they were unlettered, improvident, and unable to cope with their environments. He wished not only to provide against those whom he thought might overreach them, but against their own improvidence. To this end he invoked the aid of a trustee, sought to vest the estate in him for the use and benefit of Mariah Woolage and the children of her body and their descendants, and to make it inalienable for 200 years. The reason for vesting the remainder over in the county in which the land might be located at that time was, no doubt, because there was no person or corporation who could with any degree of certainty be named that would be in existence at that time; and, because he desired to induce the descendants of Mariah Woolage to remain on said place, he inserted a provision in the deed that as soon as they should abandon said land it should vest in the county in which the same was situated, for the use and benefit of the paupers of said county. No doubt, the reason why he selected the paupers as the object of his charity was because he knew that "the poor are always with us," and he could not know to what other charitable use it might be devoted at the end of 200 years. The scheme he devised was doubtless impracticable, if it had been legal, but the rule against perpetuities is fatal to the devise over on condition to the county. 1 Washb. Real Prop. (5th Ed.) top page 115, star page 82, par. 57; Id. top page 468, star page 293, par. 5; 2 Washb. Real Prop. (5th Ed.) top page 28, star page 460, par. 30; 1 Jarm. Wills, p. 502; Gray, Perp. § 201. From these authorities and others the following principles are deduced: First. No interest subject to a condition precedent is good, unless the condition must be fulfilled, if at all, within 21 years after some life in being at the creation of the interest. Second. A devise over on condition may take effect at a future date, since it affects the possession only, and not the seisin, of the land; nor is there any limit in which the term must take effect in order to be valid, provided the period does not reach that which constitutes what the law calls a "perpetuity,"—that, namely, of a life or lives in being and 21 years and a fraction of a year after—

wards. Third. The policy of the law is against clogging the free alienation of estates, and it has become an imperative, unyielding rule of law—First, that no estate can be given to an unborn child of an unborn child; and, second, that lands cannot be limited in any mode so as to be locked up from alienation beyond the period of a life or lives in being and 21 years after, allowing the period of gestation, in addition, of a child en ventre sa mere who is to take under such a limitation. Fourth. A remainder is an estate which by its terms is to take effect at the expiration of a prior estate which is created by one and the same instrument. And there can be no remainder, properly speaking, after an estate in fee simple; nor could that estate be a remainder which, instead of coming in and taking effect at the natural expiration of a prior estate, rises up and cuts it short before its regular determination. Without referring to the numerous authorities cited, and which might be collated, bearing on these questions, it is sufficient to say that the rules laid down seem to be established not only in this country, but in England, and to be of practically universal application, unless in some way modified by statute.

It was urged at the hearing that the interest devised over to the county was a vested interest, which took effect immediately upon the death of the testator, and therefore not obnoxious to the rule against perpetuities. The language of the will forbids that construction. The fourth paragraph is as follows:

"After the expiration of the period of two hundred years aforesaid, all real estate herein devised, I bequeath and shall vest in and become the property of the county in which the same shall be situated \* \* \* to be used exclusively for the use and benefit of the paupers of said county, so to be used forever; and, should said lands and real estate be abandoned by the said Mariah Woolage and the children of her body and their descendants at any time before the expiration of the two hundred years, then, as soon as so abandoned, the same shall vest in the county in which the said lands may be situated."

The rule is thus stated by Gray (paragraph 108):

Whether a remainder is vested or contingent depends upon the language employed. If the conditional element is incorporated into the description of or the gift to the remainder-man, then the remainder is contingent; but if, after giving a vested interest, a clause is added devising it, the remainder is vested. Thus, on a devise to A. for life, remainder to his children, but, if any child dies in the lifetime of A., his share to go to those who survive, the share of each child is vested, subject to be divested by his death. But on a devise to A. for life, remainder to such of his children as survive him, the remainder is contingent.

In view of the language just quoted, it would seem conclusive that the devise over on condition in this case creates a contingent remainder. The contingency upon which the estate in remainder may take effect might occur within one year, or might be postponed until the expiration of 200 years. Cases illustrating the question may be found in Gray, Perp. §§ 235-237. So much of the will as vests an estate in the trustee, and renders it inalienable for 200 years, in the opinion of the court, is void. In 2 Washb. Real Prop. (5th Ed.) top page 760, star page 360, the author says:

Not only is the rule, thus modified, imperative in its bearing upon the limitation of an executory interest, but the limitation, in order to be valid, must be so made that the estate not only may, but must, vest in possession within the prescribed period. If, by any possibility, the vesting may be postponed beyond this period, the limitation will be void. And the effect of a limitation over being void by reason of its being too remote is that the instrument—the will, for instance—is to be construed as if no such clause were inserted in it, and the first taker holds his estate discharged of the conditions or limitation over. If this be in terms for life, he has a life estate; if in fee simple, he has a fee simple absolute. Where a vested estate is given distinctly, and there are annexed to it conditions, limitations, powers, trusts, including trusts for accumulation, or other restraints relative to its use, management, or disposal, that are not allowed by law, it is those restraints and the estates limited on them that are void, and not the principal or vested estate. If by possibility it may not vest within the prescribed limits of time, it is a void limitation, although in the end it does in fact happen that the person might have taken within the time fixed by the rule. And a limitation extending beyond the period of perpetuity, and therefore void as to that part, is void in the whole, both as to the period within and that beyond the limits of perpetuity.

Illustrations by the author follow this statement of the text.

In *1 Perry, Trusts*, § 382, the author says:

The same rule applies with equal force in law and equity, and trusts and beneficial or equitable estates are subject to the same restrictions. A perpetuity will no more be tolerated when it is covered by a trust, than when it displays itself undisguised in the settlement of a legal estate. "If," as Lord Guilford said, "in equity you could come nearer to a perpetuity than the common law admits, all men, being desirous to continue their estates in their families, would settle their estates by way of trust, which might make well for the jurisdiction of chancery, but would be destructive to the commonwealth."

And in section 384:

In private trusts the beneficial interest is vested absolutely in some individual or individuals who are, or within a certain time may be, definitely ascertained, and to whom, therefore, collectively, unless under some disability, it is, or within the allowed limit will be, competent to control, modify, or end the trust. Private trusts of this kind cannot be extended beyond the legal limitations of a perpetuity, as before stated. Nor can a settlor give his trustees a power to appoint the property subject to a trust, to new trusts to arise at or upon the termination of the trusts created by himself. But a trust created for charitable or public purposes is not subject to similar limitations, but it may continue for a permanent or indefinite time.

And in section 386:

A legal estate in fee cannot be conveyed to a person with a provision that it shall not be alienated, or that it shall not be subject to the claims of creditors; and so trusts cannot, in general, be created with a proviso that the equitable estate or interest of the cestui que trust shall not be alienated or charged with his debts. If it is ascertained that an interest is vested in the cestui que trust, the mode in which or the time when he is to reap the benefit is immaterial. The law does not allow property, whether legal or equitable, to be fettered by restraints upon alienation. Therefore, when an equitable interest is once vested in the cestui que trust, he may dispose of it, or it may pass to his assignees by operation of law, if he becomes a bankrupt.

The rules which I have stated apply both to legal and equitable interests in both realty and personalty. *Gray, Perp.* § 202. We come now to consider what relations, as shown by the allegation in the bill, the plaintiffs in this suit bear to the subject-matter thereof. The only interest claimed by the plaintiffs is such as they acquired

under the will. They say they are the children and grandchildren of Mariah Woolage, and descendants of her body, but whether either or any of them were born at the death of the testator the bill does not show. An acquirement of any interest under the will depends upon the question as to whether they were in esse at the death of the testator. Whether, therefore, they acquired any interest under the will, does not appear. If they acquired no interest under the will, they cannot be entitled to an accounting for rents, profits, or uses accruing and arising from the use of said land. This would be so without reference to whether, on the allegations of the bill, the equitable jurisdiction of a federal court would attach to such a case as this. The bill, therefore, is fatally defective in that regard. It does, however, appear from the bill that Mariah Woolage survived the testator, but died intestate, and that plaintiffs are her children and grandchildren and their descendants; but they do not claim by descent from her, nor is it made to appear that she died seised and possessed of this land, or that any administration on her estate was ever had. It can scarcely be urged that plaintiffs could recover on that theory under the allegations of the bill.

It follows from what has been said above that the equitable, if not the legal, estate in fee vested immediately upon the death of the testator in the first takers under the will. Who were they? In the opinion of the court, it was Mariah Woolage and the children of her body, and their descendants in esse at the death of the testator. Upon his death, if they were not immediately vested with the legal estate, they were vested with the equitable fee thereto, and had the immediate right to demand of and compel the trustee to convey the legal fee to them. The trustee never entered upon the discharge of his duties, and we are not advised by the terms of the bill who took possession and control of the estate. When the will, shorn of its void features, as stated above, and the allegations of the bill as applicable to it, thus shorn, are considered, the bill is very much in the nature of a suit in ejectment. It stands in this way: The plaintiffs are out of possession. The defendant is and has been in possession for many years unlawfully, and still remains in possession, but claiming title adversely to plaintiffs. That, by reason of the use and occupancy of said place, defendant derived a large sum of money from the sale of coal taken therefrom. But the whole scope of the bill shows that the pleader intended it as a bill to quiet the title of the plaintiffs to the land claimed under and by virtue of the will, to have a trustee appointed in whom the legal title should be vested, to administer the estate under the will, and for an accounting of the profits realized by the defendant from the real estate, and to have the possession of the land delivered to the trustee. The demurrer admits the truth of all the facts which are properly pleaded. For the purposes of this decision, assuming that the plaintiffs, or some of them, are the children of Mariah Woolage, or their descendants, and that they were in esse at the death of the testator, the question arises whether such plaintiffs, being vested with the equitable fee, if not the legal fee, of the land, and being out of possession of the same (the lands being claimed and held ad-

versely by the defendant), can maintain a bill in the federal court for an accounting of rents and profits of the land, or for the net proceeds of coal taken therefrom by the defendant, or for the purpose of quieting the title thereto, or for the possession thereof, or for any one or more or all of said purposes. No argument or authority is necessary to show that a court of equity will not take jurisdiction at the instance of a plaintiff out of possession to determine, as between such plaintiff asserting title and a defendant in possession claiming adversely, the simple and naked questions of who holds the legal title to the land, or the right to the possession thereof. *Whitehead v. Shattuck*, 138 U. S. 146, 11 Sup. Ct. 276, 34 L. Ed. 873. Nor is authority required to show that in such a case as that the equity jurisdiction of the federal court would not attach because facts are stated in the bill which in a proper case would give the court jurisdiction on the ground of an account between the parties, for the reason that an accounting depends upon the title or right to possession, and the jurisdiction to try the title is in a court of law. Rev. St. U. S. § 723; article 7 of the constitution of the United States. See, also, cases cited in volume 2 of the notes of Gould & Tucker to Rev. St. U. S. § 723. Nor can the equity jurisdiction of a federal court attach to quiet title in favor of a plaintiff who is either out of possession or has not acquired the legal title, as against a defendant in possession asserting adverse title. *Frost v. Spitley*, 121 U. S. 552, 7 Sup. Ct. 1129, 30 L. Ed. 1010; *Dick v. Foraker*, 155 U. S. 415, 15 Sup. Ct. 124, 39 L. Ed. 201; *Adoue v. Strahan* (C. C.) 97 Fed. 691.

It is urged that a court of equity will take jurisdiction for the purpose of construing a will. For the purposes of this decision, the jurisdiction of a federal court in equity to construe a will may be conceded, but the answer to that contention is that such is not the purpose of the bill. The construction of the will may be, and the court thinks it is, incidental to the determination of the case; but the question here is not the construction of the will, that the rights of the parties beneficiary may be established and declared. The question here is whether any of the parties beneficiary under the will have any rights at all, as against a party defendant claiming adversely to them all, and a court of equity has no jurisdiction to determine a question of that kind. The remedy in a court of law is adequate and complete to determine that question. For the reasons stated, in the opinion of the court the demurrer in this case ought to be sustained, and it is so ordered.



CENTRAL TRUST CO. OF NEW YORK v. CALIFORNIA & N. R. CO. et al.  
(SMITH et al., Interveners).

(Circuit Court, N. D. California. July 6, 1901.)

No. 12,231.

1. MORTGAGES—FORECLOSURE BY TRUSTEE—INTERVENTION.

Individual bondholders have a right, in a suit by the trustee to foreclose a mortgage securing bonds, to intervene for the purpose of contesting the validity of certain of the bonds.

2. SAME—BONDS SECURED.

Under a mortgage to secure first mortgage bonds, providing that they can be issued only for the purpose of constructing the railroad of the mortgagor, bonds issued on a contract for construction cannot participate in the proceeds of the foreclosure,—the work not having been performed under the contract, and some of them returned to the mortgagor having been voted by it to persons in payment of services as officers and attorneys,—except as they came into the hands of purchasers for value and without notice.

3. SAME—PRIOR LIENS.

A claim which a railroad company agrees to pay a person out of the proceeds of the sale of the first bonds sold by it does not take precedence as to the proceeds under foreclosure of the mortgage thereafter given to secure bonds issued for the construction of the road, but stands on the same basis as that of any general creditor.

4. SAME—PROOF OF OWNERSHIP OF BONDS.

A person having intervened in a suit to foreclose a mortgage securing bonds, and having alleged by his bill of intervention that he was the owner and holder of certain of the bonds, and his ownership having been put in issue, and a reference made as to the issue raised by the pleadings, and testimony introduced that he was not the legal owner, he must prove his ownership, and cannot rely on his mere possession of them to maintain his claim.

Platt & Bayne, for complainant.

John A. Wright, for defendant Mary E. Roberts.

Galpin & Bolton, for intervener C. H. Smith.

H. N. Clement and T. C. Judkins, for certain defendants in intervention.

Myrick & Deering, for intervener Watkinson.

MORROW, Circuit Judge. This action was brought on June 17, 1896, by the complainant, a corporation of the state of New York, to foreclose a mortgage executed by the defendant California & Nevada Railroad Company, a California corporation, on the 10th day of April, 1884, to secure to the complainant the payment of certain first mortgage bonds of the defendant company to the extent of \$5,000,000, of which 545 bonds have been issued, of the value of \$1,000 each. The defendant railroad company filed no answer. On December 26, 1896, Charles H. Smith filed a bill of intervention, alleging that he was the owner of 304 of the bonds issued, and that 200 of the remaining bonds issued were illegal, invalid, and not a legal obligation of the defendant company, and could not be enforced as against its property. Answers to this bill of intervention were filed by the various defendants other than the California & Nevada Railroad Company, and the matter was referred to the master in

chancery to take evidence therein and report to the court which of the bonds involved in said action are legal and valid obligations of the defendant railroad company, and which of said bonds, if any, were illegally issued; also to report on all matters at issue raised by the pleadings. The master finds with regard to the bonds in question (1) that 345 of those issued, including those claimed by the intervener Charles H. Smith, were legally issued, and are legal and valid obligations of the defendant railroad company; (2) that none of the remaining 200 of said bonds were legally issued, and they are therefore not legal or valid obligations of the defendant railroad company, except such of them as are held by bona fide purchasers. As to the claims of the various defendants in intervention the master finds as follows: That, of said 200 bonds illegally issued, those in the treasury of the defendant railroad company, or in the possession, custody, or control of the defendants in intervention, J. J. Scrivner, E. A. Phelps, J. S. Emery, Abner Doble, F. M. Smith, Alton H. Clough, Clement & Judkins, or of any other person or persons who at the time of acquiring the same had notice of the terms of said mortgage and of the illegal issuance of said bonds, are not valid obligations of the defendant railroad company, and each and every of such bonds should be surrendered and canceled; that the Oakland & San Francisco Terminal Company is not in the position of a holder for value without notice, and the bonds voted and delivered to it by the defendant railroad company were illegally issued, and not valid obligations of said company, except in the hands of a bona fide purchaser; that the intervener J. H. T. Watkinson is the owner and holder of 11 of the 200 bonds aforesaid, and such bonds and the accrued interest thereon are legal and valid obligations of the defendant railroad company. The master further finds that the rights claimed by the defendant Mary E. Roberts do not constitute such an equitable lien on the property of the defendant railroad company as to give her priority over the bondholders, and her prayer must therefore be denied. And with respect to the issues raised under the bill of intervention of Charles H. Smith the master finds that said intervener was not debarred from the right of intervention by reason of his citizenship, as in the courts of the United States a party may intervene to assert his rights without reference to the citizenship of the parties, but as no right for intervention other than that of ownership of the bonds was alleged or proven, and as that right was not established, mere possession not being sufficient to constitute him a bondholder, he is not entitled to intervene, and his amended bill of intervention should be dismissed. As to the unpaid interest coupons upon some of the bonds, the master does not report, as, following the practice stated in *Railroad Co. v. Fosdick*, 106 U. S. 47, 68, 71, 1 Sup. Ct. 10, 27 L. Ed. 47, the accounting to ascertain the amount due follows the decree, and, no decree having yet been entered in this case, such accounting could not be made by the master, even though a stipulation between certain counsel in the case was filed, setting forth the method in which the unpaid interest coupons due upon the bonds should be calculated and ascertained. Such stipulation would not be binding upon the bondhold-

ers not before the court, and the master cannot regard it. Exceptions have been taken to this report by the various parties interested.

The objection that the intervener, Charles H. Smith is not legally or equitably entitled to intervene in this action as against the other bondholders cannot be sustained. The principle that the trustee named in the mortgage given to secure the payment of bonds is the proper party to protect the interest of all the bondholders, and that individual bondholders will not be permitted to take part in the litigation, is not applicable to a controversy involving the validity of bonds for the satisfaction of which the foreclosure proceedings are being conducted. An intervention is permissible and proper in such a case, for the reason that the interests of the trustee and the intervening bondholder have ceased to be identical. *Short, Ry. Bonds*, 482. In *Railroad Co. v. Cowdrey*, 11 Wall. 459, 20 L. Ed. 199, the action was brought against the railroad company to foreclose first, second, and third mortgages to pay in due order the several outstanding bonds of the company. The trustees mentioned in the mortgages were dead, and the suit was brought by certain of the bondholders for themselves and for all other holders thereof who might come in and contribute to the costs and expenses of the suit. It was objected that the complainants had no right to sue for themselves and in behalf of the several classes of bondholders under the different mortgages. In answer to this objection the supreme court held that the antagonism of interests was not a sufficient objection, as the rights of all bondholders were protected by the opportunity given to all to intervene and contest the claim of any. The court said:

"If any class of bondholders wish to contest the proceedings of a prior mortgage, they have a perfect right to intervene in the suit and file a cross bill setting up the matter of objection. All bondholders, including the complainants themselves, have to establish their claims in the case before it is finally closed, and before a distribution of the assets can be made. And any bondholder proving his claim may contest the claim of any other bondholder."

The same principle would have been applicable to the proceedings had the action been commenced by the trustees of the mortgage.

In *Williams v. Morgan*, 111 U. S. 684, 4 Sup. Ct. 638, 28 L. Ed. 559, this right of contest by intervention was sanctioned by the supreme court in a case where the holder of railroad bonds secured by a mortgage under foreclosure was held to have an interest in the amount of the trustee's compensation which entitled him to intervene and contest it, and to appeal from an adverse decision. In *Richardson v. Green*, 133 U. S. 30, 10 Sup. Ct. 280, 33 L. Ed. 516, the controversy was concerning the validity and priority of certain claims. The action, as in the present case, was by a trustee against a railroad company, to foreclose a mortgage given to secure the payment of certain bonds. The company made no defense, but numerous parties holding bonds secured by the mortgage, and others with claims of various kinds against the company, with leave of court intervened in the case, and were allowed to prove their respective claims. The controversy resolved itself into a contest over

the validity of certain bonds, and for priority among the respective claimants in the distribution of the proceeds of the sale of the mortgaged property thereafter to be made. The matter was referred to a master to take testimony and report upon the validity and also the priority of the various claims filed. The master made his report, classifying the valid claims according to their priority, and rejecting the claim of at least one bondholder for certain bonds held by him. This report was confirmed by the decree of the court, and affirmed on appeal to the supreme court. The right of intervention appears to have been admitted without controversy, and the case was cited as authority by Judge Ross in the case of Farmers' Loan & Trust Co. v. San Diego Street-Car Co. (C. C.) 45 Fed. 518, 519, in support of the right of an intervener having an equitable lien upon the mortgaged property to contest the priority of other asserted liens. Assuming, then, that Charles H. Smith has an interest in the controversy, it is clear that the objection to his intervention is untenable and must be overruled.

The defendants in intervention except to that portion of the report which finds that the 200 bonds were illegally issued and are not valid obligations of the defendant railroad company, and to the special findings that those of the defendants in intervention holding certain of such bonds have not valid claims against the defendant railroad company. Their exceptions are based upon the ground that the evidence does not sustain the findings. The report of the master is most comprehensive upon this point, and contains a complete analysis of the facts upon which his findings are made. His conclusion is that the terms of the mortgage, specifying that first mortgage bonds could only be issued for the purposes of building, constructing, completing, and equipping said railroad, and the acquirement of terminal facilities therefor, did not comprehend the use of such bonds for the payment of general expenses incident to the management of the road, officers' salaries, or for services connected with the present litigation. The facts warranting this conclusion may be outlined as follows: The 200 bonds in question were issued by the defendant railroad company upon a contract for the construction and equipment of a certain number of miles of railroad, and were paid in advance of the work to be performed under said contract. The work was never completed, and the defendant railroad company offered to release the contracting company and cancel the contract, upon the return of the 200 bonds. It does not clearly appear that the bonds were actually returned. The contracting company had turned them over to several of the defendants in intervention in exchange for stock of the defendant company, and in some cases these persons had disposed of them to other parties. By the minutes of the company, however, it would appear that 183 of these bonds had been returned, and were voted to the various defendants in intervention now holding them, in payment of services as officers and for attorney's fees. There is clearly some irregularity in these proceedings. But as the purpose for which these bonds were issued has never been accomplished, and as their ultimate disposition is not shown to have been in accordance with the

purpose of issuance, they are undoubtedly not valid obligations of the defendant railroad company, and the finding of the master must be sustained.

Exception is also taken to the finding of the master that J. H. T. Watkinson is a bona fide purchaser of 11 of the 200 bonds declared to be illegally issued, and is entitled to be protected in such ownership. It appears from the evidence that these 11 bonds were a part of the number voted to J. J. Scrivner for services as an officer of the company, and were delivered by him to a real-estate agent for sale, and were by this agent sold to the defendant Watkinson; that he purchased them for a valuable consideration, and without notice of the illegality of their issuance. No bad faith is shown on the part of the defendant Watkinson, and his status as a bona fide purchaser is clearly established, as well as his right to protection as such purchaser, according to the rule obtaining in such cases. *Murray v. Lardner*, 2 Wall. 110, 17 L. Ed. 857; *Cromwell v. County of Sac*, 96 U. S. 51, 24 L. Ed. 681.

The defendant Mary E. Roberts excepts to the master's report for the reason that it does not contain a finding that the proceeds of the first mortgage bonds of the defendant railroad company are impressed with a trust in the nature of a lien, or a lien in the nature of a trust to the use of the said Mary E. Roberts, by which she should receive the first benefit of the proceeds. It appears that Mary E. Roberts loaned or advanced to the predecessor of the defendant railroad company the sum of \$5,000, receiving therefor the following writing: "To C. F. Burrell, Treasurer of the California and Nevada Railroad Company: Pay to Jno. T. Davis or order five thousand dollars, payable out of the proceeds of the sale of the first bonds sold of this company. E. M. Walker, President. E. A. Phelps, Secretary." Upon its face it bears the following indorsement: "Accepted to be paid as herein specified. C. F. Burrell, Treasurer," and upon the back of the instrument is indorsed: "Pay to the order of Mrs. Mary E. Roberts. Jno. T. Davis." Thereafter, and before any payment was made to said Mary E. Roberts, the defendant railroad company was formed, and the first corporation sold and transferred to the second company its entire road and properties; the second company agreeing to assume all the outstanding obligations of the first company. The second company thereafter executed the mortgage to the complainant herein, under which the bonds in question were issued. Nearly two years after the execution of this mortgage the said Mary E. Roberts commenced an action against the defendant company upon the written instrument above set out, to recover the amount of her loan, with interest. A writ of attachment was issued and levied upon the whole property of said defendant railroad company, and has not yet been discharged. It is contended in her behalf that her claim constitutes an equitable lien upon the property mortgaged, and takes priority in the marshaling of the assets over all of the bondholders. That such equitable right inheres in Mary E. Roberts against the defendant railroad company under the terms of the transfer to it by the first company is not denied by the master, but he maintains that the only question

to be considered in this proceeding in connection with her claim is her right to share in the proceeds of the foreclosure sale with the bondholders, or prior to any of them. Upon this point the master finds that, by the very terms of the written instrument upon which she bases her claim, no lien prior to that of the mortgage can be asserted. It states that her loan is to be paid "out of the proceeds of the sales of the first bonds sold" of the defendant railroad company. No bonds could be issued or sold until after the execution of a mortgage providing for their issuance, and the existence of a mortgage lien upon the property was therefore a condition precedent to the lien sought to be established by this writing. Her claim is therefore in the same category as that of any general creditor of the defendant railroad company, in this foreclosure proceeding. This view of the master is well sustained by the opinion of Mr. Justice Field in the case of *Fogg v. Blair*, 133 U. S. 534, 10 Sup. Ct. 338, 33 L. Ed. 768.

Exception is also taken to the finding of the master that the intervener Charles H. Smith has not established his right to certain of the bonds in controversy. His bill of intervention is under oath, and alleges that the intervener is the owner and holder of 304 of the 545 bonds issued under the mortgage, and described in the bill of complaint as due and unpaid. The reference to the master on the 1st day of February, 1897, was "for the purpose of taking the evidence therein and reporting to the court which of the bonds involved in the said action and sued upon by the said complainant are legal and valid obligations of the said California & Nevada Railroad Company, and which of said bonds, if any, were illegally issued." The pleadings having established the fact that the bonds issued under the mortgage were due and unpaid, it only remained for this court, as preliminary to a decree of foreclosure, to determine the issue, also raised by the pleadings, as to which of the bonds involved in the action were the legal and valid obligations of the mortgagor. The order of reference was, however, amended by an order of the court made and entered on the 5th day of March, 1900, enlarging the scope of the order of reference to "all matters and issues raised by the pleadings." It appears that the answer of the defendants in intervention to the bill of intervention denied that the intervener Charles H. Smith is the owner or that he is entitled to the possession of the 304 bonds claimed by him in his bill, or that he is the owner or entitled to the possession of any portion of them. Upon this issue, and under the terms of the amended order of March 5, 1900, the master took testimony, over the objection of the intervener, relating to his ownership of the bonds in question. The intervener claimed that his possession of the bonds was sufficient for the purposes of the intervention, and offered no evidence in support of his claim of ownership of the bonds. The master is of the opinion that the mere possession of the bonds by the intervener, without the showing of any legal right thereto, is not sufficient to maintain his claim. The ownership having been put in issue, and some testimony having been introduced tending to show that the intervener was not the legal owner of the bonds, it devolves

upon the intervener to prove his ownership thereof, and not rely upon the mere possession of the bonds to maintain his claim. The intervener has asked, however, that, if the finding of the master in this behalf should be sustained, he might be allowed to introduce testimony in support of his claim of ownership of the bonds. The court is of the opinion that an opportunity should be given the intervener to present further testimony. This need not, however, delay the entering of a decree of foreclosure. It is not necessary at this stage of the proceedings to determine as a finality the ownership of the bonds in question. It is only necessary that there shall appear that there has been a default in their payment, and the amount of that default. *Guaranty Trust & Safe-Deposit Co. v. Green Cove Springs & M. R. Co.*, 139 U. S. 137, 150, 11 Sup. Ct. 512, 35 L. Ed. 116; *Toler v. Railroad Co. (C. C.)* 67 Fed. 168, 181. This showing having been made, a decree of foreclosure may be entered in accordance with the prayer of the bill of complaint. The report of the master will therefore be confirmed, as indicated in this opinion, and decree of foreclosure entered.

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**VICTOR G. BLOEDE CO. OF BALTIMORE CITY v. JOSEPH BANCROFT & SONS CO.**

(Circuit Court, D. Delaware. June 5, 1901.)

No. 4.

**1. PRODUCTION OF PAPERS—APPLICATION.**

In view of the discretionary nature of the power of the court under section 724, Rev. St. U. S., summarily to give judgment of non-suit or by default, as the case may be, the court will not favorably act on any application for production ambiguous on its face or which does not clearly conform to the requirements of the section.

**2. SAME—NON-COMPLIANCE WITH ORDER.**

In case of non-compliance by one party with an order of production the remedy of the other is restricted to the obtaining, in the discretion of the court, of a judgment of non-suit or by default, as the case may be, and does not include power to compel production by attachment.

(Syllabus by the Court.)

Anthony Higgins and Charles M. Curtis, for plaintiff.

Benjamin Neilds, William S. Hilles, and Herbert H. Ward, for defendant.

**BRADFORD**, District Judge. By an order made in this cause December 21, 1899, the defendant was required pursuant to section 724, Rev. St. U. S., to produce in court March 5, 1900, for inspection by the plaintiff, its agents or attorneys, with leave to take copies and make abstracts under the further order and direction of the court, all books and writings in the possession or power of the defendant showing all or any of the particulars mentioned in the order, and to file an affidavit showing full compliance therewith, or reasons, if any should exist, why such compliance was impossible. (C. C.) 98 Fed. 175. The particulars so mentioned were as follows:

"(1) What pulp colors and other colors and materials were manufactured by the plaintiff for and delivered to the defendant between June 1, 1893, and January 1, 1895;

"(2) What pulp colors and other colors and materials were manufactured by the defendant between June 1, 1893, and June 9, 1897, similar or substantially similar to the pulp colors or other colors or materials furnished by Victor G. Bloede to the defendant on or prior to June 9, 1891;

"(3) What pulp colors and other colors and materials were manufactured for the defendant otherwise than by the plaintiff between June 1, 1893, and June 9, 1897, similar or substantially similar to the pulp colors or other colors or materials furnished by the said Victor G. Bloede to the defendant as above mentioned; and

"(4) What pulp colors and other colors and materials were used by the defendant between June 1, 1893, and June 9, 1897, similar or substantially similar to the pulp colors or other colors or materials furnished by the said Victor G. Bloede to the defendant as above mentioned."

The defendant produced in court March 5, 1900, certain books together with an affidavit made by its president to the effect that they were all the books or writings in its possession or power showing, in so far as any books or writings in its possession or power would show, the particulars mentioned in the order. The books so produced were at the time of their production and from time to time afterwards inspected by the plaintiff through its agents and attorneys, but no motion has been made on the part of the plaintiff for judgment by default against the defendant for non-compliance with the order of production. The matter now before the court is presented by a petition filed by the plaintiff March 8, 1901, alleging, in substance, that the information sought by the plaintiff cannot be obtained from the books produced under the order; that the defendant has not fully complied therewith in that it "did not produce any books or writings showing what pulp colors or other colors or materials were used by the defendant or were manufactured by the defendant or by any other person for the defendant between June 1, 1893, and June 9, 1897, similar or substantially similar to the pulp colors or other colors and materials furnished by Victor G. Bloede to the defendant on or prior to June 9, 1891"; that such colors and materials were used by the defendant in the manufacture of several specified kinds of cloth between certain material dates; and that the defendant has in its possession books and writings which will show what quantities of goods were manufactured by the defendant in the manufacture of which such colors and materials were used; and praying, in substance, that the defendant may be required to produce "under said order and in further compliance therewith" all books and writings showing its total output in several specified lines of its business. It is evident that if the defendant fully complied with the order of December 21, 1899, the present application must be denied, unless it is to be treated as a new and independent motion under the statute. But it cannot with propriety be so considered, even if the presentation of the petition should be regarded as in substance a "motion" of which the defendant had "due notice." The prayer of the petition is that the defendant may be required to produce books and writings "under said order and in further compliance therewith," namely, the original order of production. Nor was it claimed on either side at the hearing that the



application was a new motion under the statute. Further, in view of the discretionary nature of the power of the court under section 724 summarily to give judgment of non-suit or by default, as the case may be, for non-compliance with an order of production, this court will not favorably act on any application for production ambiguous on its face or which does not clearly conform to the requirements of the section. To pursue a different course would necessarily result in many cases in rendering questionable the validity of the judgment given for non-compliance. Strict conformity to the plain requirement of a "motion and due notice thereof" is not too much to exact from parties and imposes no hardship on them. The defendant either did or did not fully comply with the order of December 21, 1899, by the production of books in this court March 5, 1900. If there was such full compliance this application must be denied, without regard to any disappointment of the plaintiff's expectations as to the contents or intelligibility of the books produced. If there was not full compliance the court is authorized, on motion of the plaintiff, to give judgment against the defendant by default. But it is contended on the part of the plaintiff that the giving of such a judgment is not the exclusive, but only a cumulative, remedy in case of non-compliance. It is urged that the provision that the court may "require the parties to produce books or writings \* \* \* in cases and under circumstances where they might be compelled to produce the same by the ordinary rules of proceeding in chancery," carries with it power to compel such production by attachment. This contention cannot, in my opinion, be sustained. While the section empowers the court to require parties to produce in cases and under circumstances where they might by the ordinary rules of proceeding in chancery be compelled to produce, it does not provide that they may be so compelled in like manner as in chancery. The section is very different from the Delaware statute on the subject. By the latter the state court "making such order, shall have the same power for enforcing it which is exercised by the court of chancery in like cases." Section 13, c. 107, Rev. Code Del. But no such provision is contained in section 724. Construing the whole section together, in case of non-compliance by one party the remedy of the other is restricted to the obtaining, in the discretion of the court, of a judgment of non-suit or by default, as the case may be. *Iasigi v. Brown*, 1 Curt. 401, Fed. Cas. No. 6,993; *Merchants' Nat. Bank v. State Nat. Bank*, 3 Cliff. 201, Fed. Cas. No. 9,448. The plaintiff, however, has not moved for judgment against the defendant for non-compliance with the order of December 21, 1899. Under the statute a motion is necessary to the obtaining of such a judgment. Indeed, at the hearing it was stated on the part of the plaintiff that the making of such a motion at that time was not in contemplation, as the securing of a judgment by default without the ability to prove the quantum of damages sustained by the plaintiff would be of little or no avail. It is manifest that whatever difficulty may confront the plaintiff does not grow out of any non-compliance by the defendant with the order of production. The affidavit of its president filed at the

time of the production of the books in court shows compliance with the order so far as it was within the power of the defendant to comply. There is no evidence in the case contradicting or tending to discredit the allegations in that affidavit. It seems that the books produced by the defendant do not contain such entries as to impart to the plaintiff the information it desires, and in order to obtain it the plaintiff, as stated by its counsel at the hearing, now asks to have the defendant compelled to produce books and writings showing its total output in certain lines of its business to enable the plaintiff to prove by testimony, expert or otherwise, what quantities of pulp colors and other colors and materials similar or substantially similar to those furnished by Victor G. Bloede to the defendant prior to June 9, 1891, entered into the goods constituting such output. Whether an order so broad in its scope would be proper, if duly applied for, it is unnecessary now to determine. It certainly cannot be granted on the present application. In view of the conclusion reached there is no occasion to discuss the exceptions taken to the answer made to the petition. The petition must be dismissed with costs.

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BOARD OF COM'RS OF LAKE COUNTY v. KEENE FIVE-CENTS SAV.  
BANK.

(Circuit Court of Appeals, Eighth Circuit. June 10, 1901.)

No. 1,441.

On Petition for Rehearing. Denied.

For former opinion, see 108 Fed. 505.

Before CALDWELL and SANBORN, Circuit Judges, and  
ADAMS, District Judge.

PER CURIAM. The petition is denied.

ADAMS, District Judge (concurring). Unless the so-called warrant statements were admissible in evidence as tending to show that the warrants wrapped in them were exchanged for the bonds sued on, there was no evidence identifying such warrants with the bonds, and no defense was made to plaintiff's right of recovery on the bonds.

After a careful reconsideration of the subject, I am satisfied, for the reasons stated in the opinion of the majority, that the warrant statements were properly excluded by the trial court. As a necessary result, the judgment for the plaintiff below should have been affirmed, and the petition for a rehearing should be denied, whether the county clerk's account book or the bond register were admissible in evidence or not. Accordingly, I concur in denying the petition for a rehearing, without expressing any opinion on the questions argued in the brief filed in support of the petition, relating to the admissibility of the clerk's account book or bond register.

**McCLAIN v. PROVIDENT SAV. LIFE ASSUR. SOC. OF NEW YORK.**

(Circuit Court of Appeals, Third Circuit. June 10, 1901.)

No. 33.

**1. LIFE INSURANCE—CONSTRUCTION OF CONTRACT—WARRANTIES OR REPRESENTATIONS.**

In case of doubt as to whether statements made by an applicant for insurance are to be regarded as warranties, the benefit of the doubt will be given to the insured, and they will be held as representations merely, as to all things not material to the risk.

**2. SAME—RULE APPLIED.**

An application for life insurance made on printed blanks of the company, and which was made a part consideration for the policy, consisted of two parts; the first containing questions and statements to be answered and subscribed to by the applicant, and the second "statements to the medical examiner" relating to the health and physical condition of the applicant. The first contained the following stipulation: "It is hereby agreed that \* \* \* all the statements contained in part 1 and part 2 of this application, by whomsoever they be written, are warranted to be full, true, and complete, \* \* \* and that if any concealment or fraudulent or untrue statement be made, or at any time any covenant or agreement herein made shall be violated, said assurance shall be null and void." Part 2 closed with the following: "I hereby declare that I have read and understand all the above questions and the answers thereto, and they are hereby made a part of my application, \* \* \* and I hereby warrant said answers as written to be true, and that I am the person described above and in part 1 of this application signed by me." *Held*, that the latter stipulation must be construed together with the first, which by its terms covered the entire application, and to prevent inconsistency, and in the application of the rule that doubts are to be resolved in favor of the insured, the word "warrant," as used in the latter, must be given the same meaning as in the former, as therein limited, and held to be a warranty only that the statements in part 2 of the application were made in good faith, without concealment or fraudulent intent which would avoid the policy under the first provision; that under such construction such statements were representations, and not warranties, and the policy was not avoided by a misstatement in regard to a matter not material to the risk, if made in good faith without intent to deceive.

**3. SAME—ACTIONS ON POLICIES—LAW GOVERNING.**

A federal court, in exercising jurisdiction concurrent with the courts of a state in an action on a policy of insurance, is administering the law of the state, and is as much bound by its statute and common law and by its declared public policies as would be the state courts in a like case.<sup>1</sup>

**4. SAME—REGULATION—CONSTITUTIONAL POWER OF STATES.**

A state may constitutionally, in the exercise of its police powers, declare its public policy in respect to life insurance, and impose conditions on the transaction of business within the state by life insurance companies, domestic and foreign, as it may deem best, and such enactments are binding upon federal courts sitting within the state in cases within their purview.

**5. SAME—EFFECT OF MISREPRESENTATIONS—PENNSYLVANIA STATUTE.**

P. L. Pa. 1885, p. 134, provides that, "whenever the application for a policy of life insurance contains a clause of warranty of the truth of the answers therein contained, no misrepresentation or untrue statement in such application, made in good faith," shall effect a forfeiture or be a ground of defense to a suit on the policy unless it relates to a

<sup>1</sup> What law governs insurance policies, see note to *Corley v. Travelers' Protective Ass'n*, 46 C. C. A. 287.

matter material to the risk. *Held*, that the decisions of the supreme court of Pennsylvania declaring it to be the law of the state that such statute applied to contracts of life insurance made within the state by a foreign insurance company under authority granted by the state to do business therein, notwithstanding a provision of such contracts that they should be governed by the laws of another state which was the domicile of the company, were binding upon a federal court sitting in the state in an action on such a policy, and established the rule by which the contract must be construed.

**6. APPEAL—REVERSAL—AWARDING NEW TRIAL.**

Where in the opinion of the trial judge a verdict is not supported by the evidence, he should set it aside and grant a new trial. It is not for the appellate court to impeach the findings of the jury upon questions clearly and distinctly submitted to it, and to order a new trial, when a judgment has been entered upon such findings which that court finds should have been in favor of the other party.

**7. LIFE INSURANCE—MISREPRESENTATIONS IN APPLICATION—GOOD FAITH AND MATERIALITY.**

In reply to questions in an application for life insurance, the applicant stated that he never had dyspepsia, and "had no medical attendance." He further stated in answer to a general question that he never had any sickness, injury, or infirmity, "except temporary ailments." He was at the time of the application a strong, robust, and active man, but died within a year from cancer of the stomach. In an action on the policy the jury found, in answer to special questions submitted, that he had previously had "dyspepsia or indigestion at times," and that he had been attended by a physician for "temporary indigestion, not material to the risk." They also found that his answers were made in good faith and without any intention to deceive. It appeared from the evidence that the physician referred to was an intimate friend, with whom he rode and talked daily, whom he had consulted three or four times with reference to indigestion, but who had never been called to visit him at his house; and it did not appear that either regarded the ailment as serious, or anything more than temporary, or that it was in fact such as could properly be considered a disease, within the meaning of the contract. *Held*, that the findings of the jury that the answers were made in good faith and were not material to the risk were justified.

In Error to the Circuit Court of the United States for the Eastern District of Pennsylvania.

J. H. Brinton, for plaintiff in error.

Francis Rawle, for defendant in error.

Before ACHESON, DALLAS, and GRAY, Circuit Judges.

GRAY, Circuit Judge. Rebecca T. McClain, the plaintiff in error, is the beneficiary named in two policies of insurance taken out by her husband, Isaac E. McClain, on his life, for \$5,000 each, bearing date May 1, 1899, and issued by the defendant company on an application signed by the insured, dated April 27, 1899. Decedent died of cancer of the stomach on October 11th following. Due proofs of death were made and submitted to the defendant, who refused to pay the insurance on the ground that certain answers to questions contained in the application were warranted by him to be true, when in fact they were untrue, whereupon an action of assumpsit by the beneficiary and plaintiff in error was brought in the court below against the defendant for an alleged breach of the contract contained in said policies.

The applications for the policies were made and signed by the insured, upon the printed blanks of the company, and consisted of two parts,—the first of printed questions and statements, to be answered and subscribed to by the applicant, other than those relating to his physical condition and habits of life. Part 2 is headed, "Statements to the Medical Examiner," and consists of questions relating to the health and physical condition of the applicant, and to which categorical answers of yes or no are written. In part 1 of the said application is contained the following stipulation:

"It is hereby agreed \* \* \* that all the statements contained in part I. and part II. of this application, by whomsoever they be written, are warranted to be full, true, and complete, and, with the stipulated premiums, shall be the sole consideration of the contract with the society, if any policy or policies be issued, reinstated, or renewed thereon, and that if any concealment or fraudulent or untrue statement be made, or if at any time any covenant or agreement herein made shall be violated, said assurance shall be null and void, and all payments made or accepted on account thereof shall be forfeited by the society, except to the extent as provided in the policy."

Among many printed questions in part 2 of the application is the following:

"(15) Have you now, or have you ever had, any of the following? Answer yes or no as to each. If yes in any case, give particulars under 18 below."

Then follows the list of 50 or 60 diseases or disorders, to all of which the answer appended is "No," except as to typhoid fever, which is, "Yes; about 13 years ago." Among the diseases or complaints to which the answer "No" is appended are, "Cancer or tumor?" and "Dyspepsia?" At the end of part 2 of the application is the following:

"I hereby declare that I have read and understand all the above questions and the answers thereto, and they are hereby made part of my application for assurance by the Provident Savings Life Assurance Society of New York, and I hereby warrant said answers as written to be true, and that I am the person described above and in part I. of this application signed by me."

Each of the two policies which were issued upon this application contains the following:

"This assurance is granted in consideration of the statements and agreements in the written and printed application for this policy, which is hereby made a part of this contract and of the payment in advance," etc.

There was testimony at the trial before the jury that in 1897 the deceased had paid four visits to a specialist on the diseases of the digestive organs, and was treated by him for catarrh of the stomach; that in January, 1898, he took a trip to Europe, partly for pleasure and partly for his health, he being run down by reason of continued attention to business, according to his wife's statement; that he consulted Dr. Stirk, with whom he was on terms of intimacy,—keeping his horse in his (Dr. Stirk's) stable,—three or four times in February and March, 1898, in regard to indigestion, but it does not appear to have been considered serious, either by himself or the physician; that he was a man stalwart and strong in appearance, taking much exercise, and apparently in robust health. To the twenty-first question contained in part 2 of the application, which was, "When and by

what physician were you last attended, and for what complaint?" the answer written is, "Had no medical attendance."

Upon the testimony in full, as outlined above, it was contended by the defendant that the insured had made untrue answers as to his having had dyspepsia, and also as to the question last recited, wherein he was asked by what physician he was last attended. It was further contended before the court below that, under the clauses of the contract of assurance above recited, these answers were in the nature of literal warranties, and as such binding upon the insured, irrespective of the bona fides with which they may have been made, and of their materiality to the risk. In this state of the case, the learned judge of the court below, at the conclusion of the testimony, asked the jury to find a special verdict on certain questions of fact submitted to them, with general instructions in regard to the same, reserving the decision of certain questions of law applicable to the facts as found, which might be determinative of the controversy. After stating the uncontroverted facts of the case, such as the proof of the policies and the applications accompanying the same, the death of the insured, and the filing in proper form of the proofs thereof with the defendant company, and that his death was caused by cancer of the stomach and adjacent organs, the following questions were submitted in writing to the jury for their consideration and determination. In so submitting them, the learned judge accompanied the statement of each question with an explanatory charge, in which he fully set forth the nature and requirements of the submission, directed their attention to the testimony bearing on each question, and made plain his opinion that the questions submitted were concerned entirely with matters of fact, as to which the findings of the jury were a necessary basis for the judgment of the court. The questions thus submitted are fully set forth in the special verdict of the jury returning the answers thereto, which is as follows:

"In May, 1899, the deceased took out two policies of insurance in the defendant company, each of \$5,000. These policies and the application upon which they are based are made part of the verdict. On the following October 9th the deceased died, and within the proper time proofs of death in the proper form were filed with the defendant company. His death was caused by cancer of the stomach and adjacent organs."

In addition to the above facts, the jury gave the following answers to questions asked by the court:

"(1) On April 27, 1899, when the application was made, was the present and usual health of the deceased sound and good? A. Yes. (2) If not, did he have the disease of cancer or of dyspepsia or both diseases? A. ———. (3) Had he previously had either disease or both diseases? A. Dyspepsia or indigestion at times. (4) If he had either or both at the time of applying, or had previously had either or both, was this fact material to the risk? A. No. (5) When the application was made, did the deceased have a usual medical attendant? If so, who was he? A. No. (6) Had he been attended by a physician before April 27, 1899? If so, who was the last physician, and for what complaint did he attend the deceased? Was it for a temporary ailment not material to the risk, or for a disease or disorder that was material to the risk? A. Yes; attended by Dr. Stirk for temporary indigestion, not material to the risk. (7) In making each answer contained in his application, did the deceased act in good faith towards the company, setting down fully and completely what he honestly believed to be true?"

Or did he intentionally conceal from the company any fact material to the risk, or fraudulently make any untrue statement? A. Yes; he acted in good faith, and did nothing to deceive the company.

"The principal of the two policies in suit, with interest to date, amounts to \$10,260. If upon the following special verdict the court shall be of opinion that the plaintiff is entitled to recover, we find in her favor in the said sum of \$10,260. Otherwise we find in favor of the defendant.

"Henry B. Cox, Jr., Foreman."

The record then proceeds as follows:

"And thereupon counsel for the said plaintiff did then and there, to wit, on the 14th day of April, A. D. 1900, move the said court to enter judgment on said verdict in favor of the said plaintiff and against the said defendant in the sum of ten thousand two hundred and sixty dollars. And thereupon, to wit, on the 16th day of April, A. D. 1900, counsel for the defendant moved the court to enter judgment in favor of the defendant and against the plaintiff, and also at said time filed a rule for a new trial."

Upon the hearing of these motions the court below afterwards directed judgment to be entered in favor of the defendant upon a special verdict. 105 Fed. 834. The reasons for this judgment are set forth in an opinion of the court filed in the case, and sent up to us with the record. They are briefly stated by the learned judge of that court as follows:

"In two respects, as the jury have found, the answers of the insured in his application were untrue. He had had the disease of dyspepsia before April 27th, the day when the application was made, and he had been attended by a physician before the same date, although the application denied that he had ever had dyspepsia, and contained the answer, 'Had no medical attendance,' in reply to the question, 'When and by what physician were you last attended, and for what complaint?' In my opinion, the insured warranted these answers to be true, and therefore their materiality or the good faith of the insured in making the answers is not to be considered. Accordingly the finding of the jury upon these two points—materiality and good faith—may properly be disregarded."

Was the learned judge correct in this opinion? Were the answers of the insured, as to which the jury made its findings, referred to and discussed by the court below, absolute warranties, or representations and statements merely, as to which good faith and substantial truth, in everything material to the risk, only are required? This is the single question with which we are here concerned, and the one which underlies all the assignments of error. Undoubtedly the parties to a contract of insurance may, by an absolute warranty, make the literal truth of a statement or answer by the insured, whether material to the risk or not, a condition precedent to the liability of the insurer, and they may, by agreement, make material a fact that would otherwise be immaterial. The practical operation of such literal warranties is so often harsh and unfair that courts require their existence to be evidenced clearly and unequivocally, and are not inclined to allow it to rest upon a mere verbal interpretation, where a reasonable construction of the contract as a whole will authorize a different meaning. Public policy sanctions such judicial administration of the law of the contract, and its embodiment, in some instances, in state legislation, has emphasized its importance and soundness. In pursuance of this policy, "all reasonable doubts as to whether statements inserted in or referred to in an insurance policy are warranties or representations should be resolved in favor of the insured." In

the case before us, the application, with its statements and answers, are referred to in the policy, and expressly made part of the entire contract of insurance. In considering, therefore, whether the answers to the two questions made by the insured, and which the jury found were not in accord with the facts, were or were not absolute warranties, we must examine the entire contract, as set forth in the policy and application, taken together. While the word "warranty" is not necessary to a contract of that character, it is also true that the word may be so used as that by its association, and by the intention of the parties, as gathered from the entire contract, it is deprived of its literal and technical meaning. The learned judge of the court below, as also counsel for the appellee, seem to rely upon the declaration with which part 2 of the application closes, which we here again quote:

"I hereby declare that I have read and understand all the above questions and the answers thereto, and they are hereby made a part of my application for assurance by the Provident Savings Life Assurance Society of New York, and I hereby warrant said answers, as written, to be true, and that I am the person described above and in part I. of this application signed by me."

If this were all, we would be compelled to consider the contract as one of warranty, as to the answers referred to, even without respect to their materiality to the risk; but we cannot, in construing the contract as an entirety, ignore the language in part I of the same application, already recited, that "all the statements contained in part I. and part II. of this application, by whomsoever they be written, are warranted to be full, true, and complete, \* \* \* and that if any concealment or fraudulent or untrue statement be made, or if at any time any covenant or agreement herein made shall be violated, said assurance shall be null and void." This declaration expressly covers the one quoted at the conclusion of part 2. By it all the statements contained in part 2 are "warranted to be full, true, and complete." The language almost immediately following must be taken to define the meaning, scope, and extent of these words. Taken thus, the natural and substantial meaning which is "warranted" is that the statements in part 2, as well as in part I, were made in good faith, without any concealment or fraudulent intent on the part of the one who made them. It is in this sense that they are "warranted," and it is with reference to a violation of this sense and meaning alone that it is declared that the assurance shall be null and void. We find ourselves unable to say that a reasonable construction of the contract in this respect requires the dissociation of the last clause of part 2 of the application from the qualifying and explanatory statement in part I, to which we have just referred. The words, "I hereby warrant said answers as written to be true," of the last clause, import a stricter and more absolute obligation than is imposed by the broad and controlling declaration in part I, that all the statements contained in part I and part 2 of the application "are warranted to be full, true, and complete," in the sense that no voluntary concealment or fraudulent or untrue statement has been made. No sufficient reason is suggested why we should make the latter clause of part 2 the controlling



statement of the whole contract. If one clause is thus to control to the exclusion of the other, the broader and more general language of the declaration in part I might well be preferred to this last clause of part 2 of the application. If the two clauses are read independently, they are inconsistent. The court below dealt with the inconsistency by giving to the last clause of part 2 controlling force. This it did by treating as surplusage, and thus ignoring, the qualifying words of the clause in part I to which we have referred. It is on this vital point that we are compelled to differ from the court below. The language of the general declaration in part I forbids the treating of the two clauses independently, as it expressly applies its stipulations to "all the statements contained in part I. and part II. of this application, by whomsoever they be written." In reading these two clauses of part I and part 2, respectively, together, it seems to us that we are conforming to the sense in which the parties to the agreement have written them. In any event, it seems to us impossible to maintain that the construction of the contract contended for by the defendant is the only reasonable one. If it is not so, then the existence of a literal warranty, as held by the court below, is at least doubtful. It is well settled that, in case of doubt as to whether statements made by the applicant for insurance are to be regarded as warranties, the benefit of the doubt will be given to the insured, and they will be held as representations merely, as to all things not material to the risk. In the case of *Moulor v. Insurance Co.*, 111 U. S. 335, 4 Sup. Ct. 466, 28 L. Ed. 447, the application contained a general warranty that the answers to the questions contained therein were fair and true, and it was provided that the application should form part of the contract of insurance. The policy recited that the agreement of the company to pay the sum specified is "in consideration of the representations made to them in the application," as well as of the payment of the premium at the time specified. The policy also contained the following:

"It is hereby declared and agreed that if the representations and answers made to this company, on the application for this policy, upon the full faith of which it is issued, shall be found to be untrue in any respect, or that there has been any concealment of facts, then and in every such case the policy shall be null and void."

After stating, in an opinion by Mr. Justice Harlan, that the law does not forbid parties to a contract for life insurance to stipulate that its validity shall depend upon the literal truth of the statements made by the insured, even in matters not material to the risk, the supreme court proceeds to say:

"But, unless clearly demanded by the established rules governing the construction of written agreements, such an interpretation ought to be avoided. In the absence of explicit, unequivocal stipulations, requiring such an interpretation, it should not be inferred" that an express literal warranty was made by the insured to the truth of statements made by him in good faith as to what diseases he may have had in his past life.

In *First Nat. Bank of Kansas v. Hartford Fire Ins. Co.*, 95 U. S. 673, 678, 24 L. Ed. 563, 565, the court said:

"When a policy of insurance contains contradictory provisions, or has been so framed as to leave room for construction, rendering it doubtful

whether the parties intended the exact truth of the applicant's statements to be a condition precedent to any binding contract, the court should lean against that construction which imposes upon the assured the obligations of a warranty."

In *Insurance Co. v. Raddin*, 120 U. S. 183, 7 Sup. Ct. 500, 30 L. Ed. 644, Mr. Justice Gray, in delivering the opinion of the supreme court, says:

"Answers to questions propounded by the insurers in an application for insurance, unless they are clearly shown by the form of the contract to have been intended by both parties to be warranties to be strictly and literally complied with, are to be construed as representations, as to which substantial truth in everything material to the risk is all that is required of the applicant."

This rule of interpretation is clearly stated by the circuit court of appeals for the Second circuit in *Brady v. Association*, 9 C. C. A. 252, 60 Fed. 727.

So far, we have been considering only the two provisions in parts 1 and 2, respectively, of the application, because on these, taken by themselves, the court below has found, and counsel for appellee contend here, that an express and literal warranty of the truth of the two answers found by the jury to have been untrue was made by the insured. The learned judge of the court below thinks that the concluding sentence of the application, above quoted and referred to, should be taken as the "final word of the parties on the subject,—the final, explicit declaration of the insured." In this, however, we think he was mistaken. The application preceded the policy, which was executed and issued some three days thereafter. The policy must be taken, if any part of the contract can be so taken, to contain the final, explicit declaration of the parties to the contract. In it we find this stipulation (already recited):

"This assurance is granted in consideration of the statements and agreements in the written and printed application for this policy, which is hereby made a part of this contract."

It is certainly a reasonable construction that the words "statements and agreements" relate to that portion of the application where they are used in regard to the same subject-matter. And it is in the general declaration of part 1, which we have just been considering, that we find what seems to us the obvious and natural subject-matter of the reference, as intended by the language of the policy just quoted. In no other part of the application are found the words "statements and agreements" in such association as would support this reference in the policy. This clause in part 1 of the application, to quote it again, provides "that all the statements contained in part I. and part II. of this application \* \* \* are warranted to be full, true, and complete, \* \* \* and that if any concealment or fraudulent or untrue statement be made, or if at any time any covenant or agreement herein made shall be violated, said assurance shall be null and void." The policy was issued after the application, and states that it was granted in consideration of "the statements and agreements" in the written and printed application. It is difficult to arrive at any other conclusion than that the policy has reference, not to the warranty, but to the fraudulent and untrue statement, or to the violation

of the covenant or agreement, mentioned in this last-quoted clause of the application. The case of *Moulor v. Insurance Co.*, referred to above in another connection, is here, we think, exactly in point. In the course of its opinion the court said:

"We have seen that the application contains a stipulation that it shall form a part of the contract of insurance; also that the policy purports to have been issued upon the faith of the representations and answers in that application. Both instruments, therefore, may be examined to ascertain whether the contract furnishes a uniform, fixed rule of interpretation, and what was the intention of the parties. Taken together, it cannot be said that they have been so framed as to leave no room for construction. The mind does not rest firmly in the conviction that the parties stipulated for the literal truth of every statement made by the insured. There is, to say the least, ground for serious doubt as to whether the company intended to require, and the insured intended to promise, an exact, literal fulfillment of all the declarations embodied in the application. It is true that the word 'warranted' is in the application; and although a contract might be so framed as to impose upon the insured the obligations of a strict warranty, without introducing into it that particular word, yet it is a fact, not without some significance, that that word was not carried forward into the policy, the terms of which control when there is a conflict between its provisions and those of the application. The policy upon its face characterizes the statements of the insured as representations. Thus we have one part of the contract apparently stipulating for a warranty, while another part describes the statements of the assured as representations. The doubt as to the intention of the parties must, according to the settled doctrines of the law of insurance, recognized in all the adjudged cases, be resolved against the party whose language it becomes necessary to interpret. The construction must therefore prevail which protects the insured against the obligations arising from a strict warranty."

In its opinion the court below referred to this case, denying its applicability to, and distinguishing it from, the present case. The learned judge says:

"The policy there expressly declared the answers to be 'representations,' while the application itself only warranted 'that the above are fair and true answers'; adding, 'It is acknowledged and agreed that if there be, in any of the answers herein made, any untrue or evasive statements, or any misrepresentation or concealment of fact,' the policy should be null and void. This was evidently a warranty of fairness and good faith only, and such a warranty is equivalent to a mere representation. In the case in hand, however, the policy refers to the 'statements and agreements,' not to the 'representations,' in the application, and neither 'statement' nor 'agreement' is opposed to 'warranty,' or qualifies it in the least."

We do not think, however, that the case can be thus distinguished. "Representations" and "statements" may here be taken as synonymous. It is true that in the case cited the application warranted "that the above are fair and true answers," but it only differs in this respect from the case at bar in that the warranty is less broad and stringent than the one we are now considering. The qualifying clause with regard to misrepresentations and fraudulent concealment which appears at the conclusion of the warranty in the application in the case cited is almost identical with the wording of the warranty in the case at bar. It is to be observed, also, that the opinion of the court in *Moulor v. Insurance Co.* shows that it was based upon the assumption that the application contained an absolute warranty, and upon the inconsistency between the application in that respect and the policy issued thereon. It would be hard to conceive of a case

more similar, in its ratio decidendi, to the one at bar, than the one we have been considering. We are compelled to the conclusion that the clauses in the application and policy relied upon by defendant for that purpose do not establish an absolute warranty of the truth of the answers made by the insured, and which were found by the jury not to have been in accord with the fact. They were statements or representations only; and according to the verdict of the jury, which must be accepted by us as a final determination of the fact in that regard, they were statements made in good faith, and without intentional concealment or suppression of the truth or fraudulent intent, and were not material to the risk. Though untrue in point of fact, these statements were not untrue in the sense in which alone, under the stipulations of the contract, they could work a forfeiture of the policy.

As before noted, questions of fact were clearly and distinctly submitted to the jury by the court below, and we are bound (at least, in the aspect of the case just considered) to accept the findings of the jury upon these questions of fact. Among these findings, the two relied upon by the defendant as evidence of the violations of the warranty contained in the contract of insurance, as alleged, are Nos. 3 and 6, as follows:

"(3) Had he previously had either disease or both diseases [cancer or dyspepsia]? A. Dyspepsia or indigestion at times." "(6) Had he been attended by a physician before April 27, 1899? If so, who was the last physician, and for what complaint did he attend the deceased? Was it for a temporary ailment not material to the risk, or for a disease or disorder that was material to the risk? A. Yes; attended by Dr. Stirk for temporary indigestion, not material to the risk."

There is nothing in these findings, of themselves, to induce the belief that the answers given by the insured, and referred to in these findings, were untrue, within the meaning of the qualifying words of the stipulation in part 1 of the application; that is, that they were intentionally or consciously untrue when made by the insured. But the jury also found, upon a question directed to that point, submitted to them by the court, that the insured, in making these answers, acted in good faith, and did nothing to deceive the company. The finding of the jury in this respect, as also that the temporary indigestion as found by them was not material to the risk, dispenses with any further discussion on our part of this point. We are of opinion, however, apart from the findings of the jury to this effect, that, having had "dyspepsia or indigestion at times" does not convict the insured of untruth, in the sense of his contract of insurance, when he answered "No" to the interrogations as to diseases in part 2 of his application. Temporary indigestion or dyspepsia at times is too common an ailment, and not serious enough, to suggest itself as a disease, to one answering such a question. The catalogue of diseases, to each of which an interrogation point was appended in the application, was a long one, and embraced diseases of a serious character; so that, under the circumstances, the insured may well have ignored or forgotten the temporary indigestion from which he had at times suffered, when called upon to say whether he had ever had, among other dis-

eases, the disease of dyspepsia. It is not without significance that, after the catalogue of diseases had been gone through with, there is a general interrogatory in the application, as follows:

"(19) Have you ever had any sickness, injury, or infirmity whatever, not already named? If so, state the number of attacks, and the date, location, and duration of each? A. No; except temporary ailments."

It would then appear that the insured distinguished temporary ailments from what might properly be called "diseases." The one trifling and of little consequence to general health; the other serious and menacing to life or health. So also as to his answer to question 21 of the application:

"When and by what physician were you last attended, and for what complaint? A. Had no medical attendance."

The jury found, it is true, that he had been attended by Dr. Stirk for temporary indigestion, not material to the risk. The evidence discloses the fact that Dr. Stirk was an intimate friend, with whom the insured was in the habit of having daily intercourse; that he kept a horse at Dr. Stirk's stable; that they rode and talked together daily. As Dr. Stirk never attended him at his house, his consultations, such as they were, as testified to by Dr. Stirk himself, may well have been considered by the insured as informal and casual, and not within the category of medical attendance, as inquired about in the application. But, as we have already said, the jury having passed, as they did, upon the question of materiality and good faith, we are only concerned with the question, what was the contract in regard to these answers, heretofore discussed; and, being of opinion that a reasonable construction of the same required us to find that the answers, as written by the insured in the application, were "representations," and not "warranties," there was no forfeiture of the policies by reason of the two answers of the insured to the questions we have been considering.

So far, we have not adverted to the question of the applicability of the statute of Pennsylvania to the so-called "clauses of warranty" in the contract of insurance, having confined ourselves to the case as discussed by the court below. The act of June 23, 1885, provides that:

"Whenever the application for a policy of life insurance contains a clause of warranty of the truth of the answers therein contained, no misrepresentation or untrue statement in such application made in good faith by the applicant shall effect a forfeiture or be a ground of defence in any suit brought upon a policy of insurance issued upon the faith of such application unless such misrepresentation or untrue statement relate to some matter material to the risk." P. L. 1885, p. 134.

If this act is applicable to this case, it is clear that its requirements are binding upon us, and will compel a conclusion favorable to the plaintiff upon the facts here disclosed, independently of the reasons hereinbefore stated. The matters of fact upon which the operation of the statute is made to depend, to wit, the good faith of the applicant in his answers, and their materiality to the risk, are the same as those which we have just considered, as determined by the special verdict of the jury. The operation of this statute, and its relation to the questions raised in this case, were not adverted to by the court

below. It does not appear that the matter was discussed, or whether the court considered that the stipulation in the application that "each and every policy issued upon this application shall at all times and places be construed to be a contract made and delivered in the state of New York," was effective to eliminate the consideration of this statute from the case. The testimony shows that the defendant was a New York corporation, doing business within the state of Pennsylvania, having an authorized agent and office in Philadelphia; that the insured resided in Philadelphia when the contract was made; and that the policies were there delivered to him. Under the law of the state of Pennsylvania, the defendant corporation, being foreign, had no right to do any business within that state without first complying with its acts of assembly, which require the corporation not only to designate a person who shall be authorized to receive the service of process for it, but which also require it to file an agreement that process may be served anywhere within the state upon that agent. In extending the judicial power of the United States to controversies between citizens of different states, the only purpose indicated by the constitution was to provide another forum than that of the state, not another law than that of the state. In this case the court below was exercising a jurisdiction concurrent with that of the courts of the state of Pennsylvania. It was administering the law of that state, and was as much bound by its statute and common law, and its declared public policies, as would be the state courts in a like case. The cases, therefore, of *Hermany v. Association*, 151 Pa. 17, 24 Atl. 1064, and *Keatley v. Insurance Co.*, 187 Pa. 197, 40 Atl. 808, appeal to us strongly, both in reason and authority. By them the statute of Pennsylvania above referred to was declared to be constitutional and in accord with a sound public policy. And it was decided that waiver of the operation of the statute by stipulation of the parties would contravene that public policy of the state, and could not be recognized. Since the argument of the present case the supreme court of the United States has decided the case of *Insurance Co. v. Warren*, 21 Sup. Ct. 535, 45 L. Ed. 755. This decision and the opinion delivered (April 8, 1901) by Mr. Chief Justice Fuller, though relating to the question whether a state statute was in violation of the constitution of the United States, are interesting and important in the consideration of the question of the bearing of the Pennsylvania statute on the case at bar. The case referred to came up from the supreme court of Ohio. It was a suit upon a policy of life insurance, and was resisted by the insurance company on the ground, among others, that certain answers made by the insured in his application were false, and that he had warranted them to be complete and true, with the further stipulation that if any of the statements were untrue the policy should be void. An Ohio statute (section 3625, Rev. St.) provides that:

"No answer to any interrogatory made by an applicant, in his or her application for a policy, shall bar the right to recover upon any policy issued upon such application, or be used in evidence upon any trial to recover upon such policy, unless it be clearly proved that such answer is wilfully false and was fraudulently made, that it is material, and induced the company to issue the policy, and that but for such answer the policy would not have been issued."

The supreme court of Ohio affirmed the judgment of the court below (51 N. E. 546) entered upon a verdict for the plaintiff rendered under the instruction of the trial judge that:

"This law, being in force at the time this policy of insurance was taken out, is applicable to the policy of insurance involved in this case, and is applicable to the questions and answers in the application that by the terms of the policy are made express warranties, as well as those that are not."

In delivering the opinion of the supreme court of the United States, Mr. Chief Justice Fuller quoted with apparent approval from an opinion of the supreme court of Ohio the following propositions cited by the latter court from Spelling on Extraordinary Relief:

"Where by statute the legal exercise of a right which at common law was private is made to depend upon compliance with conditions interposed for the security and protection of the public, the necessary inference is that it is no longer private, but has become a matter of public concern; that is, a franchise, the assumption and exercise of which without complying with the conditions prescribed would be a usurpation of a public or sovereign function. \* \* \* There is no class of business, the transaction of which, as a matter of private right, was better recognized at common law than that of making contracts of insurance upon the lives of individuals. But now, by statute, in almost if not quite all the states, stringent requirements as to security of the persons dealing with insurers, and the making and filing reports of public officers for public information, are provided, and must be strictly observed and complied with before any person, association, or corporation may make any contract of life insurance. The effect of such statute is to make that a franchise which previously had been a matter purely of private right."

The chief justice then says:

"In the present case the supreme court of Ohio sustained the constitutionality of section 3625 of the Revised Statutes, which was in force at the time this policy was issued, upon the ground that the state had a right 'to prescribe the terms and conditions upon which it grants such franchise, and the insurance company, having accepted the franchise with its terms and conditions, is bound thereby, and must accept the burdens with the benefits.' The legal effect was held to be the same 'as if the section was copied into and made a part of the policy.' \* \* \* The section in question applies to all life insurance companies doing business in the state of Ohio, and the state can certainly do with foreign corporations what it may do with corporations of its own creation."

After citations from the cases of *Insurance Co. v. Daggs*, 172 U. S. 557, 19 Sup. Ct. 281, 43 L. Ed. 552, and *Waters-Pierce Oil Co. v. Texas*, 177 U. S. 28, 20 Sup. Ct. 518, 44 L. Ed. 657, the chief justice says, at the close of his opinion:

"It was for the legislature of Ohio to define the public policy of that state in respect of life insurance, and to impose such conditions on the transaction of business by life insurance companies within the state as was deemed best."

In the case of *Insurance Co. v. Daggs*, supra, the supreme court decided that the statute of Missouri which provided that in all suits upon policies of (fire) insurance the defendant should not be permitted to deny that the property insured was worth at the date of the policy the full amount insured therein, and that no condition in any policy of insurance contrary to the provisions of this article shall be legal or valid, was not, when applied to a foreign insurance company, in conflict with the provisions of the fourteenth amendment to the constitution of the United States, forbidding a state to make or en-

force a law which shall abridge the privileges or immunities of citizens of the United States, or to deprive any person of life, liberty, or property without due process of law, or to deny to any person within the jurisdiction the equal protection of the laws. After sanctioning the proposition that a state may prescribe the liabilities under which corporations created by its laws shall conduct their business in the future, the supreme court proceeds to say:

"That which a state may do with corporations of its own creation, it may do with foreign corporations admitted into the state."

In the case of *Keatley v. Insurance Co.*, *supra*, the supreme court of Pennsylvania have passed upon the right of the parties, in case of a policy issued by a Connecticut insurance company in Pennsylvania, and to a resident of Pennsylvania, to stipulate that "the policy shall be held as of Connecticut issue, and construed solely by Connecticut laws." They held that, notwithstanding this stipulation, the contract must be construed according to the laws of Pennsylvania, and as within the provisions of the act of 1885.

The late case of *Insurance Co. v. Cravens*, 178 U. S. 389, 20 Sup. Ct. 962, 44 L. Ed. 1116, is a direct authority upon this point, and, of course, binding on this court. It decides that the contract for life insurance in that case, made by a New York insurance company in the state of Missouri with a citizen of that state, is subject to the laws of that state regulating life insurance policies, although the policy declares "that the entire contract contained in the said policy and in this application, taken together, shall be construed and interpreted as a whole, and in each of its parts and obligations, according to the laws of the state of New York; the place of the contract being expressly agreed to be the principal office of the said company in the city of New York." This, then, was clearly a Pennsylvania contract, and subject to the regulations of the Pennsylvania laws. We think the statute in question was a competent exercise of the police power of the state, and as such binding upon a circuit court of the United States sitting in Pennsylvania, in a case coming within its purview; that it was within the competence of the state to impose the requirements of that statute upon a foreign insurance company, as a condition to its exercise of the privilege accorded to it of doing business within the state, and that the right so accorded is in the nature of a public right or franchise, and a matter of public concern, the conditions prescribed for the enjoyment of which cannot be waived by contract or stipulation of the parties to a policy. This law, then, as applied to the facts found by the jury, in regard to good faith of the insured in his answers, and the materiality of his statements to the risk, would of itself determine the case in favor of the plaintiff.

A further contention, however, is made,—that the verdict was not in accordance with the weight of the evidence; and the court below has suggested that, in case it should be considered here that its construction of the contract was wrong, the plaintiff should not be allowed to have judgment upon the special verdict, but that the case should be sent back for a new trial, the learned judge adding, "As it seems to me, the weight of evidence is against the verdict, and ought to have led to a different result." But in that case we think



the court below should have granted a new trial, and that it is not for the reviewing court to impeach the findings of the jury upon questions clearly and distinctly submitted to it by the trial judge, and upon which verdict judgment has been entered by the court below. Waiving this, however, this court has carefully examined the testimony disclosed by the record; and, so far from thinking that the jury was too favorable in their findings to the plaintiff, we are of opinion that as to one, possibly both, of the questions which the jury found had been untruly answered by the plaintiff, a contrary finding might have been made. We have already briefly discussed the want of precision in the question of the application as to "dyspepsia," and the distinction between "indigestion at times" and the dyspepsia which could properly be called a disease; and we will only in this connection call attention to the way in which a similar question and answer, in an insurance case, was treated by the supreme court, in Connecticut Mut. Life Ins. Co. v. Union Trust Co., 112 U. S. 250, 257, 5 Sup. Ct. 119, 28 L. Ed. 708. Suit had been brought upon a policy of life insurance. The application contained this stipulation:

"It is hereby declared and warranted that the above are fair and true answers to the foregoing questions; \* \* \* and it is agreed \* \* \* that, if there be in any of the answers herein made any untrue or evasive statements, \* \* \* then any policy granted upon this application shall be null and void."

To the question in the application whether the applicant had ever had the disease of "affection of the liver," the answer was, "No." The syllabus of the case in this respect was as follows:

"*Held*, that the answer was a fair and true one, within the meaning of the contract, if the insured had never had an affection of that organ which amounted to disease,—that is, of a character so well defined and marked as to materially disturb or derange for a time its vital functions; that the question did not require him to state every instance of slight or accidental disorders or ailments, affecting the liver, which left no trace of injury to health, and were unattended by substantial injury or inconvenience or prolonged suffering."

The same liberality of view in this regard was exhibited by the supreme court in Insurance Co. v. Wilkinson, 13 Wall. 222, 230, 20 L. Ed. 617, and in Insurance Co. v. Trefz, 104 U. S. 197, 203, 204, 26 L. Ed. 708.

Upon the whole case, therefore, we are of opinion that the judgment of the court below should be reversed, and the case remanded, with directions to enter a judgment upon the verdict in favor of the plaintiff for the amount found due upon the two policies in suit, with interest from the date of such verdict.

## KING v. SMITH et al.

(Circuit Court of Appeals, Ninth Circuit. August 19, 1901.)

No. 700.

## 1. WRIT OF ERROR—REVIEW OF EVIDENCE.

The question whether there was any evidence before the circuit court in an action at law having a legal tendency to prove the facts found by it may be considered on writ of error, this being a question of law.

## 2. GIFT—DELIVERY.

It is immaterial that delivery to a donee is while the donor is unconscious; he having, while capable of transacting business, and for the purpose of consummating the gift, directed the delivery to be made.

In Error to the Circuit Court of the United States for the Northern District of California.

Wm. M. Cannon and Whitworth & Shurtleff, for plaintiff in error.  
Galpin & Bolton and L. S. B. Sawyer, for defendants in error.

Before GILBERT, Circuit Judge, and HAWLEY and DE HAVEN, District Judges.

DE HAVEN, District Judge. This was an action at law, in the form of replevin, to recover 190 bonds of the California & Nevada Railroad, of the alleged value of \$50,000. A jury trial was expressly waived by the parties, and the cause was tried by the circuit court without a jury, and upon such trial the court found:

"(2) The plaintiff on the 26th day of September, 1900, was, ever since has been, and still is the owner and entitled to possession of the property described in the complaint; and said property was at all of said dates and times of the value of forty-seven thousand five hundred dollars (\$47,500). The defendants at all said dates and times unlawfully withheld and now retain the possession of said property described in plaintiff's complaint from the possession of the plaintiff."

As a conclusion of law from this and other findings not necessary to refer to, the court found that the plaintiff was entitled to recover from defendants the possession of the bonds described in the complaint, and judgment was thereupon entered in his favor and against the defendants in accordance with such conclusion of law. The case is brought here on writ of error by the defendant C. K. King, as administrator of the estate of J. W. Smith, deceased. There are 15 formal assignments of error, all directed against the findings of fact, and the judgment based upon such findings. With the exception of the first, relating to the citizenship of the parties, and which is not insisted upon by the plaintiff in error, the assignments of error really present but two questions, stated in different form; one challenging the legal sufficiency of the evidence to justify the finding above set out, and the other the sufficiency of the findings to sustain the judgment. There is in the record a bill of exceptions containing the evidence given upon the trial, and which also shows that an exception to the above finding was taken by the plaintiff in error, upon the ground of the insufficiency of the evidence to support it. One of the assignments of error, and the only one which need be noticed, is as follows:

"That the court erred in finding that the evidence was sufficient to show that plaintiff was at any of the times mentioned in the complaint the owner

or entitled to the possession of the property described in the complaint, or any part thereof."

1. It is urged by the defendant in error that this assignment of error presents a question of fact, which this court has no power to review, and, as we understand the argument, that the evidence contained in the bill of exceptions cannot be examined for the purpose of determining whether the finding excepted to is sustained by any legal evidence. We do not understand that the rule is as broad as this contention. The finding that the plaintiff in the action is the owner and entitled to the possession of the property described in the complaint is clearly a general finding of the ultimate facts of ownership and right of possession, and is conclusive here, unless there was an entire want of evidence upon which to base it. The seventh amendment to the constitution declares that:

"In suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise re-examined in any court of the United States, than according to the rules of the common law."

Section 649, Rev. St., provides:

"Issues of fact in civil cases in any circuit court may be tried and determined by the court, without the intervention of a jury, whenever the parties or their attorneys of record, file with the clerk a stipulation in writing waiving a jury. The finding of the court upon the facts, which may be either general or special, shall have the same effect as the verdict of a jury."

The findings of the court, when a jury has been waived, having, under the statute, the same effect as the verdict of a jury, it follows that such findings cannot be otherwise re-examined "than according to the rules of the common law"; that is to say, "either by the granting of a new trial by the court where the issue was tried, or to which the record was returnable, or by the award of a venire facias de novo by an appellate court, for some error of law which intervened in the proceedings." *Parsons v. Bedford*, 3 Pet. 433, 7 L. Ed. 732; *Miller v. Insurance Co.*, 12 Wall. 285, 20 L. Ed. 398. *Hathaway v. Bank*, 134 U. S. 494, 10 Sup. Ct. 608, 33 L. Ed. 1004, was an action at law tried by a United States circuit court without a jury, and brought to the supreme court on writ of error. Some of the assignments of error assailed certain findings of the court as not sustained by the evidence, and in passing upon the question so presented the supreme court said:

"The first three assignments of error allege errors merely in the findings of fact by the court. These errors are not subject to revision by this court if there was any evidence upon which such findings could be made."

In *Stanley v. Board*, 121 U. S. 535, 7 Sup. Ct. 1234, 30 L. Ed. 1000, —a case in which the same question was involved,—the rule, without its qualification, was thus stated by the supreme court:

"Where a case is tried by the court without a jury its findings upon questions of fact are conclusive here, it matters not how convincing the argument that upon the evidence the findings should have been different."

See, also, *Ryan v. Carter*, 93 U. S. 78, 23 L. Ed. 807; *Hepburn v. Dubois*, 12 Pet. 345, 9 L. Ed. 1111; *Zeller's Lessee v. Eckert*, 4 How. 289, 11 L. Ed. 979.

The law as declared in the foregoing cases is the rule by which this court must be governed in the matter now before it. The judgment of a circuit court of the United States in an action at law can only be reviewed in the circuit court of appeals by writ of error. Section 6 of the act of March 3, 1891, establishing circuit courts of appeals (26 Stat. 826). This writ brings up for review only errors of law apparent on the face of the record; and for this reason, and also because of the seventh amendment to the constitution, and section 649 of the Revised Statutes, the circuit court of appeals, in the decision of a case on writ of error, is necessarily confined to the consideration of questions of law arising upon the record. *Hill v. Woodberry*, 1 C. C. A. 206, 49 Fed. 138; *Graham v. Earl*, 34 C. C. A. 267, 92 Fed. 155; *Syracuse Tp. v. Rollins*, 44 C. C. A. 277, 104 Fed. 958. This rule, however, when properly understood, does not deny to that court the right to inquire whether there is any evidence to support a finding; for when a fact is found upon no evidence whatever, and the record shows that the finding was excepted to upon that ground, an error of law is presented. *The Francis Wright*, 105 U. S. 381, 26 L. Ed. 1100; *The City of New York*, 147 U. S. 72, 13 Sup. Ct. 211, 37 L. Ed. 84; *Laing v. Rigney*, 160 U. S. 531, 16 Sup. Ct. 366, 40 L. Ed. 525; *Mason v. Lord*, 40 N. Y. 476. In the case last cited it was said by Grover, J.:

"An appeal to this court can only be taken upon the law. The question, then, is whether finding a fact without any evidence to sustain it is an error of law. The statement of the question would seem to suggest the answer: A finding of facts must always be based upon evidence, and, where none is given tending to show an affirmative fact, it is contrary to law to find such fact against a party traversing it."

The *Francis Wright*, 105 U. S. 387, 26 L. Ed. 1101, was a cause in admiralty, and it was held in that case that the act of February 16, 1875 (18 Stat. 315), limited the appellate jurisdiction of the supreme court in admiralty causes to a review of "questions of law arising on the record." The court, however, added:

"It is undoubtedly true that if the circuit court neglects or refuses, on request, to make a finding one way or the other on a question of fact material to the determination of the cause, when evidence has been adduced on the subject, an exception to such refusal, taken in time, and properly presented by a bill of exceptions, may be considered here on appeal. So, too, if the court, against remonstrance, finds a material fact which is not supported by any evidence whatever, and exception is taken, a bill of exceptions may be used to bring up for review the ruling in that particular. In the one case the refusal to find would be equivalent to a ruling that the fact was immaterial; and in the other, that there was some evidence to prove what is found, when in truth there was none. Both these are questions of law, and proper subjects for review in an appellate court."

The supreme court, in *Hepburn v. Dubois*, 12 Pet. 345, 9 L. Ed. 1111, in discussing the effect of a verdict, and to what extent the evidence upon which it was based may be considered upon a writ of error, said:

"That, where the evidence in a cause conduces to prove a fact in issue before a jury, it is competent in law to establish such fact. A jury may infer any fact from such evidence which the law authorizes a court to infer on a demurrer to the evidence. After a verdict in favor of either party on

the evidence, he has a right to demand of a court of error that they look to the evidence only, for only one purpose, and with the single eye to ascertain whether it was competent in law to authorize the jury to find the facts which make out the right of the party on a part or the whole of his case."

And in *Laing v. Rigney*, 160 U. S. 531, 16 Sup. Ct. 366, 40 L. Ed. 525, the judgment of the supreme court of New York was reversed on error because a material fact upon which the judgment was based was without any evidence to sustain it. We think, therefore, that, upon the exceptions to the findings and the assignment of error above set out, we can look into the bill of exceptions for the purpose of ascertaining whether there was any evidence before the circuit court having a legal tendency to prove the facts found by that court. The matter in issue related to the ownership of the bonds described in the complaint. The defendant in error claims title by gift from his deceased father, J. W. Smith. The plaintiff in error contends that no such gift was ever made, and claims the bonds as the administrator of the estate of the said J. W. Smith. The evidence contained in the bill of exceptions shows that at the time the gift is alleged to have been made on August 15, 1895, the bonds were held by Abner Doble in escrow, under an agreement by which they were to be delivered to one F. M. Smith upon payment of a stipulated sum of money. The rights of F. M. Smith under this agreement expired October 25, 1895. Of course, during the time they were in escrow there could be no manual delivery of the bonds to the defendant in error, and the evidence shows they were not in fact delivered to him by Doble until November 14, 1895. J. W. Smith, the alleged donor, died on November 15, 1895, and for a day or two previous to his death was unconscious. In support of his title the defendant in error offered in evidence a bill of sale to himself of the bonds in question, dated August 15, 1895, with proof tending to show that the same was signed and delivered to him by J. W. Smith. This instrument recited that the bonds were sold to the defendant in error "subject to the option given to F. M. Smith, which I also assign to C. H. Smith." Upon the question of the delivery of the bonds, Doble testified, in substance, that it was his impression that J. W. Smith, a short time before his death, told him that they belonged to the defendant in error, and to deliver the same to him, and the witness added, "I think that conversation was the groundwork of my delivering the bonds to his son." In addition to this, other witnesses testified to declarations made by J. W. Smith during his last sickness, and after August 15, 1895, to the effect that he had given the bonds to the defendant in error. It cannot be said that this evidence has no legal tendency to prove a gift of the bonds to the defendant in error. The fact that they were actually delivered to him while the donor was in a state of unconsciousness does not affect the question, if in fact the direction to deliver them to the defendant in error was given by the donor while he was capable of transacting business, and for the purpose of consummating the gift. Our conclusion upon this point is that there was evidence tending to show that defendant in error is the owner of the bonds in controversy, and that he acquired title thereto by gift from his father.

2. The findings are sufficient in law to support the judgment. This is so clear that no discussion of the question is necessary. The judgment of the circuit court is affirmed. The mandate to issue forthwith.

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DYER v. ROBINSON et al.

(Circuit Court, S. D. Ohio, W. D. April 13, 1899.)

1. LESSORS—DEFECTIVE BUILDING—LIABILITY TO LICENSEES OF LESSEES.

Lessors of a building, not having known of a defect therein whereby the ceiling fell, are not liable to persons present therein by license of the lessees and injured thereby.

2. LESSEES—DEFECTIVE BUILDING—LIABILITY TO LESSEES.

Lessees of a theater are not liable to persons therein by their license injured by the falling of the roof from the giving way of a truss rotted at the end by water from the roof leaking about a spout passing down the wall; the only thing giving notice thereof being the leaky condition of the roof, and the stains and appearance of dampness on the outside wall, and this condition having commenced long before the lease.

Thos. L. Michie, for plaintiff.

John R. Sayler, Louis Kramer, Charles Evans, and John W. Warrington, for lessors.

Jones & James, for lessees.

THOMPSON, District Judge (orally). I have had occasion since the last trial of this cause to make a careful examination of the questions involved, and, in view of the conclusions I have reached, it is not necessary to take up time in further argument. I may as well dispose of these motions now.

The ceiling and dome of the opera house fell, injuring the plaintiff, and he charges that his injuries were caused by the negligence of the defendants, the lessors and the lessees, in permitting this building to become unsafe and remain in that condition until the disaster resulted. In determining the question of negligence, it is necessary, first, to ascertain what duty the defendants owed to the plaintiff, the failure to perform which constituted the negligence.

As to the lessors: What duty were they under to the plaintiff to keep and maintain this building in a condition of safety? If they were under no duty, if they owed him no duty in that respect, they are not liable for the consequences of the breaking down of the ceiling and the falling of the dome of this building. Ordinarily, when the owner of buildings, whether devoted to public or to private uses, lets them to another, and surrenders possession and control, he is not responsible to the tenant, or to those who may come upon the premises through the invitation of the tenant, for any unsafe condition thereof, whether it existed prior to and at the time of the letting or arose afterwards. If Brady & Stair desired to obtain a lease of this opera house building, it was there for their inspection and examination; and if they were satisfied with it, and took a lease, and the control and possession of it was delivered to them, the lessors, the Robinsons, are under no liability to them for the unsafe condition

of the building, because the rule of caveat emptor applies in such case. They take it as they find it; and if there be defects, if it be in an unsafe condition, and they, or those in privity with them, suffer injury in consequence thereof, they have no claim upon the lessors, because it is their duty to ascertain its condition, and they take it in the condition in which they find it. It is there for their inspection. They have the opportunity to judge for themselves whether it is in a condition to be useful to them, and if it turns out that there is anything wrong with it, if they have made a bad bargain, they must abide it, unless they have been misled, defrauded, or deceived. That presents another question. The lessors' liability for any unsafe condition of the property at the time of the transfer ends when they turn the property over, unless there be some latent hidden defect of which the lessors know and the lessees do not know, nor by reasonable inspection and examination at the time could know,—something so hidden as not to be open to their observation; not to be open to any examination which they would be required to make, or which any one would be required to make under the circumstances. If the lessors, knowing the defect, conceal it,—if they practice a deceit upon the lessees,—they are responsible; but some of the authorities hold that in cases of fraud and deceit the fraud and deceit must be active; that there must be a purpose and intention to deceive, to mislead, to misrepresent. I prefer, however, to take the broad ground, which I think the authorities sustain, that in such case a duty is cast upon the lessors to disclose the defect, and if they fail to do so they are liable for injurious consequences. Suppose the Robinsons at the time of the letting knew that the end of the truss had rotted so that at any moment it might fall down, as it did do, and failed to disclose that fact to the lessees, contemplating, as they must have done, just such a disaster as occurred; would not they have been liable for the injuries caused by the disaster? In such a situation the law would impose a duty upon them to disclose the fact, and it would not be necessary to show active misrepresentation and concealment to establish their liability. But, when the disclosure is made, then the lessees take up the burden, and it is for them to put the premises in safe condition if they propose to invite people to come there. At the former trial there were citations of authority, and a line of cases relied on, which I want now to distinguish, lest counsel may think I have overlooked them. I have been talking of the duty of the lessors and the lessees to the persons with whom they deal; but there is the duty which lessors and lessees owe to strangers with whom they have no contractual relations. If the owners of a building allow it to become unsafe; if they allow a nuisance to grow up, or create a nuisance in the building; if, for instance, they should allow the rain to pour down into the wall of the building until the wall becomes unsafe, and falls down and kills a passer-by in the alley or street,—then it does not matter who is in possession of the property, whether the owners or the lessees; the owners are liable for the injury, and they cannot shift the responsibility which the law casts upon them by saying that they have let the premises to somebody else. But the cases which support that doctrine have no ap-

plication to the case at bar. This is a question between the lessors and lessees and the person injured, who was there at the time of the disaster by the invitation of the lessees. Now in this case, as far as the lessors are concerned, there is no evidence, and it is not pretended by anybody, that the lessors knew of this rotten truss. Therefore they could not have failed in the duty which the law would cast upon them to make disclosure of any secret, latent, or hidden defect which might render the building unsafe and dangerous. And the lessors stand upon the ordinary, well-settled rule that, having surrendered possession of the property to the lessees, they are not responsible for the condition of the building, to the lessees or to those whom the lessees may invite there. If this unsafe condition existed at the time of the lease (and there is evidence here which would warrant the jury in finding that it did), yet it was something of which the lessors had no knowledge, and therefore they could practice no deceit with reference to it, nor fail in the duty of disclosure; and, under the well-settled rule, there was no implied warranty on their part that the building was fit and suitable for the purpose for which it was leased, nor any express warranty to that effect in the lease; and therefore when it passed out of their control, into the hands of the lessees, their responsibility for what might happen afterwards on account of any condition of unsafety in the building ended, and they were under no duty to the lessees or to those in privity with them to maintain the building in a condition of safety. The motion on behalf of the lessors must therefore be sustained.

As to the lessees: If the lessees knew of this condition of unsafety, whether it arose before or after the making of the lease, or if by the exercise of ordinary care they could have known of it, then they are liable, and must answer in damages to the plaintiff; and the question I am called upon to determine is whether there is any evidence introduced by the plaintiff which tends to show (and I have not in mind now the doctrine of the *scintilla*) negligence on the part of the lessees in failing to know of this unsafe condition, and in failing to take the necessary steps to prevent the disaster which occurred. If there is, it will be my duty to submit it to the jury and take their judgment and verdict upon it. It is not the function of the court to determine questions of fact, and it is a function which the court must be careful not to usurp. Nobody contends that the lessees knew anything about this unsafe condition; that is, knew that this truss was rotten; but the claim is that they ought to have known it; that the evidence already introduced shows facts and circumstances sufficient to put them upon notice that would require them to make investigations which would have disclosed this condition, and thereby this disaster might have been averted. That is the question, and if the facts disclosed by the evidence are of a character which would tend to put them upon notice, requiring such investigations, then the case must go to the jury, whatever opinion the court may have as to the sufficiency of the evidence. But, if the circumstances do not tend in that direction, it would be a violation of duty upon the part of the court to submit the case to the jury, resulting, possibly, in the confusion of



things, in a verdict which would not be in accordance with the real facts and with the law. Now, what was there in the circumstances presented, pointing to the rotten condition of this truss, which would put anybody upon notice, and require such investigations as would lead to the discovery of that condition? The evidence at this trial has shown more fully and satisfactorily than before the condition of the roof and the wall, and the dampness in the wall which probably led to the condition of decay in the truss. Looking back now, we can see the process which led up to this condition; but looking from the other side, as it appeared before the disaster, what was there to put a man of ordinary prudence and care upon notice which would require him, under penalty of damages such as are asked in this case, to institute an investigation which would have disclosed this condition? That is the real question. Because no extraordinary or unreasonable care is required, as I had occasion to say to the jury on the former trial. The law does not require that the roof should be taken off, and the wall torn down, and the condition of every truss examined, because possibly some condition of unsafety might be found. That would be unreasonable. That would put an end to the erection and use of such buildings. The law only requires reasonable care and prudence, and we, who go by invitation to such buildings, have a right to demand that, and no more. Beyond that we must take the chances.

The evidence for the plaintiff (and that is all we have before us) shows that there was a spout down the wall, near the end of this truss, leading from the gutter or valley in the roof, through a box set in the wall, and passing through the wall, and that the gutter, box, and spout were in a condition of very bad repair, and had been for a number of years, and that, in consequence of this condition of repair, when rains fell or the snow came the water would pass into the wall around about this truss, and that there was a condition of dampness in the wall following heavy rains or a heavy fall of snow; and the inference is drawn, which may be well founded, that through this dampness and moisture, communicated in this way, this condition of rot and decay grew up, but the outward indications of which were to be found only in stains on the wall inside, in discoloration, and an appearance of dampness on the outside wall, and in the leaky condition of the roof. What notice would these indications give to the lessees? Why, the first thing, it seems to me, the lessees would think of, would be that the leakage would spoil the paper and decorations inside, and that it might after a while cause permanent injury to the wall; but what prudent man, what careful man, would ever have dreamed, from these appearances, that a rot would set in at the end of the truss, and as a consequence the truss would break off, as if sheared off, and let the ceiling and dome down upon an audience seated in the auditorium below? Who could have reasonably contemplated anything of that kind, or the possibility of any such condition there? Can it be said, when it is presented to you upon these indications, that the reasonable man, the prudent man, the careful man, would at once send for mechanics and have the roof taken off and the wall taken down,

and the end of the truss exposed, in order that he might ascertain whether it was rotten or not? In my judgment, it would point to many things besides that, and to that last of all. If it be said, however, that if reasonable care had been exercised in keeping the roof in repair, so as to prevent it from leaking, the truss would not have rotted, and that therefore the lessees should answer for their negligence in failing to keep the roof in repair, even though they could not have anticipated the consequences of their negligence, the refutation of such a claim is found in the fact, as appears from the evidence, that this rot and decay began many years before the letting of the premises, and only culminated in the disaster within a little more than a year after the letting.

I do not think I ought to permit this case to go to the jury upon the suggestion that the case turns upon the question of whether the rot was the result of dampness caused by allowing the water from the roof to run into the wall, when the real question to be considered is whether the lessees were guilty of negligence in failing to discover the rot, and I am unable to find any evidence tending to show want of reasonable care and prudence on the part of the lessees in that respect. The motion of the lessees therefore will be sustained, and the jury will be instructed to return a verdict for the defendants.

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TRACY v. WESTERN UNION TEL. CO.

(Circuit Court, W. D. Pennsylvania. July 9, 1901.)

No. 10.

**MASTER AND SERVANT—PLACE TO WORK—MASTER'S DUTY OF INSPECTION.**

Under the rule that it is the positive duty of a master to provide a servant with a reasonably safe place in which to work, having regard to the nature of the employment, it is the duty of a telegraph company to see that proper inspection is made of poles which its linemen are required to climb in the course of their duty; and the negligence of a foreman to whom such duty is delegated is the negligence of the company, which renders it liable for an injury to a lineman by the breaking of a decayed pole on which he was at work, the unsafe condition of which would have been discovered by efficient inspection.

Sur Motion by Defendant for a New Trial.

John O. Petty, for plaintiff.

Dalzell, Scott & Gordon, for defendant.

ACHESON, Circuit Judge. The evidence, I think, required the submission of the question of the defendant's alleged negligence to the jury, and was quite sufficient to sustain the verdict. The plaintiff was a lineman in the employ of the defendant, the Western Union Telegraph Company. The duties of a lineman are to climb telegraph poles, and to string wires on the cross-arms, and remove wires therefrom, and do other work thereon. The defendant had occasion to remove part of a line of its wires from four old poles which had been standing for 11 or 12 years to four new poles which had just been set. Before the work of moving the wires began, the

defendant's foreman, Joseph Krotzer, visited the premises and made an inspection. He caused three of the old poles to be guyed, but did nothing with respect to the fourth pole. That pole appeared to the eye to be sound and firm, and the foreman applied no test to determine its condition. The plaintiff was one of a gang of linemen working immediately under another foreman of the defendant (Oscar Long), assigned to the work of removing the wires from these old poles to the new ones. In the course of his employment and in the discharge of his duty as lineman, the plaintiff climbed the fourth pole just mentioned, to assist another lineman in removing the wires from the cross-arms. While thus engaged, the pole suddenly broke, and the plaintiff was thrown to the ground and very badly injured. The cause of the disaster proved to be the rotted condition of the lower end of the pole underneath the surface of the ground. The pole broke off three or four inches under the ground. There was evidence to show that a proper inspection of this pole by the usual test, by means of tools provided for the purpose, would have disclosed that the pole was in an unsafe condition for a lineman to ascend and do his work thereon. The defendant alleged and gave evidence tending to show that, according to the custom and practice in doing such work as this, it is the duty of the lineman to determine for himself the safety of the poles. This the plaintiff denied, and gave evidence tending to show the contrary, and that it is always the practice and business of the foreman to inspect the poles to determine their safety, and that the linemen rely on the foreman's inspection. The court left this disputed question of fact to the determination of the jury, and upon their verdict in favor of the plaintiff it must be accepted as established that the plaintiff was not under the alleged duty, and also that he was not guilty of any contributory negligence, and was free from fault. In its facts the case in hand differs materially from every one of the cases which the defendant's counsel has brought to my attention. I am of opinion that the present case is governed by the principle approved and settled by the supreme court of the United States,—that it is the personal duty of the master to provide his servant with a reasonably safe place to work in, and that the master cannot relieve himself of the responsibility growing out of this positive duty by delegating its performance to another. *Hough v. Railroad Co.*, 100 U. S. 213, 25 L. Ed. 612; *Railroad Co. v. Peterson*, 162 U. S. 346, 353, 16 Sup. Ct. 843, 40 L. Ed. 994. Speaking of the positive duties which the master owes to the servant, the court in the last-cited case declared:

"He owes the duty to provide such servant with a reasonably safe place to work in, having reference to the character of the employment in which the servant is engaged. \* \* \* If, instead of personally performing these obligations, the master engages another to do them for him, he is liable for the neglect of that other, which in such case is not the neglect of a fellow servant, no matter what his position as to other matters, but is the neglect of the master to do those things which it is the duty of the master to perform as such."

The neglect in this instance of the defendant's foreman properly to inspect and test the pole, the fall of which while the plaintiff

was doing his work thereon caused the mischief, was the neglect of the defendant. The conclusion which I have reached accords with the decision in the analogous case of *Kelly v. Telephone Co.*, 34 Minn. 321, 25 N. W. 706. And now, July 9, 1901, the motion for a new trial is overruled, and it is ordered that judgment upon the verdict be entered in favor of the plaintiff.

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## NICKOLSON v. WHEELING, L. E. &amp; P. COAL CO.

(Circuit Court, D. New Jersey. February 8, 1901.)

## CORPORATIONS—SERVICE OF PROCESS—NEW JERSEY STATUTE.

Laws N. J. 1896, p. 277, c. 185, requires every corporation, under a penalty, to file annually with the secretary of state a statement giving its principal office in the state, and the name of the agent in charge, upon whom process against the corporation may be served, and authorizes service on such agent. Previously the statute provided for service only on officers or directors of the corporation. A corporation previously organized designated its principal office in the state, as required by the statute then in force, at the office of an attorney, to whom it paid a sum as rental, and for keeping the books which were required to be there kept. It failed to designate any agent under Act 1896, and was subsequently adjudged insolvent, and a receiver appointed for its property, who discontinued the payments to the attorney. *Held*, that service upon the attorney in an action thereafter brought against the corporation was not a good service on the corporation, under the statute.<sup>1</sup>

## On Motion to Set Aside Service of Process.

James E. Howell, for the motion.

Edward Q. Keasbey, opposed.

KIRKPATRICK, District Judge. It appears from the agreed state of facts stipulated by the attorneys of the respective parties herein that the defendant is a corporation organized under the general corporation laws of the state of New Jersey August 7, 1888; that, in accordance with the provisions of the law then in force, the defendant company filed in the office of the secretary of state of New Jersey a list of its directors, and designated the location of its principal office or place of business in the state of New Jersey; that the office of the company was a part of the premises used by Walter Kip for a law office, and that the company paid Walter Kip the sum of \$25 per annum for their use of the same, and for his services in taking charge of the books of the corporation required by law to be kept therein. This payment was made by the company to Kip from the date of its organization until January, 1897, when a receiver was appointed for said corporation on the ground of insolvency. From the date of the incorporation of the company until 1896 the law relating to the service of process in personal ac-

<sup>1</sup> Service of process on foreign corporations, see note to *Eldred v. Car Co.*, 45 C. C. A. 3.

tions on resident corporations was set out in section 87 of the act of 1875 (Revision N. J. p. 924), which provides as follows:

"That whenever any personal action shall be commenced against a corporation in any of the courts of law of this state, the first process to be made use of may be a summons a copy whereof may be served on the president or other head officer of said corporation, or left at his dwelling house or usual place of abode, \* \* \* and in case the president or other chief officer can not be found in this state \* \* \* then a copy of said summons shall be served upon the clerk or secretary and if no clerk or secretary then on one of the directors. \* \* \*

Section 49 of the same act provided that it should be the duty of the directors of every corporation each year to file in the office of the secretary of state a complete list "\* \* \* of the names of the directors, trustees and officers of said corporation, with the residence of each, and also to designate the business and location of the principal office or place of business of the company in this state." It is apparent from a consideration of these sections that "the designation of the business and location of the principal office or place of business of the company" was not required for the purpose of providing a means through which service of process might be made upon the corporation, for the law expressly provides for such service upon the president or chief officer, the clerk or secretary, or a resident director, personally or at their respective places of abode. In 1896 there was a change in the law, and the forty-third section of an act respecting corporations (chapter 185, p. 277, Laws 1896) provided that every corporation should file annually with the secretary of state the "names of all directors and officers," etc., "\* \* \* and the location \* \* \* of its principal office in this state, and the name of the agent in charge of said office upon whom process against the corporation may be served," and provided that every corporation failing to comply with the law in this respect should forfeit to the state \$200, to be recovered, etc. The law of 1896, supra, in section 87, also provided that "in any personal action commenced against any corporation in any of the courts of law in this state the first process to be made use of may be a summons a copy whereof may be served on the president or other head officer or agent in charge of its principal office in this state or left at his dwelling house or usual place of abode \* \* \* and in case said president or other head officer or agent can not be found \* \* \* then a copy of said summons shall be served" on the clerk or secretary or on one of the directors, etc. The effect of this section was to add to the number of those upon whom process against the corporation might be served a person whom the company thereafter and from time to time should designate for the purpose and place in charge of its principal office. The law went into effect July 4, 1896; the company failed and neglected to designate any agent in charge; and in January, 1897, the company was judicially declared insolvent, and its directors and officers enjoined from exercising any of the privileges or franchises of the corporation, and a receiver was appointed to take the charge and management of the company's affairs. Until the receiver's appointment the defendant company rented its principal office in New Jersey from

Mr. Walter Kip, and, in addition to the payment to him of rent therefor, remunerated him for his care of their books which the law required them to keep therein. The company never made him agent in charge upon whom process might be served, nor did he become such from the fact that he was the landlord of the corporation and the custodian of their property. Upon the appointment of the receiver it may be presumed that he, in accordance with his duty, took charge of the books of the company; and, from his failure to pay rent, it may be inferred that he relinquished the office which the company had rented from Mr. Kip. The duties of Mr. Kip were ended, his connection with the company severed. He never had been designated as agent in charge upon whom service could be made and upon the receiver's appointment; was in no sense an employé or agent of the company upon whom devolved any duty to notify the receiver, who became the custodian of the interests of the corporation, that service of process had been made upon him. In my opinion, the service of the summons in this case upon Walter Kip was insufficient, and should be set aside.

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PEURRUNG v. CARTER-CRUME CO.

(Circuit Court, S. D. Ohio, W. D. January 11, 1899.)

CONTRACT—REPUDIATION—ACTIONS FOR INSTALLMENTS.

Where one repudiates a contract by which he is bound to make certain payments at certain times, the other party is not bound to sue for damages as for a breach, or to wait till all the installments are due, but may bring separate actions for installments as they become due.

C. W. Baker, for plaintiff.

O. M. Gotschall and Jos. Wilby, for defendant.

THOMPSON, District Judge. On August 14, 1894, Peurrung Bros. & Co. and the Carter-Crume Company entered into an agreement by the terms of which Peurrung Bros. & Co. agreed to waive all claim to and rights under a certain contract between Peurrung Bros. & Co. and Tower & Matthews for the manufacture and sale of wooden butter dishes; and the Carter-Crume Company, in consideration thereof, agreed to pay Peurrung Bros. & Co. \$3,000 per annum, for the term of 3 years and 6½ months, in monthly installments of \$250 on the 15th day of each month. Among other things, the contract further provided that the Carter-Crume Company should sell Peurrung Bros. & Co. 1,500,000 wooden dishes from the factory of Tower & Matthews at certain prices, and also sell them wire end dishes with certain favorable discounts from the market price, reserving the right to ship the dishes from the factory nearest to destination; and, in consideration of the discount allowed and other valuable considerations, Peurrung Bros. & Co. agreed not to purchase wire end dishes from any other firm or corporation, and not to give or allow to any customer any part of the discount allowed. And it was further provided that as the agree-

ment was based upon a contract of even date made between the Carter-Crume Company and Tower & Matthews, by the terms of which it was provided that that contract might be annulled by the Carter-Crume Company on the 1st day of March of any year, it was also agreed that, if that contract—the contract between the Carter-Crume Company and Tower & Matthews—should be annulled, then the contract between Peurrung Bros. & Co. and the Carter-Crume Company might also be annulled on the 1st day of March of any year, by the Carter-Crume Company giving 90 days' written notice thereof. Under this contract the monthly installments of \$250 were paid up to and including the installment due September 15, 1895, amounting to \$3,000. On September 20, 1895, the Carter-Crume Company, in writing, notified Peurrung Bros. & Co. that they would no longer be bound by the contract, and thereafter refused to make any further payments to Peurrung Bros. & Co. under the same. Afterwards, on September 29, 1896, Joseph P. Peurrung, as the assignee of Peurrung Bros. & Co., brought suit in this court against the Carter-Crume Company for the installments due upon the contract up to that date, to wit, from and including the installment due October 15, 1895, up to and including the installment due September 15, 1896, amounting to \$3,000, and on April 3, 1897, obtained judgment for that amount, with interest. Afterwards, on June 14, 1898, Joseph P. Peurrung brought this suit to recover the remainder of the installments due under said contract. The case was tried to the jury, and at the conclusion of the evidence counsel for the plaintiff moved the court to withdraw from the consideration of the jury the second and third defenses of the answer, upon the ground that they were not sufficient in law to constitute defenses to the action. The motion was sustained, and these defenses were withdrawn from the consideration of the jury. The case was then submitted to the jury upon the remaining defenses, and they returned a verdict for the plaintiff for the amount claimed, \$4,625, with interest.

The case is now presented to the court upon two motions: First, a motion for a new trial, which, without discussion, is overruled; second, a motion for judgment non obstante veredicto. This latter motion is predicated upon the third defense of the answer,—one of the defenses which was withdrawn from the consideration of the jury. The claim made in support of the motion is that the contract sued on is entire and indivisible, and that the judgment in the former case is a bar to a recovery in this case. It is argued that the letter of the Carter-Crume Company of September 20, 1895, to Peurrung Bros. & Co., was a repudiation of the contract,—a total abandonment or breach of the contract on the part of the Carter-Crume Company,—such as (1) required Peurrung Bros. & Co. to treat their claim against the Carter-Crume Company as a "single cause of action upon the contract," and at once bring an action for the entire amount claimed, whether due or not (Suth. Dam. § 108); or (2) gave them an election either to pursue that course, or to treat the contract as subsisting, and wait until all the unpaid installments became due, and sue for the entire amount. To support this

claim a great many cases are cited to show that running accounts, contracts for the payment of a sum of money in installments, and service contracts providing for weekly, monthly, or quarterly payments of wages, are single and indivisible, in the sense that upon breach but one cause of action arises or can be prosecuted thereon, and that such cause of action cannot be split up so as to maintain separate actions on the several installments, etc., but that a recovery on one installment will be held to cover the entire claim, and bar any other suit on the contract for any other installment. But when the cases are examined it will be found that the rule which the courts seek to enforce is that all such installments as may be due at the time of bringing the action shall be regarded as one entire, indivisible cause of action, which cannot be split up for the purpose of bringing more than one suit, and does not and never was intended to cover installments not due. *Guernsey v. Carver*, 8 Wend. 402, 24 Am. Dec. 60; *Bendernagle v. Cocks*, 19 Wend. 207; *Perry v. Dickerson*, 85 N. Y. 345, 39 Am. Rep. 663; *Jex v. Jacob*, 7 Abb. N. C. 452; *Burritt v. Belfy*, 47 Conn. 323, 36 Am. Rep. 79; *Hallack v. Gagnon* (Colo. App.) 36 Pac. 70; *Underhill v. Collins* (Sup.) 15 N. Y. Supp. 495; *Lorillard v. Clyde*, 122 N. Y. 41, 25 N. E. 292, 19 Am. St. Rep. 470. While the contract is subsisting each installment may be sued for as it becomes due. But where the payments under the contract require an accounting to determine the amount, or where the contract provides for but a single payment, the party entitled to the payment must either accept the breach and sue for damages, or wait until the expiration of the contract and then sue for the total amount. In such cases it cannot be said that the amount claimed is due until an accounting be had or the contract expires. In this case, however, the contract fixes the amount and date of payment of each installment, each installment becoming due on the 15th day of each month. And the party not in fault may elect to treat the contract as subsisting. The party in fault cannot put an end to the contract, of his own will, so as to deprive the other party of any of the benefits of the contract accruing from its continuance. To permit him to do so would enable him to take advantage of his own wrong. If the party not in fault elects to accept a total breach of the contract tendered by the other party, then the whole claim becomes due, and he may bring an action to recover the entire amount, or, perhaps more properly speaking, he may claim and recover damages covering the entire amount. If he elects to treat the contract as subsisting, then it continues for the benefit of both parties. The party making the election must stand ready at all times to perform the contract on his part, and the other party may repent and perform. A total breach or repudiation of the contract is regarded in the eye of the law as a prevention of performance by the other party, and justifies his election to treat the contract at an end and sue for his entire claim. *Railway Co. v. Richards*, 152 Ill. 59, 38 N. E. 773, 30 L. R. A. 33.

In this case the Carter-Crume Company repudiated the contract, but the plaintiff chose to keep it alive. He never replied to the letter of September 20, 1895, from the Carter-Crume Company re-



pudiating the contract, but made a demand for and brought suit for the installments then due, and afterwards brought this suit for the remaining installments when they became due. The performance required of him was of a negative character, but it is conceded that he refrained from doing the things prohibited to him by the contract, and the defendant has never availed itself of the opportunity to repent and perform. I am still of the opinion that the third defense set up in the answer does not, in law, constitute a defense to the action, and the motion for judgment notwithstanding the verdict will be overruled, and judgment will be entered on the verdict.

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In re HOWELL.

(District Court, N. D. Georgia. May 14, 1901.)

No. 559.

CONVEYANCE—TITLE—MORTGAGE—USURY.

Under Code Ga. § 2892, providing that all titles to property made as a part of a usurious contract are void, an assignment of a bond for title, made in terms to secure an indebtedness to the assignee, is, in effect, a mortgage, and valid, though the loan is usurious, since it does not convey a title.

In Bankruptcy.

Thompson & Farmer, for objectors, cited:

Zellner v. Mobley, 84 Ga. 746, 11 S. E. 402; Johnson v. Wheelock, 56 Ga. 83; Carswell v. Hartridge, 55 Ga. 414; Caswell v. Banking Co., 50 Ga. 70.

L. L. Middlebrooks and E. F. Edwards, for objectors.

L. F. Rogers and J. G. Lester, for Clark Banking Co., cited:

Code Ga. §§ 2812, 2956, 2959, 2960, 3682; Gibson v. Warden, 14 Wall. 244, 20 L. Ed. 797; Cook v. Tullis, 18 Wall. 332, 21 L. Ed. 933; Henderson v. Hackney, 23 Ga. 384; Hackney v. Rome, 33 Ga. 231; Ford v. Finney, 35 Ga. 258; Bank v. Sibley, 71 Ga. 726; Walter v. Kierstead, 74 Ga. 25; Smith v. Jennings, 74 Ga. 553; Partridge v. Williams' Sons, 72 Ga. 807; Hodge v. Brown, 81 Ga. 276, 7 S. E. 282; White v. Kennon, 83 Ga. 343, 9 S. E. 1082; Railroad Co. v. Theus, 91 Ga. 41, 16 S. E. 208; Holliday v. Banking Co., 92 Ga. 675, 19 S. E. 28; Banking Co. v. Peacock, 103 Ga. 182, 29 S. E. 752; Pierce v. Parrish, 111 Ga. 729, 37 S. E. 79.

NEWMAN, District Judge. The bankrupt, on the 26th day of May, 1893, was the owner of a piece of real estate in the town of Oxford, Ga. On that day she executed to the Mutual Aid, Loan & Investment Company of Atlanta, Ga., a deed to secure the payment of a certain sum of money borrowed from the investment company, receiving from it a bond to reconvey said property upon the payment of the borrowed money. On February 17, 1897, the bankrupt borrowed an additional sum from the Clark Banking Company of Covington, Ga., and transferred the bond for title to the bank, to secure the payment of this sum so borrowed. The entry on the back of the bond for title is as follows: "I hereby transfer the within bond for title to Clark Banking Co. of Covington, Ga., all my rights under

this bond, as security for indebtedness to them. Feby. 17th, 1897. Sarah A. Howell." It is conceded that the bankrupt agreed to pay the Clark Banking Company usurious interest. Subsequently to this, on October 18, 1897, the bankrupt executed certain mortgages to Thompson & Farmer on the same real estate.

An issue arose before the referee in the bankrupt case as to whether or not the usury in the transaction with the Clark Banking Company would render void the transfer of the bond for title, and give Thompson & Farmer a lien inferior only to that of the Investment Company, whose first lien is recognized by all parties.

Section 2892 of the Code of Georgia is as follows: "All titles to property made as a part of an usurious contract or to evade the laws against usury, are void." The supreme court of the state of Georgia, in applying this section, have held that, as the section itself provides, titles are void, but mortgages and liens to secure indebtedness are not. The referee held that the transfer of this bond for title was a mere lien on the bankrupt's equity in the real estate in question. I think the referee was right. The transfer itself provides that it is made as security for indebtedness. It does not convey title, and in my opinion is not obnoxious to the section of the Code referred to. The decision of the referee will be sustained.

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IN RE FALCONER.

(Circuit Court of Appeals, Eighth Circuit. June 18, 1901.)

No. 23.

**BANKRUPTCY—EXEMPTIONS—SELECTION.**

Under the statute of Arkansas (Sand. & H. Dig. c. 78, §§ 3716, 3718), which permits a debtor who is married or the head of a family to select and hold as exempt "specific articles," not exceeding in value the sum of \$500, a bankrupt who is a married man may claim his exemption in money as well as in property; and where, at the time of filing his schedule, he claims articles of property of less value than \$500, he may amend such schedule to include a sum of money subsequently surrendered to the trustee by a creditor, as the proceeds of property transferred to him by the bankrupt and constituting a preference, and may at the same time claim the remainder of his exemption therefrom.

Sanborn, Circuit Judge, dissenting.

Petition for Review of Order of the District Court of the United States for the Western District of Arkansas, in Bankruptcy.

William A. Falconer, in pro. per.

Homer C. Mechem and Edgar E. Bryant, for respondent.

Before SANBORN and THAYER, Circuit Judges, and ADAMS, District Judge.

THAYER, Circuit Judge. The petitioner, William A. Falconer, seeks by this proceeding to review an order made by the United States district court for the Western district of Arkansas, allowing J. M. Hamilton, who had previously been adjudged a bankrupt, the sum of \$414, as an exemption out of certain moneys which had been

paid to the petitioner as trustee of the bankrupt's estate, under the following circumstances:

Hamilton was adjudged a bankrupt on March 17, 1899, under an involuntary petition in bankruptcy which was filed against him by three of his creditors. On March 24, 1899, he filed his schedules in bankruptcy, wherein he claimed as exempt certain specific articles of personal property of the aggregate value of \$86, and further stated that he was a married man and the head of a family, and a citizen and resident of Johnson county, in the state of Arkansas. Within four months preceding the commencement of bankruptcy proceedings Hamilton had conveyed to the Bank of Clarksville certain personal property to secure an indebtedness which he owed to it, the conveyance being made under such circumstances that it operated as a preference. Prior to the institution of bankruptcy proceedings the personal property so transferred had been sold by the bank, for which it had received the sum of \$565.25. At the first meeting of Hamilton's creditors, to wit, on April 10, 1899, the Bank of Clarksville presented its claim against the bankrupt amounting to the sum of \$983.25, and asked leave to surrender the preference which it had received and to prove the entire amount of its claim as an unsecured debt. Such leave was granted, and the bank thereupon paid to the trustee the sum of \$565.25, which it had received from the sale of the personal property aforesaid. On the same day that the money in question was paid to and received by the trustee, the bankrupt filed an amended schedule of assets, embracing therein the sum of \$565.25 which had been paid to the trustee, and claimed a part thereof, to wit, \$414, as exempt. Such claim on the part of the bankrupt was allowed by the trustee, and the sum so allowed, in addition to the specific articles of personalty theretofore claimed as exempt, increased his total exemptions to the full amount allowed by law. Exceptions were taken to the latter allowance of \$414, by one of the bankrupt's creditors, but the district judge, after a hearing had upon the exceptions, approved the action of the trustee in making the same. It is this latter order which we are called upon to review.

Section 6a of the bankrupt act of July 1, 1898 (30 Stat. c. 541, p. 548), declares that "this act shall not affect the allowance to bankrupts of the exemptions which are prescribed by the state laws in force at the time of the filing of the petition in the state wherein they have had their domicile for six months, or the greater portion thereof, immediately preceding the filing of the petition"; and the laws of Arkansas on the subject of exemptions, which were in force when the bankruptcy proceedings against Hamilton were inaugurated, declare, in substance (vide Sand. & H. Dig. Ark. c. 78, §§ 3716, 3718), that any resident of the state who is married or the head of a family may select specific articles, not exceeding in value the sum of \$500, in addition to his wearing apparel and that of his family, and that the same shall be exempt from seizure on attachment or sale on execution or other process emanating from any court, to enforce a debt created by contract. They also provide, in substance, that whenever any resident of the state, upon the issuance against him, for the collection of a debt created by contract, of an execution

or other process against his property, shall desire to claim any of the exemptions allowed by the constitution and laws of the state, he shall prepare a schedule, verified by affidavit, of all of his property, including moneys, rights, credits, etc., and specify the particular property which he claims as exempt, and that, after giving five days' notice in writing to the opposite party, his agent or attorney, he shall file the same with the justice or clerk issuing the process, and that the justice or clerk shall thereupon issue a supersedeas staying any sale or further proceeding under such process against the property of the debtor in such schedule described, and that no alias execution shall be levied on property which has been so relieved from seizure until one year after the date of the filing of the aforesaid schedule of exemptions.

It is insisted by the petitioner that the bankrupt should have made his claim to be allowed the amount of his statutory exemption out of the proceeds of the property which had previously been conveyed to the Bank of Clarksville, when he filed his schedule on March 24, 1899, and that because he failed to make such a claim at that time he thereby waived his right to resort to that fund for his exemption. We think, however, that this position is untenable. When the bankrupt filed his original schedule it was not known that the proceeds of the property previously conveyed to the bank would ever become a part of the bankrupt's estate. The bankrupt himself could not challenge the validity of that conveyance, and whether the fund would become a part of his estate in bankruptcy depended altogether upon such action as the trustee might take to recover it, and upon the outcome of litigation brought for that purpose, if the fund was not voluntarily surrendered by the preferred creditor. Under these circumstances, we think that the bankrupt was under no obligation at the time he filed his original schedule to claim his exemption out of the fund in controversy, or to indicate his intention to do so if the fund should be recovered by the trustee or surrendered voluntarily by the creditor. In making his claim for exemption in the first instance his choice was necessarily confined to such property as he could himself lay claim to, at the time, as forming a part of his estate. His right to select other property then held by third parties, whose title could only be challenged by the trustee, arose, and in the nature of things could be exercised only, when the title by which it was held was vacated, and the property became actually, as well as potentially, a part of his estate. It was not until then that the bankrupt court could exercise dominion over the fund in controversy by directing a part thereof to be paid to the bankrupt on account of his exemption; and, as the bankrupt acted promptly in making his claim upon the fund as soon as it was surrendered to the trustee, we perceive no substantial reason for rejecting the claim because it was not interposed at an earlier date or when the original schedule was filed.

The petitioner further insists that, under the Arkansas statute relating to exemptions, the bankrupt was required to select specific articles of personalty to make up his exemption, and that under no circumstances can he be permitted to take the proceeds of property,

once a part of his estate, but which has been sold and reduced to money. This contention appears to be based wholly on two decisions of the supreme court of Arkansas, namely: *King v. Ruble*, 54 Ark. 418, 16 S. W. 7, and *Surratt v. Young*, 55 Ark. 447, 18 S. W. 539. In the first of these cases (*King v. Ruble*), it was held that the reservation by an insolvent assignor from the proceeds of personal property assigned, of a sum of money equal to his exemptions, is an unlawful benefit to the assignor at the expense of his creditors, and that such a reservation will not be allowed. In the other case (*Surratt v. Young*) it was decided that when personal property is attached the debtor, if he has an opportunity to do so, must select those articles of personalty which he chooses to hold as exempt, and that he cannot claim his exemption out of the proceeds of the sale after the attached property has been sold under judicial process. The reasons assigned for these decisions were that it would operate to the prejudice of the creditors if debtors were allowed to stand by and suffer their property to be sold at the expense of their creditors, and subsequently claim their entire exemption out of the proceeds. Neither of these decisions holds, however, nor does the local statute so declare, that a debtor may not claim his exemption in money as well as in property, and the present case seems to be one in which the bankrupt should receive his exemption in money. If he had himself sold the property, as he had an undoubted right to do at the time it was sold by the Bank of Clarksville, and had had the proceeds of the sale in his possession when he was adjudicated a bankrupt, he could doubtless have claimed \$500 thereof as exempt, and we can perceive no substantial reason for denying his right to claim a part of the fund in controversy when it appears that prior to the commencement of bankruptcy proceedings the property out of which the fund arose had been sold by a third party, to whom he had transferred it as security for an honest indebtedness, and such third party has surrendered the fund to the trustee. In the state of Arkansas it is held that when land in which a homestead right inheres is conveyed by a debtor in fraud of his creditors, and the conveyance is subsequently annulled at the instance of creditors, the debtor does not thereby forfeit his exemption, but may assert his right thereto, and may have his homestead set apart out of the land, even as against creditors who have succeeded in annulling the fraudulent conveyance. *Carmack v. Lovett*, 44 Ark. 180. A similar doctrine prevailed under the bankrupt law of 1867. It was uniformly held, in controversies arising under that act, that, if the assignee recovered property which had been conveyed in fraud of the provisions of the act, the bankrupt could successfully assert any homestead exemption right which he originally possessed in the property recovered by the assignee, and that the right was not forfeited by the debtor's fraudulent conduct. *Cox v. Wilder*, 2 Dill. 45, Fed. Cas. No. 3,308; *In re Detert*, 7 Fed. Cas. 545 (No. 3,829); *McFarland v. Goodman*, 16 Fed. Cas. 90 (No. 8,789); *Penny v. Taylor*, 19 Fed. Cas. 194 (No. 10,957); *In re Poleman*, 19 Fed. Cas. 918 (No. 11,247). The same doctrine has been approved by the circuit court of appeals for the Sixth circuit in a case arising under

the present bankrupt law (*In re Tollett* [C. C. A.] 106 Fed. 866), wherein it was held that the conveyance of property without fraud in fact, even though there was constructive legal fraud, does not bar the right of the bankrupt to claim a homestead in the property when it is recovered by the trustee.

We are of opinion, therefore, that Hamilton did not forfeit his right to claim his exemption out of the personal property transferred to the Bank of Clarksville, although such transfer at the time it was made operated as a preference. It was not fraudulent in fact, the conveyance having been made to secure an honest indebtedness due to the bank, but was simply voidable under the provisions of the existing bankrupt law. It ought not to be held, we think, that a transfer of personal property which is affected with no other vice than that it falls within the prohibition of the bankrupt law against preferring creditors, operates as a forfeiture or waiver of the bankrupt's right to claim such exemption as the law allows out of such property or its proceeds when it has been restored to his estate and comes into the possession of his trustee. It would certainly be a harsh rule, and one that is not consonant with the humane purpose which has led to the enactment of exemption laws, to hold that if a bankrupt makes a payment or transfers property by way of security to one of his creditors, and such money or property is subsequently recovered by his trustee and becomes a part of his estate which the bankrupt court is called upon to administer, no part of the money or property so recovered can be set apart to the bankrupt to satisfy his claim for exemptions, although he may have no other property out of which the amount of his statutory exemption can be paid. The present bankrupt law does not make it a ground for refusing a discharge that the bankrupt has transferred property to one or more of his creditors which operates as a preference, and we perceive no adequate reason for holding that such a transfer of property places the same, or the proceeds thereof if it has been sold by a creditor, beyond the reach of a claim for exemptions when it is restored to his estate. No bankrupt should be deprived of his exemptions by a narrow and strict interpretation of laws which were passed for his benefit and prompted by a wise and humane public policy. The order made below was, in our judgment, a proper order, and the petition to review the same is accordingly dismissed.

SANBORN, Circuit Judge (dissenting). May a bankrupt by preferring a favored creditor transform a statutory exemption of specific articles of personal property of the value of \$500 to be selected by him into a preferential lien upon a part or all of his property for \$500 in cash? The opinion of the majority is, in effect, an affirmative answer to this question, while, in my opinion, it should be answered in the negative. This bankrupt was entitled to an exemption of specific articles of personal property to be selected by him, and to that exemption only. Without making any selection, he made a preferential conveyance of his goods to a creditor. This creditor sold these goods for \$565.25, deducted \$23.75 expenses of sale, surrendered the balance to the court, and the court has applied this balance first to

the payment of \$414 claimed by the bankrupt as a part of his exemption, and the remainder, \$127.50, to the benefit of the creditors. The result is exactly what it would have been if the bankrupt had been invested with a first lien upon all his property to secure the payment to him of \$500 in cash, and this result appears to me to be unwarranted by the law, unjust, and inequitable.

1. The exemption which the bankrupt is here enforcing is granted to him by the constitution and statutes of Arkansas in these words: "The personal property of any resident of this state who is married or the head of a family, in specific articles to be selected by such resident, not exceeding in value the sum of five hundred dollars, \* \* \* shall be exempt." Section 2, art. 9, Const. Ark. This selection is required to be made by means of an affidavit of the debtor "specifying the particular property which he claims as exempt." Sand. & H. Dig. § 3718. A debtor is legally and morally bound to pay his debts, and the rule is that all his property not expressly exempt by law is subject to appropriation by his creditors to satisfy their just demands. Exemptions constitute statutory exceptions to this rule of morals and of law. They are grants of special privileges on certain conditions, and if a debtor would avail himself of them he must comply strictly with the conditions and pursue the terms of the grant. Moreover, these statutory exceptions must be fairly and reasonably interpreted, so as to effect the evident purpose intended, and to prevent the plain mischiefs deprecated by the legislators. In the light of these considerations, the legislative permission to a debtor to select and retain a tract of land of the value of \$1,500 as a homestead cannot be lawfully construed to be a warrant for him to sell, or to authorize the sale of, a large part or all of his real or personal property, and to take from the proceeds of this sale \$1,500 in money as a homestead. Nor is it perceived how the grant by the state of Arkansas to a debtor of the right to select and retain specific articles of personal property free from the claims of his creditors can be lawfully held to empower him, without making any selection, to sell, or to authorize a favorite creditor to sell, a large part or all of his general estate, and to take \$500 in money out of the proceeds as the specific articles selected by him as exempt. The constitution and statutes of Arkansas neither authorized this bankrupt to sell, nor to empower the Bank of Clarksville to sell, his unselected personal or real property to raise money to pay him \$500 in preference to all his creditors. It seems to me that here is one of the fundamental errors of the majority. This bankrupt was entitled to specific articles of personal property selected before their sale, and to those only. If he had selected and set these articles apart before the Bank of Clarksville made the sale, and if their proceeds had been kept separate from the proceeds of his unexempt property, it may be that he could have been allowed these proceeds. But when, without selection, he conveyed the property he might have claimed as exempt, and permitted this to be sold, and its proceeds to be mixed inextricably with property which he could not have claimed as exempt, he waived and lost all claim to this exemption, and his carelessness and disregard of the law should not be permitted to transform his lost right to select and retain

specific articles into a preferential lien upon the proceeds of his unselected property.

2. This exemption is granted by the constitution and statutes of Arkansas. The construction by the supreme court of that state of that constitution and of those statutes in this case, in which no question of general or commercial law or of right under the constitution or laws of the United States is involved, is binding upon this court, and ought to be followed. *Madden v. Lancaster Co.*, 65 Fed. 188, 192, 12 C. C. A. 566, 570, 27 U. S. App. 528, 536; *Dempsey v. Township of Oswego*, 4 U. S. App. 416, 435, 2 C. C. A. 110, 112, 51 Fed. 97, 98; *Rugan v. Sabin*, 10 U. S. App. 519, 3 C. C. A. 578, 53 Fed. 415; *Travelers' Ins. Co. v. Oswego Tp.*, 19 U. S. App. 321, 327, 7 C. C. A. 669, 674, 59 Fed. 58, 61; *Claiborne Co. v. Brooks*, 111 U. S. 400, 410, 4 Sup. Ct. 489, 28 L. Ed. 470; *Bolles v. Town of Brimfield*, 120 U. S. 759, 763, 7 Sup. Ct. 736, 30 L. Ed. 786; *City of Detroit v. Osborne*, 135 U. S. 492, 499, 10 Sup. Ct. 1012, 34 L. Ed. 260. That court has expressly decided that a debtor who, without selecting specific articles of personal property which he might have claimed as exempt under this constitution and these statutes, permits them to be sold indiscriminately with others which he could not have claimed, cannot be lawfully permitted to receive from the proceeds of the mixed property the value, or any part of the value, of the articles which he might have selected and retained as exempt. *King v. Ruble*, 54 Ark. 418, 16 S. W. 7; *Surratt v. Young*, 55 Ark. 447, 18 S. W. 539.

In *Surratt v. Young*, which is the last decision of the Arkansas court upon this question, the debtor had made an assignment of personal property for the benefit of his creditors. A creditor had attached the assigned property, and had prayed for its sale pending the litigation. The debtor had consented to the sale. The property was sold for the sum of \$506.65. The assignment was avoided. The debtor then filed his schedule, in which he claimed specific articles of property which had not been attached, of the value of \$29.50, and \$470 in cash from the proceeds of the sale. After citing the constitution and the statutes, the court said, among other things:

"These provisions seem to require that the debtor shall claim his exemptions in specific articles to be selected by him. Most of the authorities bearing upon the question, 'When must the selection be made?' hold that it must be made in a reasonable time, and they all seem to agree, as far as we have examined, that as a rule the selection must be made before the sale of the property, which is said, in most of the cases, in reference to a sale of the property attached on final process. It would seem that the claim of exemption should be made in accordance strictly with the requirements of the statute, and in apt time, that the debtor may have the benefit of the humane provisions of the law in reference to exemptions, and that the creditor may not be prejudiced in his rights. *Prima facie* all the property of the debtor is subject to sale on execution for the payment of his debts. But the constitution confers upon him the privilege of claiming specific articles of his property as exempt from execution, and the statute points out particularly the manner in which this must be done, and provides that when it is thus done a supersedeas shall be issued to prevent the sale of the property thus selected as exempt. If the debtor were permitted to stand by and see his property sell without claiming his exemptions in specific articles, and then be allowed to claim the amount in



value of his exemptions out of the proceeds of the sale of his property, it is not difficult to see how he might work this to the prejudice of his creditor, and how an improvident and thriftless man, by permitting the sale of his property exempt by law from execution, and necessary for the use of his family, might thwart the purpose of the law in securing the right to a debtor to claim his exemption."

How much more may a debtor use his privilege to the prejudice of his creditor, and to thwart the purpose of the law, if he may convey his unselected property to a favored creditor, and permit him to sell it to raise money for his benefit. The judgment of the supreme court of Arkansas was that the debtor was entitled to no share of the proceeds of the sale, and in support of its decision it cited Weaver's Appeal, 18 Pa. 309; Miller's Appeal, 16 Pa. 303; King v. Ruble, 54 Ark. 418, 16 S. W. 7; Norris v. Kidd, 28 Ark. 499; Healy v. Conner, 40 Ark. 352; Chambers v. Perry, 47 Ark. 400, 1 S. W. 700; Brown v. Peters, 53 Ark. 182, 13 S. W. 729. This decision of the supreme court of Arkansas appears to me to be reasonable, right, applicable, and controlling in this case.

3. It is an established principle, in support of which the authorities are uniform, that identification and separation of the exempt articles is an indispensable condition of the exercise of the right of exemption. If, through any act or omission of the debtor, the articles which he might have claimed as exempt have become so mixed with those which he could not claim that the former can be no longer identified and separated, the right to the exemption is gone. Freeman in his work on Executions states this rule in these words:

"If exempt goods be so mixed with others that they can no longer be identified, the right of exemption is lost. The claimant must always be able to point out the property claimed. The exempt and nonexempt property having been inextricably blended, the exemption must necessarily be denied as to the whole; else the creditor is compelled to suffer, and the debtor permitted to profit, by the act or neglect of the latter." *Freem. Ex'ns*, § 214a.

Smith v. Turnley, 44 Ga. 243, 248; Miller's Appeal, 16 Pa. 300, 303; Miller v. Sherry, 2 Wall. 237, 248, 17 L. Ed. 827; Norris v. Kidd, 28 Ark. 485, 499; Healy v. Conner, 40 Ark. 352, 358; Chambers v. Perry, 47 Ark. 400, 403, 1 S. W. 700; Friedman v. Sullivan, 48 Ark. 213, 215, 2 S. W. 785.

The bankrupt is barred by this rule from taking and retaining from the proceeds of this sale the \$414 which has been allowed to him. His act in transferring his goods to the Bank of Clarksville, and his neglect to select from the articles transferred those he claimed as exempt before their sale, have estopped him from charging the proceeds of this sale with the amount of the value of his exemption. He may not thus impose upon his creditors the expenses of the administration and sale of the property he might have claimed as exempt, and the necessary loss of a forced or speedy sale, while he secures to himself a first lien upon his unselected property, that was never given him by the law, for \$500 in cash. There is nothing in the opinions of the courts in the authorities cited by the majority in conflict with this position. Those decisions all treat of cases in which the bankrupt was able to identify the specific property or the proceeds of

the specific property which he was entitled to claim as exempt. In the case entitled *In re Detert*, 7 Fed. Cas. 545 (No. 3,829), the insolvent conveyed his homestead and other property. He was entitled to a homestead not exceeding in value \$1,500. The assignee in bankruptcy recovered the property conveyed, and it was sold. The homestead was, however, sold separately for the sum of \$725. The bankrupt applied for an allowance out of the proceeds of the sale of his property of the sum of \$1,500, the value of the homestead exemption which he was permitted to specify and retain by the law. The court denied his application, and allowed him only what his homestead yielded, the sum of \$725. In all the other cases cited by the majority in support of their view,—*Cox v. Wilder*, 2 Dill. 45, Fed. Cas. No. 3,308; *McFarland v. Goodman*, 16 Fed. Cas. 90 (No. 8,789); *Penny v. Taylor*, 19 Fed. Cas. 194 (No. 10,957); *In re Poleman*, 19 Fed. Cas. 918 (No. 11,247), and *In re Tollett*, 3 Nat. Bankr. N. 454, 105 Fed. 425,—the claim of the bankrupt which was allowed was for the specific land constituting the homestead, which he identified and claimed, and his claim was made and allowed before the property was sold. No authority that has been cited or found goes further than to hold that where a bankrupt can identify and set apart specific exempt property, or the proceeds of that very property, after a preferential conveyance thereof has been avoided, he may yet assert his claim to it. On the other hand, the authorities which treat of the question uniformly hold, so far as I can discover, that when a bankrupt has inextricably mixed the property which he might have claimed as exempt with that which he could not have claimed, and has induced or permitted a sale thereof so that it is impossible to separate the proceeds of the former from those of the latter, he has thereby waived and lost his right to any exemptions in the mixed property or its proceeds, and has not promoted himself to the position of a preferential lienholder upon all the property he has authorized to be sold. Thus, in *Weaver's Appeal*, 18 Pa. 307, 309, the statute granted to the debtor an exemption of the value of \$300 in real estate or specific articles of personal property to be selected by him. He specified articles of property of the value of \$64.17, and after the sale of his real estate claimed the balance of his exemption out of the proceeds of the sale, and the court below allowed him therefrom the sum of \$235.83. The supreme court of Pennsylvania reversed the order of allowance, and held that the omission of the debtor to specify the property he claimed as exempt before it was sold, and its proceeds inextricably mixed with the proceeds of the other property, was a waiver of all the advantages of the exemption. This, as we have seen, is the rule adopted and emphatically sustained by the decisions of the supreme court of Arkansas in *Surratt v. Young*, 55 Ark. 447, 449, 18 S. W. 539, and *King v. Ruble*, 54 Ark. 418, 421, 16 S. W. 7, and it ought to prevail in this case.

For the reasons which have now been briefly stated, I am of the opinion that the order allowing the bankrupt \$414 out of the proceeds of the mixed property, which he conveyed and permitted to be sold without selecting any exemptions from it, was erroneous, and should be reversed.

## In re TECOPA MINING &amp; SMELTING CO.

(District Court, S. D. California, S. D. July 12, 1901.)

**BANKRUPTCY—MANUFACTURING CORPORATION—OPERATION OF SMELTER.**

A corporation which leases and operates a mine and smelter at a point remote from a railroad, and incidentally conducts a store and boarding house for the accommodation of its employes, and which employs 2 or 3 men in mining, and 12 or 14 in smelting the ore so mined, its chief profit being derived from the operation of the smelter, is "engaged principally in manufacturing," within the meaning of Bankr. Act 1898, § 4b, and may be adjudged an involuntary bankrupt.

In Bankruptcy. On application to set aside adjudication.

The following are the findings and opinion of the referee, William D. Stephens:

**Findings.**

(1) That on the 14th day of April, 1900, a creditors' petition was filed herein, praying that said corporation be adjudged bankrupt, and on May 1st thereafter an order was made by said court adjudging said corporation a bankrupt, and referring said cause to me as referee. That on June 16, 1900, the petition of T. A. Brown was filed herein, praying to have the said order of adjudication set aside, and that said petitioner, Brown, was informed of the pendency of the proceedings in bankruptcy herein on May 14, 1900. (2) That more than six months prior to the commencement of proceedings herein the said corporation entered into a contract with the owner of certain mines and a smelter situated in the desert region of Southern California, and one hundred miles from the nearest point on a railroad, whereby said corporation was placed in possession of said mines and smelter, and agreed to mine and smelt the ore of said mines in said smelter, paying the owners 33½ per cent. royalty therefor. Said company entered into the performance of said contract, and continued to mine and smelt said ore up to about March 12, 1900. Said mines were about 3½ miles from the smelter, and the ore was hauled to the smelter, and after being smelted the bullion or pig resulting from the smelting, consisting of lead and silver, was hauled to Manvel, on the railroad, and thence transported to Kansas City, Missouri, to a refinery, at a cost of \$32 per ton for transporting by wagon and rail. The refiners separated the different constituent metals in the pig or bullion, and paid the shippers the market value thereof, after deducting the charge for refining. There were two or three men employed in mining the ore, which cost seventy-five cents per ton, and there were twelve or fourteen men employed at smelting,—the cost of smelting being \$8.94 per ton. The business of mining this ore could not have been successfully carried on without the smelter, neither could the business of smelting have been successfully carried on without ore from the mines. The company, in order to supply the workmen with food, kept a boarding house at the smelter, at which the employes were boarded at a charge of \$1.00 each per day, and also kept and sold merchandise, such as was necessary or usual in such places, for sale to the employes and others who wished to purchase. The keeping of such boarding house and the keeping and selling of such merchandise is usual under the circumstances mentioned, and the mining and smelting could not be well carried on without it. Nor would the boarding house and merchandise have been kept without the mining and smelting business also being done. The amount derived by the company from the boarding house and sale of merchandise was about \$600 per month. The ore of the mines was of no value until it was smelted, owing to remoteness from the railroad and from market; and the bullion or pig, while it had a market value there proportionate upon the assay, could not be fully realized upon until refined, which refining could not be done there. The company was not the owner of any mine, and mined only the ore from the mines mentioned, and smelted no other ore than that from those mines. (3) I find the fact to be that the principal business of said corporation was that of smelting, and that the profits arising from its business arose principally from the smelting, and to a less ex-

tent from the keeping of a boarding house and selling of merchandise, and that there was no profit derived from mining alone, but that said mining and the keeping of a boarding house and merchandise, and selling of merchandise, were incidental to and necessary to the carrying on of the smelting business, and that the mining was done in order to smelt, and that the smelting was not done in order to mine. (4) That, as a matter of fact and law, the said corporation was engaged principally in manufacturing, and is subject to the provisions of the bankrupt act. (5) That said petitioner, T. A. Brown, did not exercise due diligence in presenting or filing his petition herein, but was guilty of laches and unreasonable delay in said respect.

#### Conclusions of Law.

As conclusions of law from the foregoing, the referee finds that said corporation was engaged principally in manufacturing, and is subject to the provisions of the bankrupt act as such manufacturer, and that the petition of the said T. A. Brown should be dismissed at his cost, and that he is guilty of laches and unreasonable delay in presenting or filing his petition herein, and that judgment be entered in favor of Gregory Perkins, Jr., et al., against the petitioner, T. A. Brown, for costs.

Dated February 7, 1901.

#### Opinion.

From the findings herein it appears that the corporation was engaged principally in smelting, and it becomes necessary to determine whether smelting is manufacturing, under the provisions of the bankrupt act. Smelting is a process by which ore is placed in an incombustible receptacle, with alternate layers of ore (sometimes mixed with fluxes) and coke. It is then fired, and the ore, being melted, is run off into a receptacle apart from the slag or dross. The different metals in the ore are not separated from each other in the process, but require refining, which is a process by which they are separated. In mines situated as the one mentioned in the findings, it is not usual to refine the bullion or pig at the smelter, but it is shipped to large refineries remote from the smelter; the refiners paying the market value of the refined metals after deducting charges for refining. The word "manufacture" is a compound word of Latin origin, derived from the words "manu" (ablative), by hand, and "facere," to do, to make, to form; but the meaning is not confined to that which is done by hand alone, but by machinery as well. The definition given by Webster is, to make or fabricate from raw materials by the hand, by art or machinery, and work into form convenient for use. Worcester has, in substance, the same definition. This definition must be taken as the popular and usual meaning of the word. Mr. Brande defines "manufacture" as a term employed to designate the changes or modifications made by art or industry in the form or substance of material articles in the view of rendering them capable of satisfying some want or desire of man; and manufacturing industry to consist in the application of art, science, or labor to bring about certain changes or modifications of already existing materials. He includes under the term "manufacture" all branches of industry, with the exception of fishing, hunting, mining, and such industries as have for their object to obtain possession of material products in the state in which they are fashioned by nature. He says that the term is generally applied to those departments of industry in which the raw material is fashioned into desirable articles by art or labor without the aid of the soil, but that there is no real good reason for such limitation, and that it is obvious from the slightest consideration that agriculture is nothing but a manufacture, for the business of the agriculturist is to so dispose of the soil, seed, manure, or other materials that they may supply him with other and more desirable products. Brande, Enc. tit. "Manufacture"; 14 Am. & Eng. Enc. Law, p. 257. Has the corporation here, by smelting, made or formed anything useful? It has changed the form of the ore, by eliminating useless matter, into that which is useful; and the product has another name, being ore no longer, but "pig" or bullion, and having a market value depending upon its assay. In a strict sense, man can create nothing. He can only alter the form of existing things. The ore, when taken from the mine by the process of mining, is changed neither in form nor in substance, un-

less breaking may be termed a change of form. It is ore still. But when smelted it is ore no longer, in form, and the substance is altered by taking away some of its component parts. There has been alteration, and that by human hands and machinery. To my mind, it comes clearly within the popular definition of "manufacturing."

What light do the decisions of the courts throw on the subject? It has been decided that mining is not manufacturing, and this is obvious. If the corporation had been engaged in mining alone, there could be no doubt but that the corporation was not a manufacturer. One may engage in mining without engaging in smelting, or in smelting without mining. In fact, I think the two things are not generally done by the same persons. The great smelters of the country, such as those at Denver and at San Francisco, and at Swansea, in Wales, if I am correctly informed, do only custom work, and do not mine their own ore. In the case of *Rogers v. Danforth*, 9 N. J. Eq. 289, the court say: "What is the definition for a forge or furnace for the manufacture of iron? For, if there is a definition comprehended and understood alike by scientific men and by mechanics acquainted with the business referred to, such definition ought to control the court in its construction of this covenant. What is such a forge or furnace? An establishment or mechanical contrivance by which iron is made or manufactured from the ore. From what is iron manufactured? It is manufactured from ore." See, also, the same point, *Attorney General v. Lorman*, 59 Mich. 157, 26 N. W. 311, 60 Am. Rep. 287, and *Lawrence v. Allen*, 7 How. 785, 12 L. Ed. 914. I can see no distinction in principle between these cases and the one at bar; the only difference in fact being that one is iron ore, and the other lead and silver. Both are converted by heat into a mass, which is not as yet worked into its final form for use. The following have been held to be manufactures: Animal charcoal, produced by burning bone, and bonedust, produced by pulverizing it. *Schriefer v. Wood*, 5 Blatchf. 216, Fed. Cas. No. 12,481. Salt, when produced by boiling or evaporation. *Id.* Producing and supplying illuminating gas. *Nassau Gaslight Co. v. City of Brooklyn*, 89 N. Y. 409. The tanning of leather. *City of New Orleans v. Le Blanc*, 34 La. Ann. 597. Ice, when made by artificial means. *People v. Ice Co.*, 99 N. Y. 181, 1 N. E. 669. Timber split into staves, or into long pieces designed for shovel handles. *U. S. v. Hathaway*, 4 Wall. 404-408, 18 L. Ed. 395. Reeds which have been cut into square form. *Foppes v. Magone (C. C.)* 40 Fed. 570. The slaughtering of hogs, and converting the flesh into bacon, *Engle v. Sohn*, 41 Ohio St. 691, 52 Am. Rep. 103. A flour mill furnished with a middlings purifier, bran duster, belting, and other machinery. *Carlin v. Assurance Co.*, 57 Md. 515, 40 Am. Rep. 440. See the definition given by the court in this case. "Under the bankrupt law, one who prepares lumber, the growth of his own land, for market, and sells it, is a manufacturer, within the meaning of the bankrupt act; and the land may almost be said to be incident to the lumber which usually forms its chief value, and the manufacture itself is the main source of profit." *In re Chandler*, 1 Lowell, 478, Fed. Cas. No. 2,591. The above cases, analogous in principle to the one under consideration, would seem clearly to establish the law to be that smelting, under the circumstances in this case, is manufacturing. But one case was cited by counsel where the contrary was held. *In re Rollins Gold & Silver Min. Co. (D. C.)* 102 Fed. 983, in which the referee, in an obiter dictum, declares the law to be that smelting is not manufacturing. He gives no reason for such rule, nor do the authorities bear him out. I therefore hold that smelting, under the circumstances in this case, is manufacturing.

The objection by Mr. Dunning, of counsel for respondent, to admission of the judgment roll in the case of T. A. Brown against the Tecopa Mining & Smelting Company, is overruled, and said copy of the judgment roll is admitted in evidence.

Otis & Gregg, for applicant.

E. T. Dunning, for respondents.

WELLBORN, District Judge. I am satisfied, from the evidence, that the said company is a manufacturing corporation, within the

meaning of the bankrupt law. This conclusion renders it unnecessary for me to pass upon the question of laches. The decision of the referee is affirmed.

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In re GARNER.

GARNER v. FINDLEY.

(District Court, N. D. Georgia. June 29, 1901.)

No. 90.

**BANKRUPTCY—INTEREST OF WIFE IN LANDS—ESTOPPEL.**

A wife furnished one half the money from her separate estate for the purchase of a farm, under an agreement between her and her husband, who furnished the other half, that they should be equal owners. The legal title remained in a third person as security for unpaid purchase money, but a bond for a deed had been executed to a prior purchaser, which was assigned to the husband, who promised, on his wife's objecting when she learned such fact, that the deed should be made to both. While the title stood in such condition the husband became a bankrupt. *Held*, that the wife was not estopped to claim and recover her interest in the land as against the general creditors of her husband by the condition of the title or by any representations by him as to his sole ownership, made without her consent or knowledge, whether the question be determined by the decisions of the supreme court of Georgia or of the supreme court of the United States.

In Bankruptcy. On petition of Mrs. Millie Garner, wife of the bankrupt, against his trustee.

H. H. Perry, for complainant.

Dean & Hobbs, for trustee.

Howard Thompson, for bankrupt.

NEWMAN, District Judge. On the 12th day of January, 1899, John D. Garner was adjudged a bankrupt. On October 3, 1899, Mrs. Millie Garner, wife of the bankrupt, filed her petition on the equity side of the district court against the trustee, asking that she be decreed to have an undivided one-half interest in the equity in a certain tract of land in Hall county, Ga. The petition was referred to the referee to take the evidence, and the facts, as gathered from the pleadings and the testimony so taken, are as follows: That Mrs. Millie Garner was married to John D. Garner on December 18, 1889, at which time she owned a farm in Hall county, and had in money \$426; that she agreed with her husband to sell her farm and purchase jointly with him the land now in controversy, each paying one-half of the purchase money, and said purchase was made from H. T. Martin for \$4,250, subject to a debt of \$2,500 due to one Stanley, who held the legal title to the land, Martin having a bond for title thereto; that Mrs. Garner sold her own farm for the sum of \$1,670; that she turned over to her husband the sum of \$2,000, to be paid upon the land they bought, and that her husband contributed \$2,000, which left a balance due to Martin of \$250, which was afterwards paid off from the proceeds of the farm; that the debt due Stanley of \$2,500 was afterwards transferred by him, together with the legal title, to

Miss Cora Wood, and \$500 has been paid upon the principal of this debt from the proceeds of the farm; that said Martin, without the knowledge of Mrs. Garner, transferred the bond for title held by him to John D. Garner, and when Mrs. Garner discovered this she objected, but her husband assured her that the deed when made should be to them jointly; that the bankrupt afterwards, without the knowledge of Mrs. Garner, executed to the State Banking Company of Gainesville, Ga., a mortgage upon said land to secure a loan made by him from the banking company; that he did not advise the officers of said banking company that his wife owned a half interest in said land, nor did he advise other parties from whom he borrowed various sums of money, but claimed that it was his property alone. The bankrupt has a number of general creditors. It is shown that the bankrupt made a statement to a mercantile agency, which was such that the land must have been embraced in the real estate he claimed to own. One, at least, of these general creditors had a copy of this mercantile agency statement, and probably acted on it in giving the bankrupt credit.

The record shows no act whatever on the part of Mrs. Garner to induce persons to give credit to her husband as the sole owner of this land. If she is estopped at all from setting up her claim now to an undivided half interest, it must be because of her allowing the title to remain in her husband, thereby enabling him to hold it out to the world as his own. Is this sufficient? In *Bell v. Stewart*, 98 Ga. 669, 27 S. E. 153, the supreme court of the state, referring to several former cases on the subject, determined the question at issue here in a way favorable to the contention of Mrs. Garner. An extract from the opinion by Chief Justice Simmons will show what was determined:

"Undoubtedly the wife was the owner of an equitable undivided interest in the land, and it was proper and lawful for the husband to convey to her a portion of the land, now greater in value than the amount of her money that went into the purchase. *Brooks v. Fowler*, 82 Ga. 329, 9 S. E. 1089; *Dodd v. Bond*, 88 Ga. 355, 14 S. E. 581. The judgment against the husband not having been obtained until after the land had been conveyed to her, her title, if the conveyance was made in good faith, was superior to the judgment, unless there was conduct on her part amounting to an estoppel; that is to say, unless her conduct had been such as to mislead the creditor, and cause him to extend the credit to the husband upon the faith of the latter's apparent ownership of the property. In no way could an extension of credit upon the faith of property which did not in fact belong to the debtor give the creditor any right to subject it, as against the real owner, to the payment of the debt. In the cases relied on by counsel for the defendant in error, and in all others in which this court has held that a creditor could subject to a general judgment against the debtor, as against the claim of an equitable owner, property which at the time the credit was extended was apparently the property of the debtor, the creditor had obtained his judgment while the legal title was still in the debtor, or there was conduct on the part of the equitable owner which operated as an estoppel. See *Zimmer v. Dansby*, 56 Ga. 79; *Sumner v. Bryan*, 54 Ga. 614; *Kennedy v. Lee*, 72 Ga. 39; *Humphrey v. Copeland*, 54 Ga. 543; *Hobbs v. Trust Co.*, 96 Ga. 770, 22 S. E. 331. In the present case no inquiry was made of the wife by the creditor, nor, so far as appears, was anything said by her to induce the belief that her husband was the sole owner of the land. It does not appear that she was ever brought into contact with the creditor at all. She did not authorize her husband to take the title in his own name alone, but, on the contrary, insisted,

as soon as she learned that it was in his name, that he should make a deed to her of her part of the land. There is no evidence whatever that she gave him permission to use the property as his own exclusively, and it was accordingly error for the trial judge to charge the jury, as he did, upon the hypothesis that she did give such permission."

Although some of the former cases on the subject, particularly *Kennedy v. Lee*, 72 Ga. 39, may not be in entire harmony with the views expressed in *Bell v. Stewart*, still the latter case must control, and, tested by that, it seems that, if this court follows the decisions of the supreme court of the state, there is no reason, under the facts disclosed by this record, why Mrs. Garner is not entitled to have her undivided half interest in this land decreed to her.

If, however, it is a question which should be controlled by general law, and is not one in which this court will follow the decisions of the supreme court of the state, then the general law on the subject, as laid down by the supreme court of the United States, will be found to be at least as favorable to Mrs. Garner in this case as are the decisions of the supreme court of the state. In *Garner v. Bank*, 151 U. S. 420, 14 Sup. Ct. 390, 37 L. Ed. 218, an extract from the opinion by Mr. Justice Harlan will show that that court is in entire harmony with the views announced by the supreme court of this state in *Bell v. Stewart*. The extract is as follows:

"Applying the principles recognized by this court, as well as by the highest court of the state in which the property in question is situated, and where the transactions in question occurred, we hold that Mrs. Graeffe is entitled to a decree canceling the deeds under which the defendants claim the property described in the deed to her. That her husband was without any means of his own, and had in his possession, substantially, the entire estate of his wife, controlling and managing it for her; that the property in question was purchased and improved wholly with her money, under an explicit assurance by him, before the purchase was made, that it would be put in her name; that she relied upon his compliance with that promise; that the husband, on the 1st of March, 1881, owed her a larger sum than the amounts expended in purchasing and improving the property; that the conveyance to Garner, in order that he might convey to Mrs. Graeffe, was made in good faith, for the purpose, and only for the purpose, of satisfying, to the extent of the value of the property conveyed, the debt due to the wife; and that no one became a creditor of the husband in consequence of any representation made by her, or with her knowledge, that he owned the property,—are all facts clearly established by the evidence. Why should not the wife be protected under these circumstances? If the husband in fact had owned this property, and, in order to prefer a part of his creditors, had, in good faith, sold and conveyed it to them, with the intent to give a preference over other creditors, the right of such grantees to hold it, unless the case was brought within the insolvent laws of the state, could not be questioned. No different rule should be enforced in this case against a wife who has received a conveyance of property purchased with her money, and which should have been put in her name when so purchased. By no act or word upon her part was the husband discharged from the performance of his agreement to put the property in her name. The conveyance to Garner, followed by his conveyance to her, was executed for the purpose of discharging the husband's obligation to the wife, and was made before any creditor acquired a lien upon the property by attachment. As between the husband and wife, a court of equity would have compelled him to secure this property to her. If, before any rights of attaching creditors intervened, he did voluntarily what the law made it his duty to do, the transaction is not subject to impeachment by his creditors, unless the wife has been guilty of such fraudulent conduct as ought, in conscience, to estop her from claiming the property as against such creditors. If the wife had herself been guilty of deception, or if she had con-



tributed to its success by countenancing it, she might, with justice, be charged with the consequences of her conduct. *Sexton v. Wheaton*, 8 Wheat. 229, 240, 5 L. Ed. 603. But the evidence furnishes no ground for the imputation of fraud against her. That she relied upon the husband's promise to purchase the property for her and invest her with the title, and that she again relied upon his assurance, given in August, 1880, that he would have the property conveyed to her, are circumstances that do not affect the substance or good faith of the transaction. She acted with all the diligence that could reasonably have been expected or required under the circumstances. She supposed that he kept an accurate account of all transactions involving her estate as managed by him, and had no purpose to give him a false credit before the world. As subsequent developments showed, she erred in relying upon the assurance and promises of her husband as much as she appears to have done. But, as fraud cannot be imputed to her, a court of equity ought not, for such an error, to deprive her of that which is justly hers."

It is undoubtedly true, therefore, that, as against the general creditors of the bankrupt, Mrs. Garner has the right to have a decree in her favor for an undivided half interest in the land in question.

As to Mrs. Garner's right, however, against the State Banking Company, an entirely different question is presented. It appears from the record that that bank has a mortgage on this land, given by Garner for his individual debt. The bank appears to be made a party to the proceeding in this court, but, so far as can be gathered from the record, it was never served, and it has not entered an appearance. Even if Mrs. Garner could have a decree against the bank in view of its contract lien on the land, the lien cannot be removed or any decree rendered against the bank as the record stands. The bill is filed against Findley as trustee of the bankrupt, John D. Garner, Harrison T. Martin, and the State Banking Company, and subpoena is prayed against all of them; yet, as stated, the record shows no service whatever, nor does it show any appearance by any one except the trustee, who has answered the bill, and participated in the taking of evidence before the referee. Mrs. Garner is undoubtedly entitled to her interest in this land as against general creditors. They are fully represented in this litigation by Findley, trustee. As the record now stands, no decree can be entered against the State Banking Company.

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In re PLATTS.

(District Court, D. South Dakota, S. D. August 20, 1901.)

**BANKRUPTCY—CHATTEL MORTGAGE—VALIDITY AGAINST CREDITORS.**

A chattel mortgage given by a merchant on his stock in trade to a bank, he retaining possession as before, and from the proceeds paying his living expenses and debts in general, no attempt being made to live up to the provision that he should make daily deposits of all sales to apply on the debt to the bank, is within Bankr. Act 1898, § 67e, providing that incumbrances of property made by one adjudged a bankrupt, within four months prior to the filing of the petition, with intent and purpose on his part to hinder, delay, or defraud his creditors, shall be void as against them.

In Bankruptcy.

George Rice, in pro. per.

Edward R. Winans, for Egan State Bank.

CARLAND, District Judge. Upon the petition of the Egan State Bank, heretofore filed in this court, an order was made requiring George Rice, trustee in bankruptcy, to show cause before this court why the claim of the Egan State Bank arising out of a certain chattel mortgage claimed by said bank to be a valid lien upon the property in the hands of the trustee belonging to the estate of Henry H. Platts, bankrupt, should not be paid in full, to the exclusion of the rights of the general creditors. Upon the return of said order said matter was referred to Hon. Henry A. Muller, referee in bankruptcy, to take testimony and make findings of fact and conclusions of law as to the validity of said lien. The stock of merchandise upon which the mortgage is claimed to have been a valid lien has heretofore, by order of the court, been sold free of incumbrances; and the present proceeding is for the purpose of determining the validity of the lien claimed by the bank upon the proceeds of the property sold, now in the hands of the trustee. As shown by the order filed herein, the referee found in favor of the bank, and the trustee is ordered to pay the amount of the lien claimed by the bank out of the proceeds now in the hands of the trustee, in preference to the claims of the general creditors. The trustee, feeling aggrieved by the decision of the referee, excepted to the findings of fact and conclusions of law made by him; and at his request the referee has certified the questions involved, together with the testimony, findings of fact, and conclusions of law, so that said order may be reviewed.

The trustee has excepted to the sixth, seventh, fifteenth, and sixteenth findings of fact made by the referee, and also to the conclusions of law made by the referee upon the facts found.

The sixth finding of fact is as follows:

"That, to secure said notes, the said Platts gave to the bank a mortgage on his entire stock of general merchandise, situated in the village of Egan, Moody county, South Dakota; that, by the terms of said mortgage, the mortgagor, Henry H. Platts, was permitted to remain in possession of and to sell the property covered by said mortgage in the usual course of trade; and that said mortgage contained a clause requiring said mortgagor to pay and deposit the proceeds of said sales in the Egan State Bank, mortgagee, to be applied in the payment of the notes, to secure which such mortgage was given."

The exception to this finding of fact must be overruled, as it is in strict accordance with the evidence.

The seventh finding of fact is as follows:

"That at the time of making the loan last above mentioned, and in consideration thereof, it was further agreed between the parties thereto that the proceeds of the sales thereof be deposited as aforesaid, to be applied in payment of the debts and expenses incurred in said business under the direction and with the consent of the said mortgagee, and to pay the mortgage debt."

Unless the finding of the referee is clearly against the weight of evidence, this court will not disturb it; and, there being evidence to sustain such a finding, the exception thereto will be overruled.

The fifteenth and sixteenth findings of fact are as follows:

"(15) That the evidence does not show that either of the above-described mortgages was given, accepted, or withheld from record with the intent to defraud any creditor of the said Platts, or with any fraudulent intent what-

soever, or that any creditor was deceived or induced to give credit by any delay in filing either of said mortgages. (16) That there is no evidence that the petitioner believed or had cause to believe at the time of the making of either of said mortgages that the said Platts was insolvent, or that he was receiving a preference, within the meaning of the national bankruptcy act of 1898."

After a careful consideration of the testimony certified, I cannot agree with the learned referee that these findings are supported by the testimony in the case. Nor can I agree with the conclusions of law found from the facts. The facts, as shown by the testimony, seem to be substantially as follows: The bankrupt, Henry H. Platts, was a merchant at the town of Egan, Moody county, this state, on the 8th day of December, 1899. On that date he borrowed from the Egan State Bank \$600, giving his promissory note therefor, with interest at 10 per cent. per annum from date, due June 8, 1900. On the same date, in order to secure the payment of said note, he executed and delivered to said bank a chattel mortgage, which, so far as is material to the consideration of this case, is in the following language:

"Know all men by these presents: This mortgage, made this eighth day of December in the year A. D. 1899, by H. H. Platts of Egan, county of Moody, state of South Dakota, by occupation a merchant, mortgagor, to Egan State Bank, of Egan, county of Moody, state of South Dakota, by occupation a banking business, mortgagee, witnesseth, that the mortgagor mortgages to the mortgagee the following described personal property, now in my possession in said town and county, to wit: All of the dry goods, including boots and shoes, in his store on west one-half  $\frac{1}{2}$  of lot three (3), block (22), of Egan, South Dakota, amounting to about \$4,000.00 (four thousand & no/100 dollars), according to the invoice price, as security for the payment to the said Egan State Bank, of Egan, S. D., of six hundred & no/100 dollars, with interest thereon at the rate of 10 per cent. per annum until fully paid, as expressed in one promissory note, of even date herewith, described as follows, to wit: One for \$600.00, payable June 8th, 1900."

—That said mortgage was withheld from record until August 10, 1900, when it was duly filed. When said note was due, Platts paid the interest thereon, amounting to \$30, and by an indorsement in writing on the back of the note the payment of the same was extended for six months. Platts remained in possession of his stock of merchandise, selling the same in the ordinary course of trade, and replenishing his stock from time to time as he desired. None of the proceeds were applied on this note, and no agreement, either in or outside of the mortgage, was made to that effect. The proceeds of sales made by Platts were deposited in the Egan State Bank, and were checked out by Platts in payment of claims against him, and for any purpose which he chose. This condition of affairs continued until the 2d of November, 1900. The referee did not find that the bank had any lien by virtue of this mortgage, and no such finding could be made, because the mortgage was void as to creditors, whether filed for record or not; and it can have no bearing upon the consideration of this case, except in determining what the actual state of affairs between Platts and the bank was under the mortgage which is to be hereafter mentioned. But it does not follow that, because this first mortgage was invalid, the debt thereby secured was not a valid one, and remains such notwithstanding

the invalidity of the mortgage. On the 2d day of November Platts borrowed \$500 from the Egan State Bank, and gave 11 promissory notes, as follows: One for \$75, due November 30, 1900; one for \$75, due December 31, 1900; one for \$125, due January 31, 1901; one for \$75, due February 28, 1901; one for \$100, due March 31, 1901; one for \$100, due April 30, 1901; one for \$100, due May 31, 1901; one for \$100, due June 30, 1901; one for \$100, due July 31, 1901; one for \$100, due August 31, 1901, and one for \$150, due September 30, 1901. The \$600 which was due June 8, 1900, the payment of which was extended until December 8, 1900, was added to the loan of \$500, to make up the amount of the notes given November 2, 1901. On November 2, 1901, Platts, in order to secure the payment of the notes just described, executed and delivered to the Egan State Bank a chattel mortgage, which, so far as is material to the consideration of this case, is as follows:

"This mortgage, made this 2nd day of November, A. D. 1900, by H. H. Platts, of the village of Egan, of Moody county, and state of South Dakota, mortgagor, to the Egan State Bank, a corporation, of the village of Egan, Moody county, and state of South Dakota, mortgagee, witnesseth, that the mortgagor mortgages to the mortgagee all that personal property described as follows, to wit: The stock of dry goods, groceries, boots and shoes, furnishing goods, Yankee notions, hats & caps, crockery, and all fixtures, scales, and sundries, contained in frame building situated on west half of lot four (4), block nineteen (19), in the village of Egan, Moody county, state of South Dakota, as will more freely appear by inventory hereto attached, marked 'Exhibit A,' and made a part of this mortgage. And it is further agreed by the mortgagor that he will make daily deposits of all sales of goods made by him to apply on the notes secured by this mortgage until all of said notes are paid. And it is further agreed by the mortgagor that this mortgage will cover all further purchases of goods made by me to replace sold stock, and this mortgage to cover all future advances made to me by the said Egan State Bank."

Upon the validity of this last-named mortgage depends the validity of the lien claimed by the bank. The mortgage given December 8, 1899, having been given more than four months prior to the filing of the petition in bankruptcy, is not affected by the bankruptcy law. It is only to be tested by the general law governing chattel mortgages, and, as I have stated, was clearly void as against creditors of Platts, under the facts shown in this case, whether it was on record or not. The mortgage given November 2, 1900, is subject to the principles of general law as well as the bankruptcy act of 1898; the involuntary petition to have Platts adjudged a bankrupt having been filed December 13, 1900. Section 67e of that act provides as follows:

"That all conveyances, transfers, assignments or incumbrances of his property, or any part thereof, made or given by a person adjudged a bankrupt under the provisions of this act, subsequent to the passage of this act, and within four months prior to the filing of the petition, with the intent and purpose on his part to hinder, delay or defraud his creditors or any of them, shall be null and void as against the creditors of such debtor."

The mortgage given November 2, 1900, was recorded November 8th of the same year. Conceding, but not deciding, that the mortgage was valid on its face, what does the testimony show as to the real condition of affairs between Platts and the bank? It clearly

appears from the testimony that no attempt was made to carry out that provision in the mortgage which is as follows:

"And it is further agreed by the mortgagor that he will make daily deposits of all sales of goods made by him, to apply on the notes secured by this mortgage, until all of said notes are paid."

Platts, according to the terms of the mortgage, was left in possession of the property, to dispose of it and add to it in the ordinary course of trade. Mr. Struble, cashier of the bank, and who acted for the bank in all matters concerning this mortgage, testified as follows:

"Q. How much do you think he [Platts] deposited in your bank from the time he executed this second mortgage up to the time that his stock was taken under bankruptcy proceedings? A. When was his store closed? Q. The 13th of December. A. I should judge that he deposited \$300 or \$400. Q. Did you make any claim to any part of this money which he deposited with you, excepting what was at the time due on notes? A. No; I did not. Q. Did you exercise any control over the proceeds of his sales? A. Yes, sir. Q. To what extent? A. To this extent: That what few bills were standing against him with me at that time, that they should be paid. Q. What few bills were standing against him, and were with you for collection, should be paid? A. Yes, sir; all the money that Mr. Platts deposited with me after that time I had control of, and it was used in the payment of debts. Q. Was there any agreement to that effect at the time you took the mortgage? A. Yes; there was; Q. What was that agreement? A. The agreement was that the money he got from the sale of those goods should go in to pay up this mortgage, and also pay off his indebtedness. Q. Which you held for collection? A. Not only me, but that might be held against him, whether we held it or not. Q. Did he ever render you an account of the amounts of his sales,—a statement? A. No; he did not. Q. At the time you let him have the \$600, there was no such agreement made at that time, was there? A. No; there was no agreement made, other than Mr. Platts paid a few accounts at that time. They were not very heavy, but they were left there and paid into the business as he saw fit to do, but there was no particular specific agreement at all. Q. Did you ever have an accounting with Mr. Platts on this last mortgage,—what is due on it? A. A settlement, you mean? Q. An accounting of sales, and so on? A. No; nothing other than when his note came due I told him to go in and get his note, and give me a check out of the proceeds for it. Q. Did you attempt to control him [Platts] as to what claims he should pay and what he should not pay? A. Nothing, only I was looking out for my own claim. I don't know as I told him to pay the claims in the hands of attorneys, or anything of that kind, but I saw that he did. He sent drafts at different times to the attorneys, but otherwise I did not attempt to control him as to the payment of those funds. Q. As long as the funds went to the payment of his creditors, you paid no attention as to who they were, or who was paid? A. No; I did not."

On cross-examination he testified as follows:

"Q. Have you any statement showing the amount of Mr. Platts' sales after you took that mortgage? A. Nothing only my individual ledger, showing his deposits. Q. He never made any statement to you as to what his sales for any particular day or any particular time was, did he? A. No, sir; nothing only he showed me the general footing for the month before. He didn't give me any daily record or anything of the kind. Q. The 'general footings,'—what do you mean by that? A. Well, his showing; his entire cash sales and credit sales during each month. He exhibited his books showing that [cash book]. Q. He did not turn over to you the gross amount of his sales? A. No; he didn't turn over anything like that. Q. Did he make any statement of what his expenses were? A. No; he did not."

The bankrupt, Platts, went on the stand and testified as follows concerning the mortgage of November 2, 1901:

"Q. What were you to do with the money, the proceeds of sales of goods which were covered by this mortgage? A. I was to pay those notes to the bank as they became due, and I was to apply the rest in payment of debts I was owing for goods."

On cross-examination he testified as follows:

"Q. You used the goods, the proceeds of the goods, and so on, out of your business, to support your family, did you, Mr. Platts, after giving this mortgage? A. I don't understand the question. Q. After you gave this chattel mortgage you used the money out of your business, from your goods, in supporting your family, did you? A. I presume I did. I naturally would."

These quotations from the testimony that appear in the record, and which are not qualified by any other testimony found therein, show that there was no attempt by either Platts or the bank to comply with the contract in the mortgage that Platts should make daily deposits of all sales of goods made by him, to apply on the notes secured by this mortgage, until all of said notes were paid. The fact clearly appears that Platts remained in possession of the property attempted to be mortgaged, and sold and disposed of the same in the ordinary course of business, just the same after giving the mortgage as he did before; that the Egan State Bank was the bank in which he made his deposits; that when he wanted to pay any debt he drew his check upon the bank, and it was honored if he had funds. Both Mr. Struble and Mr. Platts testify that the actual understanding between the parties was that the proceeds of the sales should be deposited for the purpose of paying any creditor of Platts, including the notes held by the bank. Platts never rendered any statement of the expenses of carrying on the business, so that the bank would have any knowledge of what the actual sales amounted to, over and above expenses. He lived and supported his family out of the proceeds of the sales. After giving the second mortgage, and before the stock was seized by proceedings in bankruptcy, according to Struble's testimony, there was deposited by Platts \$300 or \$400. Yet, in the face of this fact, the note of \$75 given by Platts, and due to the bank November 30, 1900, was not paid until December 8th; and that is the only payment upon all this indebtedness of Platts to the bank that has ever been made, notwithstanding there was \$300 or \$400 deposited between November 2, 1900, and December 13, 1900, which, according to the terms of the second mortgage, were to be applied on this debt, and notwithstanding there was \$2,500 deposited by Platts between December 8, 1899, and December 13, 1900. It is clearly made to appear by the testimony that the giving of the mortgage of November 2, 1900, made no difference as to the relations existing between Platts and the bank, or the conduct of the business on the part of Platts. He did not pay any more attention to paying the bank's notes than he did any other creditor. In fact, if Platts paid into the bank \$300 or \$400 between the date of the second mortgage and the date the goods were seized under bankruptcy proceedings, and this amount, except \$75, went to pay creditors, then he paid more to other creditors than he did to the bank. It is not probable that Platts had any intention of defrauding his creditors by any dishonest act, but, when we are called upon to determine the intent of a debtor in this kind

of a case, the debtor must be held to have intended the natural and legal result of his act; and, if his act in giving the mortgage in question did in fact operate to hinder or delay his creditors, then he must be held to have intended this result; and that such a mortgage would have this result need not be argued. Platts agreed in the mortgage that he would make daily deposits of all sales of goods made by him, to apply on the notes secured by the mortgage, until all of said notes were paid. This agreement, being on record, is supposed to have been known by all his creditors, and they might have been content with that state of affairs; but, when we ascertain that no attempt was made to comply with that agreement, we cannot escape the conclusion that the mortgage did in effect hinder and delay the creditors of Platts, and if that was its effect, and that effect flowed naturally and legitimately from the giving of such a mortgage, and the mortgagor failing to live up to its provisions, then it must be held that Platts intended just such a result. It must not be forgotten that the words of the statute are "hinder, delay, or defraud," thus making a distinction between the intent to defraud and the intent to hinder or delay. In this connection the language of Paine, J., in *Pilling v. Otis*, 13 Wis. 497, is instructive:

"We think the charge is also liable to the objection that it confounds the distinction between mere intent to hinder and delay creditors and the intent to defraud them. The statute clearly recognizes this distinction. It makes void all conveyances made 'with intent to hinder, delay or defraud' creditors. This language implies that the intent to defraud is something distinct from the mere intent to 'delay.' And whoever has been familiar with trials involving the question of fraud in sales has doubtless often noticed the necessity of this distinction. It is frequently the case that debtors, with an honest intention to pay their creditors in the end, make some shift or transfer merely to gain time. And it is usual in such cases for counsel to lay great stress upon the facts indicating the intent to pay at last, as disproving fraud. It is natural for the minds of jurors as well as others to give them that effect. For the term 'fraud,' as ordinarily understood, imports something of a more vicious character than the mere production of a delay of judgment. If a court, therefore, should tell a jury that it required 'an intent to hinder, delay and defraud creditors,' in order to avoid a sale, they might very naturally find the sale good, though satisfied of the intent to delay, upon the ground that the debtor also intended to use the time gained by providing for full payment in the end. The charge in this case was given in the form stated, and for that reason we think it liable to the objection urged against it on the argument here."

The actual transaction between the bank and Platts, as shown by the testimony, constituted a legal fraud which avoided the mortgage as against the creditors of Platts.

Being of the opinion that it must be held in this case that the mortgage of November 2, 1900, is void because the natural and legal effect of the same would be to hinder and delay the creditors of Platts, it may not be necessary to discuss the further question as to whether or not, so far as the mortgage covered the past-due debt of \$600, it constituted a preference under the bankruptcy act of 1898. This question cannot properly be decided on the present record, for the reason that there is no finding of the referee, nor is there sufficient evidence upon which a court could find one way or the other, as to whether Platts was insolvent on the 2d day of

November, 1900. If he was, of course, there could be no preference. If he was insolvent, and the bank had reasonable cause to believe that in giving the mortgage of November 2, 1900, so far as it covered the past-due debt of \$600, Platts intended to give a preference, then as to the \$600 the mortgage would be void, under section 60b; and, if the case were to turn upon this proposition alone, it would have to be remanded to the referee, with instructions to take testimony and make a finding upon the question as to the solvency of Platts on the 2d day of November, 1900. In view of the finding of the referee in this case that the bank did not have reasonable cause to believe that Platts intended to give a preference, I desire to state some principles of law which should govern the determination of such a question: Whether a person whom it is alleged has received a preference has reasonable cause to believe that it was intended thereby to give a preference or not, of course, involves the question as to whether or not the transferee had reasonable cause to believe that the person making the transfer was insolvent, but it is not essential that the creditor should have actual knowledge or belief in his debtor's insolvency, but that he should have reasonable cause to believe his debtor to be insolvent; and if facts and circumstances with respect to the debtor's financial condition are brought home to him, such as would put an ordinarily prudent man on inquiry, a creditor is chargeable with knowledge of the fact which such inquiry would reasonably be expected to disclose. It results from these views that the order sought to be reviewed should be vacated and set aside; that the findings of fact and conclusions of law made by the referee should be vacated and set aside; that an order be entered to this effect, and also declaring the mortgage in question void, and no lien upon the assets in the hands of the trustee.

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## In re GRAHAM.

PIERIK v. HAVENS &amp; GEDDES CO. et al.

(District Court, S. D. Illinois. June 25, 1901.)

**BANKRUPTCY—VOIDABLE PREFERENCE.**

Evidence considered, and *held* to establish the fact that the agent of a creditor, who took an assignment of an insurance policy under which a loss had occurred, to secure his principal's debt, within four months prior to the debtor's bankruptcy, and while she was insolvent, had reasonable cause to believe that it was intended thereby to give a preference, so as to render the assignment voidable, under Bankr. Act 1898, § 60b.

In Bankruptcy. On exceptions to report of special commissioner. Alonzo Hoff and Brown, Wheeler, Brown & Hay, for complainant. James M. Graham, for defendants.

HUMPHREY, District Judge. Briefly stated, the facts are that the bankrupt bought a stock of goods at Pawnee, Ill., in June, 1898, from Ament & Dixon; the first-named partner being the same Ament who then was, and still is, the agent of the defendants Hav-



ens & Geddes Company. The bankrupt suffered a loss by fire February 7, 1900. On February 10, 1900, three days after the fire, Ament, on behalf of the defendants, procured from the bankrupt an assignment of a certain fire insurance policy for \$2,000 as security for a debt of about \$900 due the defendants Havens & Geddes Company. Flora J. Graham was adjudged a bankrupt April 16, 1900. The complainant Pierik was appointed receiver April 27, and the bill herein was filed May 25, 1900, praying that the assignment of the insurance policy be decreed to be null and void, and the insurance company required to pay the amount due thereunder to the receiver. The cause was referred to W. E. Shutt, special commissioner, to take proof and report conclusions; and the commissioner reported May 13, 1901, recommending that the prayer of the bill be refused. The matter now comes before the court upon the exceptions of Herman Pierik, receiver, to the report of the special commissioner.

Under section 60a of the bankrupt act, the assignment of the insurance policy gave a preference to the defendants. As to this there can be no dispute. The bill in this case prays for relief under section 60b of the act, and is based upon the assumption that the defendants Havens & Geddes Company had reason to believe that the assignment so given was intended to work a preference. The whole question here turns upon the application of this section of the statute to the facts as disclosed by the evidence. It appears that Ament knew the bankrupt intimately for about 10 years. When the bankrupt bought the stock of goods from Ament and his partner, Dixon, in June, 1898, the bankrupt owned nothing in her own right, except a dower interest in a small homestead, and a life estate in a few other pieces of real estate, of very small value. The entire value of the real estate, as shown by the statement of the bankrupt, in June, 1898, was only \$1,600, and both the bankrupt and her husband testify that Ament at that time knew and was told what the interest of the bankrupt was. The bankrupt testifies that she then and there told Ament that she was paying for the stock with notes she held belonging to her children. "I said to him, 'You know that this money is the children's money, that I am buying the goods with?' He said, 'Yes,' he knew all about it." (Page 3 of Flora J. Graham's testimony.) "I said to Mr. Ament, 'You know I have nothing only the home,—my dower in the home place. The rest was the children's, you know.' " (Page 5, Flora J. Graham's testimony.) It appears also that the bankrupt signed two property statements prepared by the agent, Ament; that these statements both include the several pieces of real estate, the fee of which belonged to the bankrupt's children. One of these statements, made June 27, 1898, fixes the value of real estate in Keyesport, Ill., at \$1,200, and the other, made January 4, 1900, fixes the value of the same real estate in Keyesport at \$1,800; and the bankrupt testifies that at the time of making both statements she told Ament, in substance, that she did not own the property, but only had a dower in the homestead, but he insisted that she should sign it as he made it out. Without stating in words the various items of evidence tending to bring to the defendants, through their agent, Ament, the knowledge of the insolvency of the bankrupt, it

is sufficient to say that Ament knew in 1898 that the bankrupt had practically nothing of her own; that he had kept himself advised as to her business since; that he knew she was behind in her payments; that his house had held up a shipment in the fall of 1899 on account of failure to pay; that Dixon, his former partner, had a claim against the bankrupt which he was unable to collect; that other houses had discontinued business with her because they did not consider her good. All of these facts were known to Ament prior to and at the time of the taking of the assignment in question, as the evidence clearly shows. Against this is the testimony of Ament himself that he was innocent of any intention to gain a preference for Havens & Geddes Company, and ignorant of the insolvency of the bankrupt; that he did not know she had paid for the stock with her children's money, and did not know that the real estate in question belonged to the children; that he supposed it belonged to the bankrupt. The weight of the evidence on these questions is against the witness Ament. I am of opinion that the assignment of the fire policy in question was a preference given to Havens & Geddes Company by the bankrupt, Flora J. Graham, within four months before the filing of the petition in bankruptcy, at a time when she was insolvent, and that the defendants, through their agent, Ament, had reasonable cause to believe that such assignment was intended to be a preference for the benefit of the creditors, Havens & Geddes Company. The exceptions are sustained. The prayer of the bill will be granted, and an order entered accordingly.

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In re LAWLER et al.

(District Court, D. Washington, W. D. June 22, 1901.)

**BANKRUPTCY—DEBTS HAVING PRIORITY—WAGES UNDER WASHINGTON STATUTE.**

Section 5919, 2 Ballinger's Ann. Codes & St. Wash., providing that "every person performing labor for any person, company or corporation, in the operation of any railway, canal or transportation company, or any water, manufacturing, or mining company, sawmill, lumber, or timber company," shall have a prior lien for wages due for labor performed during the six months preceding the filing of the claim therefor, is sufficiently broad to include all persons who give their time for hire in the operation of any of the companies named; and a traveling salesman for a lumber company is within its provisions, and on the bankruptcy of the company is entitled to priority of payment for wages earned within the preceding six months, under Bankr. Act 1898, § 64b, cl. 5.

In Bankruptcy. Hearing on the claim of R. E. Rogers to be preferred as a creditor to the amount of \$563, due for wages.

Greene & Griffiths, for claimant.

HANFORD, District Judge. By the uncontradicted evidence it appears that the claimant, R. E. Rogers, was employed by the bankrupt at a salary of \$150 per month between September 20, 1899, and July 20, 1900, and that on the latter date there was an unpaid balance of \$563 for wages earned under his contract within a period of six

months next preceding the initiation of the bankruptcy proceedings herein. The disputed question in the case is whether or not Mr. Rogers is entitled to a lien upon the assets in the hands of the trustee for the entire amount of his demand, by virtue of section 5919, 2 Ballinger's Ann. Codes & St.; that section being a reprint of the first section of a statute of this state enacted in the year 1897 (Laws 1897, p. 55), entitled "An act providing for a lien for employes," and it reads as follows:

"Every person performing labor for any person, company or corporation, in the operation of any railway, canal or transportation company, or any water, mining or manufacturing company, saw mill, lumber or timber company, shall have a prior lien on the franchise, earnings, and on all the real and personal property of said person, company or corporation, which is used in the operation of its business, to the extent of the moneys due him from such person, company or corporation, operating said franchise or business, for labor performed within six months next preceding the filing of his claim therefor, as hereinafter provided; and no mortgage, deed of trust or conveyance shall defeat or take precedence over said lien."

While the amount of the debt is undisputed, the trustee contends that the statute should be construed narrowly, so as to limit its application to those who perform manual labor in the operation of railroads, canals, mines, sawmills, and other factories; and a number of adjudged cases have been cited, holding that statutes giving a preference to claims of laborers for their wages should be interpreted by giving to the word "labor" a restricted definition, signifying manual toil for hire. But the legislature of this state has declared a different policy. The general statute providing for liens of mechanics and material men contains a section providing that:

"The provisions of law relating to liens created by this chapter and all proceedings thereunder, shall be liberally construed with a view to effect their object." 2 Ballinger's Ann. Codes & St. § 5917.

The title of the act of 1897 indicates an intention to treat all the employes of railroad and transportation companies, milling and other manufacturing corporations, with equal favor. If the terms used in the body of the statute left its meaning obscure, it would be proper to refer to the title of the act for a key to the solution of any difficult question affecting its interpretation. The word "employes" is of broad significance, including any person who gives his time for hire. It is my opinion that the title of this statute was not chosen in a careless manner, but with a deliberate purpose to aid in giving the enactment a true interpretation in accordance with the intention of the legislature to insure to the employes of corporations in this state payment of their wages by subjecting the entire assets and franchise of every industrial corporation to a prior lien in favor of employes. A careful reading of the statute also leads to the conclusion that the legislature selected its words with care, to accomplish the purpose expressed in the title. The statute does not in terms restrict its beneficence to persons performing labor in the operation of railways, canals, mines, sawmills, and factories, but is much more comprehensive. The lien is given to every person performing labor in the operation of any railway, canal, or transportation company, or any water, mining, or manufacturing company, sawmill, lumber, or

timber company. Therefore all participants in carrying on the operation of the several different kinds of companies mentioned are entitled to liens. The bankrupt in this instance carried on business as a sawmill and lumber company, and its operations included the manufacturing of logs into lumber, and the marketing of the manufactured product. In going from place to place to find a market for the lumber manufactured by his employer, Mr. Rogers was aiding in carrying on the operation of a lumbering company; and there is no good reason for discriminating against one so employed, by assuming that his services can be efficient without requiring any labor on his part. Success in the calling of a traveling salesman requires skill, energy, and perseverance; and in going from place to place, seeking customers, these traveling salesmen have to make considerable physical exertion. Therefore I consider that one who is employed by a lumber company as a traveling salesman, within the strict letter of the statute, belongs to the class of persons entitled to liens for their wages. It is true that the earlier statutes giving liens for wages were more restricted in their terms than the statutes of this state are now, and that the courts were inclined to construe all such statutes strictly; but the tendency shown by the successive legislative enactments has been in the direction of equality in affording protection to all wage earners, and the disposition of the courts is to march in step with the legislative branch of the government, and to judicially expound and enforce the laws in accordance with the legislative will. *Mining Co. v. Cullins*, 104 U. S. 176-179, 26 L. Ed. 704; *Stryker v. Cassidy*, 76 N. Y. 50, 32 Am. Rep. 262, and note. Section 64b of the bankruptcy law provides that debts owing to any person who by the laws of the states or the United States shall be entitled to priority shall be paid in full out of the bankrupt estate in the order of payment therein specified; and, by virtue of this provision of the law, I direct the trustee to allow the full amount of this claim as a preferred debt, of the rank indicated by clause 5 of the section referred to.

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GREEN RIVER DEPOSIT BANK et al. v. CRAIG et al.

(District Court, W. D. Kentucky. August 23, 1901.)

1. **BANKRUPTCY—VERIFICATION OF PETITION.**

Petition in bankruptcy is not subject to motion to dismiss for want of jurisdiction because of failure of one of the petitioners to verify it.

2. **SAME—ASSIGNMENT FOR CREDITORS.**

An assignment for the benefit of creditors is of itself an act of bankruptcy, though the debtors are not insolvent.

8. **SAME—PARTNERSHIP.**

Where a partnership and the individuals composing it make an assignment for the benefit of creditors, the act of bankruptcy is committed by all.

In Bankruptcy.

John J. & L. H. McHenry, for plaintiff.

Joseph Noe, Joseph H. Miller, and J. R. Duffin, for petitioning creditors.

Sweeney, Ellis & Sweeney, for defendants.

EVANS, District Judge. On the 24th day of July, 1901, three creditors of Craig Bros., whose provable debts exceeded the sum of \$500, filed a petition in bankruptcy against that firm and the members thereof, and prayed that they might be adjudged bankrupts, upon four distinct grounds, only one of which need be specifically mentioned. That ground was that A. J. Craig and John Craig, composing the firm of Craig Bros., and Craig Bros., within four months before the filing of the petition, had made a general assignment of all their property for the benefit of their creditors to James D. Camfield. This petition, when filed, was verified by only two of the creditors. On the 5th day of August, 1901, the debtors appeared by counsel, and filed: First, a motion to dismiss the petition for want of jurisdiction; second, a general and special demurrer; and, third, an answer to the merits, stating in the latter pleading, however, that they did not intend thereby to waive either their motion to dismiss or their demurrer. The motion to dismiss was based upon the contention that the court had not acquired and could not acquire jurisdiction of the proceeding, because, when the petition was filed, it had not been sworn to by each of the three petitioners who had joined in it. The court is of opinion that the objection urged is not, in a proper sense, jurisdictional, though a failure to make the verification required by the general rules in bankruptcy and by law might, upon the defendant's objection, result in checking the progress of the litigation until the verification was properly made. In *re Simonson* (D. C.) 92 Fed. 904, 1 Am. Bankr. Rep. 197. After the motion to dismiss was filed, namely, on August 7, 1901, the third creditor did duly verify the petition, and when that was done all that the debtors could demand in that regard had been performed. Besides, instead of waiting until this verification was made, the debtors, two days before it was done, filed an answer to the merits, and I am not sure that that of itself was not a waiver of the objection that the petition had not been verified by all three of the creditors. It seems to the court that it acquired jurisdiction of the case upon the filing of the petition, although it could, and upon the proper presentation of the matter would, have required that the pleading should be verified by the three petitioners before the defendants would be required to answer it. The motion to dismiss for want of jurisdiction is therefore overruled. Indeed, that precise motion does not seem to be the proceeding applicable to the difficulty which the defendants desire to meet at this point. A motion for a rule to require a proper verification would probably be the better step, and, if such rule was not complied with, the court might then dismiss the petition for that reason.

The demurrer filed is based upon the objection that the petition is not sufficient because it does not on its face state the fact to be that the defendants are not wage earners, and are not chiefly engaged in farming or in tillage of the soil. Section 4 of the bankruptcy act provides that "any natural person, except a wage-earner or a person engaged chiefly in farming or the tillage of the soil, \* \* \* shall be subject to the provisions and entitled to the benefits of this act." With this section before it, the supreme court, in making the general

orders in bankruptcy, prescribed form No. 3 for petitions by creditors against a debtor, which, no doubt, has been generally followed in involuntary bankruptcy cases from that time until now. It might, I suppose, be quite fairly inferred that the judges of that court, in framing the rules and forms, considered the question whether the allegation that the debtor was not a wage earner, and was not chiefly engaged in farming or the tillage of the soil, was essential, and concluded that it was not. Otherwise, doubtless, the form prescribed would have included it. They probably thought that the exceptions named in section 4 could more properly be specially and affirmatively pleaded if the facts justified it, and that they need not be anticipated or negatived in the petition. Settling form 3 is strong evidence of this. The decisions upon the subject are contradictory, but the one most directly in point is that of the circuit court of appeals of the Seventh circuit in *Re Taylor*, 42 C. C. A. 1, 102 Fed. 728, 4 Am. Bankr. Rep. 515, where, however, an answer was filed after a demurrer was overruled, and the direct issue of fact upon the proposition was made. That case holds that the exceptions must be negatived in the petition. The answer in this case presents no plea or defense of that character, and I am much inclined to think that the defendants, by pleading to the merits, have thereby themselves overruled their demurrer, even if their answer did expressly assert that it was not intended to waive it. *Mitf. & T. Pl. & Prac.* 304; *Story, Eq. Pl.* § 688. The equity rules, and not the State Code of Practice, govern in bankruptcy proceedings. The difficulties upon this point, however, have happily been removed by an amended petition which expressly avers that the debtors are not chiefly so engaged and are not wage earners. The petition, construed with reference to section 5 of the act, sufficiently charges that the individual members of the firm of Craig Bros., as well as the partnership, made the general assignment for the benefit of creditors; and since the case of *George M. West Co. v. Lea*, 174 U. S. 590, 19 Sup. Ct. 836, 43 L. Ed. 1098, it is not necessary to charge, nor for the fact to be, that the defendants were insolvent when the assignment was made. The assignment is of itself an act of bankruptcy. A copy of that paper, duly authenticated, has been filed as an exhibit to the petition. The demurrer to the petition is overruled. The answer does not deny that the general assignment was made. The defendants would be entitled to a jury to try the issues made as to the other acts of bankruptcy alleged, but as those issues have become immaterial by the admitted fact that the general assignment was made, and as they may now be disregarded, there is no issue for a jury to try, and one is not necessary.

At the hearing the evidence showed that on the 23d day of July, 1901, A. J. Craig and John Craig, individually and as the persons composing the firm of Craig Bros., both joined in making a general assignment to James D. Camfield of all their property, individual and partnership alike, for the benefit of all their creditors; and it inevitably results from these admitted facts, whatever may be the truth upon the other issues involved, that there must, upon that ground, be an adjudication both against the firm and the individual

members composing it. The proper rule seems to be that, where both the partnership and each of the individuals who compose it make the assignment, the act of bankruptcy is committed by all of them. The adjudication should therefore embrace both the firm and the individual members. Section 5, Bankr. Act; *In re Meyer*, 39 C. C. A. 368, 98 Fed. 976, 3 Am. Bankr. Rep. 559; *In re Grant* (D. C.) 106 Fed. 497, 5 Am. Bankr. Rep. 838. Orders accordingly may be prepared.

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In re BECK.

(District Court, D. Massachusetts. July 10, 1901.)

No. 4,696.

**BANKRUPTCY—MEMBER OF PARTNERSHIP—SELECTION OF TRUSTEE.**

Bankr. Act, § 5b, providing that the creditors of the partnership shall appoint the trustee, applies only in case of a joint petition; and in case of the separate bankruptcy of one of the members, though all the assets are partnership assets, the separate creditors are entitled to vote.

In Bankruptcy.

Joseph A. Sweeney, for creditors.  
Samuel B. Taft, pro se.

LOWELL, District Judge. The only question left to be decided in this case concerns the right of a separate creditor to vote for trustee in case of the separate bankruptcy of one member of a partnership; all the assets being partnership assets, and there being one joint creditor. Bankr. Act, § 5b, provides that "the creditors of the partnership shall appoint the trustee," but I am of opinion that this provision applies only in the case of a joint petition. In the case of a separate petition it would be inconvenient that the right of creditors to vote should depend upon the bankrupt's membership in a partnership perhaps undisclosed in the petition, or upon the nature of the assets. Would the separate creditors appoint the trustee, under a joint petition, if all the assets were separate? It is a safer rule to make the right to vote depend upon the nature of the petition, and not upon outside facts. We are not concerned here with the distribution of the estate, but only with the choice of a trustee. See *Clarke v. Stanwood*, 166 Mass. 379, 44 N. E. 537, 34 L. R. A. 378; *In re Webb*, Fed. Cas. No. 17,317. If the votes of the majority of separate creditors will unduly affect the rights of the minority of joint creditors, the referee has power to control the decision of the former. It may be said that in this case, under section 5h, the partnership property should be administered by the nonbankrupt partner. This may be true, but the fact does not concern the right to vote for trustee of the bankrupt. Perhaps the nonbankrupt partner has assented to the administration of the joint estate by the court of bankruptcy. Decision of the referee affirmed.

## In re FLY.

(District Court, S. D. California. April 29, 1901.)

No. 1,458.

**BANKRUPTCY—EXEMPTIONS—TEMPORARY CHANGE OF OCCUPATION.**

A bankrupt who was engaged in farming until a short time before the adjudication is entitled to the exemptions given to a farmer by the laws of the state, although he is temporarily engaged in another pursuit, but without intention to permanently abandon his former occupation.

In Bankruptcy. Review of referee's decision dismissing so much of bankrupt's petition to set aside exempt property as relates to two horses, a sucking colt, plow, harrow, hayrake, and cultivator.

A. J. Monihon, Adcock & Reymert, and J. M. Emmert, for petitioner.

R. V. Bouldin, for trustee.

WELLBORN, District Judge. The evidence is undisputed that up to June of last year the bankrupt was actively engaged in farming. Although the bankrupt has since engaged in another pursuit, yet I think the inference a fair one that this latter occupation is but temporary, and does not mean permanent abandonment of his former occupation. It has been held, under the Iowa statute, that a debtor could claim his exemption as a farmer, though he had temporarily stopped farming and was living in town, and had sought other employment there, and had offered to sell some of his farming implements, if he intended to resume farming. *Pease v. Price*, 101 Iowa, 57, 69 N. W. 1120; 12 Am. & Eng. Enc. Law (2d Ed.) 104, note 1. See, also, *Caswell v. Keith*, 12 Gray, 351; *Freem. Ex'ns*, § 226. The referee's decision, so far as it relates to the articles above enumerated, is reversed, and said articles will be set aside to the bankrupt as exempt.

## In re ANDERSON.

(District Court, D. Massachusetts. July 10, 1901.)

No. 3,867.

**BANKRUPTCY—EXEMPTIONS—ALLOWANCE UNDER STATE INSOLVENCY LAW.**

Under Bankr. Act, § 6, allowing the exemptions prescribed by the state laws in force at the time of filing the petition, a bankrupt in Massachusetts is allowed the exemptions established by Pub. St. Mass. c. 171, § 84, but is not entitled to the allowance for the support of his family provided by the state insolvency law (Id. c. 157, § 99) pending the proceedings under such law, since such allowance is not an exemption, but relates to that part of the insolvency law which is suspended in its operation by the bankrupt act.

In Bankruptcy.

Henry T. Richardson, for bankrupt.

William M. Morgan, for trustee.



LOWELL, District Judge. Pub. St. Mass. c. 157, § 99, provide that:

"The debtor shall receive from the assignee one dollar a day for his attendance on the judge or the assignee when required under section seventy. He shall also be allowed out of his estate, for the necessary support of himself and his family, such sum not exceeding the rate of three dollars per week for each member of his family, and for such time not exceeding two months, as the judge may order. Every debtor who is discharged shall be allowed five per cent. on the net produce of all his estate received by the assignee, if such net produce after such allowance is sufficient to pay the creditors entitled to a dividend the amount of fifty per cent. on their debts; but the allowance shall not exceed in the whole five hundred dollars."

The bankrupt seeks to obtain the allowance given by the second sentence of the section above quoted. To do this, he must establish that the allowance to be made is one "of the exemptions which are prescribed by the state laws in force at the time of the filing of the petition." Bankr. Act, § 6. Precisely what meaning should be given to the word "exemption" is difficult to determine in a case like this. Hitherto the only exemptions allowed in this district have been those established by Pub. St. Mass. c. 171, § 34, concerning goods exempt from execution, which exemptions are dealt with by the Massachusetts insolvency act in section 46. Upon the whole, though with considerable doubt, I think that the allowances made by section 99 are not properly exemptions, within the purview of section 6 of the bankrupt act, but are concerned with that part of the insolvency law which is suspended in its operation by the passage of the bankrupt act. We can hardly suppose that the debtor is entitled to receive from the trustee one dollar per day for his attendance, as provided in the first sentence of section 99, or that he is to be allowed 5 per cent. on the net produce of his estate, if that estate pays a 50 per cent. dividend to his creditors, as provided in the last sentence of the same section. The provision here in question, which comes between the two just mentioned, may seem less objectionable, but one can hardly be enforced under the bankrupt act while the others are refused enforcement. Moreover, it is to be observed that the allowance provided is at the discretion of the judge of probate, and it is doubtful if the bankrupt act was intended to substitute in any respect the discretion of the judge of the district court for that of the judge of probate. True, if the allowance is denied, the bankrupt will get less from his own estate than if the bankrupt act had not been enacted, and the insolvency law was still in force. This result seems opposed to the general intent of section 6 of the bankrupt act, but in this case the result seems unavoidable. The judgment of the referee is reversed, and the allowance to the bankrupt is denied.

## In re COVINGTON.

(District Court, E. D. North Carolina. August 24, 1901.)

## 1. BANKRUPTCY—DISCHARGE—FINDINGS OF REFEREE.

The findings of fact of a referee in bankruptcy on petition for discharge, where a rule of court requires him to hold the meeting to consider it, will not be disturbed, except for clearly-shown error.

## 2. SAME—REPORT OF REFEREE—EXCEPTIONS.

In excepting to findings of fact or conclusions of law by a referee in bankruptcy, equity rule 83, requiring the errors to be specifically pointed out, should be followed.

In Bankruptcy.

J. H. Cook, for petitioner.

B. F. McLean and Patterson & McCormick, for defendant.

PURNELL, District Judge. On the 8th day of March, 1901, petitioner was duly adjudged a bankrupt, and on June 10th following filed a petition for discharge. Notice of a meeting of creditors was duly issued, and at such meeting certain creditors objected to the discharge on grounds which are set out in specifications filed. The referee finds the facts, and recommends the discharge be granted. A consideration of the cause has been delayed at the request of counsel, on account of conflicting engagements in their state courts.

Referees are important officers in the administration of the bankrupt law, and great weight should be given their decisions. In many respects their relation to the court corresponds to that of a master in chancery, especially under the rule in this district requiring them to hold the meeting of creditors to consider the petition for discharge, which is a general order of reference,—a duty not required by statute. The findings of fact by a referee will not, therefore, be reversed, unless it is clearly shown there is error in such findings, such as would, under the equity rules, which govern in bankruptcy proceedings, by express provisions of the statute, justify the reversal of a master in an equity cause. Referees are not only judicial officers charged with the performance of the duties prescribed in the statute, for the faithful performance of which they take and subscribe an official oath, but are also required to give bond to insure the observance of the oath. This is an unusual requirement, of a quasi judicial officer. Being thus bound, their decisions should not be lightly treated, but given the consideration due to conclusions reached by conscientious officers seeking to discharge their duty to the best of their ability. That they sometimes err is to be expected. So do the ablest judges of all the courts. But they should not be reversed except upon clear and convincing proof of error, especially as to the findings of fact, when they have seen the witnesses and heard them testify.

There are five specifications in opposition to the discharge, which will be considered in detail:

The first specification charges that the bankrupt made a false oath, in that he swore he did not know he was insolvent when he transferred the cotton mill stock to S. W. Covington, on January 1, 1901. Upon a careful examination of the original record of bankrupt's ex-

amination (B), the referee finds no evidence to support this charge. He therefore recommends that this specification be overruled. The finding of the referee on this specification is affirmed. There are no satisfactory grounds to say the referee is not correct in his conclusion.

The second and fifth specifications are to the same transaction. From the evidence and the schedules it appears that on March 31, 1900, the bankrupt borrowed from J. D. Shaw, Jr., \$1,500, and, to secure the same, he and his wife executed a mortgage on his wife's land. The note was due March 31, 1901. Just prior to the execution of the mortgage the bankrupt had constructed upon the land two stores at a cost of about \$1,300; the money having been borrowed to replace the money which the bankrupt had expended upon the said buildings, and to finish paying for their erection if needed. On the 9th day of February, 1901, before the said mortgage fell due, the bankrupt made a payment on the same to Mr. Shaw of \$1,300, knowing that he (the bankrupt) was insolvent. On February 21, 1901, the bankrupt executed a general assignment to W. H. Neal. The second specification charges that the bankrupt made a false oath, in that he failed to schedule this \$1,300 payment as a debt due by his wife to him; and the fifth specification charges that he had concealed assets, by not scheduling this \$1,300 as a debt due by his wife to him. Under Schedule A (2), "Creditors Holding Securities," the following appears:

"John D. Shaw, Jr., has a mortgage, dated on or about 31st March, 1900, on wife's property. This was given to secure a debt of bankrupt for money loaned him. Amount of mortgage was \$1,500, on which a payment of \$1,300 was made by bankrupt on the 9th day of February, 1901. The wife's property is located northeast side of Main street, Laurinburg, N. C. The said Shaw holds the above note, for which bankrupt's wife became surety. The value of said property is about \$2,500. J. D. Shaw, Jr., resides in Laurinburg, N. C. Bankrupt's wife signed said mortgage and note as surety for bankrupt."

The referee held the statement of the transaction as appears in the schedules is sufficient to negative the idea of concealment of assets and false oath, and recommends that these specifications be overruled. The specifications are overruled. The suggestion (for it is only a suggestion) of false oath and concealment of assets is too remote to sustain a refusal of discharge, under the statute.

"In specification 3, objectors charge that bankrupt failed to keep proper books, with fraudulent intent, etc. While it appears books were not kept as carefully as they should have been, the evidence will not support the finding that a fraudulent intent was present, or that there was any omission to keep books in contemplation of bankruptcy." The language of the statute is (section 14b, Bankr. Act):

"Discharge the applicant unless he has (1) committed an offense punishable by imprisonment as herein provided; or (2) with fraudulent intent to conceal his true financial condition and in contemplation of bankruptcy, destroyed, concealed, or failed to keep books of accounts or records from which his true condition might be ascertained."

The finding of fact by the referee is affirmed, and the specification overruled.

**The referee says:**

"It appears from the evidence that S. W. Covington had clerked for the bankrupt 'pretty much all last year,' and the bankrupt had borrowed from said S. W. Covington \$100. That there had been no contract between the bankrupt and said Covington as to how much was to be paid for services as clerk, but just prior to the transfer to him of said stock \$300 was agreed upon. The value placed upon the said mill stock was \$400. The objectors charge that the delivery by the bankrupt to S. W. Covington of this mill stock just prior to his execution of his deed of assignment to W. H. Neal constituted a concealment of assets. From the evidence it does not appear that the debt was fraudulent or fictitious, nor that there was any concealment of assets in this transaction. The referee therefore recommends that this specification be overruled."

The conclusion or charge of objectors is not sustained, but is a mere inference. The debt not being fraudulent or fictitious, it was a recognition and payment of what was due. If not in full, this would have been a preference; but, being in full, the conclusion of the referee that it was no concealment of assets is sustained by the evidence in the cause. The payment of a bona fide debt is not a concealment of assets, or the discovery of microscopic germs of dishonesty to some creditors in making such payments, sufficient grounds for refusing a discharge in bankruptcy. The recommendation of the referee is adopted, and the specification overruled.

In excepting to findings of fact or conclusions of law by a referee in bankruptcy, equity rule 83, and the construction thereof in *Railway Co. v. Gordon*, 151 U. S. 285, 14 Sup. Ct. 343, 38 L. Ed. 164, should be followed, except where otherwise provided in the bankruptcy act. It was intended referees should do the detail work in bankruptcy causes (section 39, Bankr. Act), and the district judge should review their action on exceptions thereto. An order will be entered granting a discharge according to the petition.

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**In re TWADDELL.**

(District Court, D. Delaware. June 18, 1901.)

**1. BANKRUPTCY—ASSETS—ESTATE DEVISED.**

A testator devised certain real estate situate in Pennsylvania to the mother of the bankrupt "for and during the term of her natural life and at the time of her decease to her surviving children equally share and share alike \* \* \* to hold to them, their heirs and assigns, forever." After the death of the testator and during the lifetime of the life beneficiary, one of her children was adjudged a bankrupt. *Held*, that he had a vested interest in the subject of the devise, which passed to his trustee in bankruptcy.

**2. SAME.**

Mere ability, possessed by one who subsequently becomes a bankrupt, by deed, conveyance, or assignment, or by executory contract, to estop or preclude himself from claiming title to or enjoying property wholly acquired after the execution of such deed or contract, does not constitute "property which prior to the filing of the petition he could by any means have transferred."

**3. SAME.**

Where the contingency relates to the event, and not to the person, the remainder-man possesses a right or title which may indifferently be considered or termed a vested right in or to a contingent interest or estate,

or a contingent right to a future interest or estate, and such a right is alienable and transmissible to heirs or personal representatives according to its nature, and consequently passes to a trustee in bankruptcy of the remainder-man.

(Syllabus by the Court.)

Leonard E. Wales, for creditors.

William F. Kurtz, for bankrupt.

BRADFORD, District Judge. The question now for decision was certified to this court by the referee in bankruptcy for this county, under section 39a(5) of the bankruptcy act, together with his finding thereon. It is whether John P. Twaddell had at the date he was adjudged a bankrupt, by virtue of the last will and testament of Jacob W. Horter, any interest or claim in or to certain real estate situate in Pennsylvania transmissible to the trustee in bankruptcy. The finding of the referee is that the bankrupt had not at the time of his adjudication such an interest or claim. The testator died on or about August 4, 1875, and it was admitted at the hearing that he was at the time of his death the owner in fee of the real estate in question. The sixth item of his will, which was duly admitted to probate and recorded in the office of the register of wills for the city and county of Philadelphia, August 9, 1875, is as follows:

"Sixth. I give and bequeath unto my daughter Catherine Twaddell, wife of William Twaddell, for and during the term of her natural life and at the time of her decease to her surviving children equally share and share alike, the following properties, viz., my brick house situate at the southwest corner of Wharton and Hicks streets, in the Twenty-sixth Ward of the said city of Philadelphia, also my three-story brick house situate on the west side of Sixth street, north of Master street, No. 1416, in the Twentieth Ward of the said city of Philadelphia, to hold to them, their heirs and assigns forever."

It appears from an agreed statement of facts that Catherine Twaddell, one of the daughters of the testator, had twelve children, of whom the bankrupt is one, living at the time of the testator's death, all of whom are now living, and that their mother was living at the time of the adjudication in bankruptcy. It is admitted that she is still living. By virtue of section 70 of the bankruptcy act the trustee, upon his appointment and qualification is, subject to a certain proviso and an exception not pertinent to this case, vested with the title of the bankrupt as of the date of the adjudication to all "property which prior to the filing of the petition he could by any means have transferred or which might have been levied upon and sold under judicial process against him." Did, or did not, the bankrupt from and after the death of the testator and during the lifetime of his mother have some right, title or interest, vested or contingent, to or in the real estate, which prior to the filing of the petition in bankruptcy he "could by any means have transferred" or which might have been levied upon and sold under judicial process? Either such transferability or such liability to be sold would establish its transmissibility to the trustee in bankruptcy. But it is absolutely essential to the successful assertion of any right on the part of the trustee that the bankrupt should have had at the date

of the adjudication, a claim or interest of some kind, vested or contingent. Mere ability possessed by one who subsequently becomes a bankrupt, by deed, conveyance or assignment, or by executory contract, to estop or preclude himself from claiming title to or enjoying property wholly acquired after the execution of such deed or contract, is not sufficient to constitute "property which prior to the filing of the petition he could by any means have transferred." The Circuit Court of Appeals for this circuit, in the case of *In re Wetmore*, 108 Fed. 520, in treating this subject, said:

"It is the 'title of the bankrupt, as of the date he was adjudged a bankrupt,' which is 'vested by operation of law' in the trustee; and this title, so far as pertinent to this case, must be to 'property which prior to the filing of the petition he could by any means have transferred or which might have been levied upon and sold under judicial process against him.' A bare possibility or mere expectation of acquiring property does not constitute property or a title to property; nor can it be transferred or levied upon. While the right of enjoyment may be uncertain and contingent, it is necessary that an interest or title of some kind be vested in the bankrupt in order that it may pass by operation of law to the trustee. If the contingency or uncertainty be such as relates to the person, and not merely to the event, and he who is to take remains unascertained by name, designation or description, obviously no given individual while so unascertained can be held to have a property right to or in the subject-matter of the gift or limitation. \* \* \* If the bankrupt had an expectant estate it undoubtedly passed to the trustee. But if he had no claim or title, absolute or defeasible, vested or contingent, but merely an expectation of an estate or interest in the future, then there was nothing in him to pass to the trustee. \* \* \* One may have a contingent right to a future interest or estate. So one may have a right in or to a future contingency. But it cannot with legal propriety be affirmed of anyone that he has either a contingent right or a right in or to a contingency unless the person of whom the affirmation is made is ascertained by name, designation or description."

As the controversy here relates to land, the *lex rei sitæ* governs, and on the question whether the bankrupt had at the time of the adjudication a right, title or interest, vested or contingent, absolute or defeasible, to or in the houses referred to in the sixth item, recourse must be had to the law as declared or recognized by the supreme court of Pennsylvania. In that state any such right, title or interest is alienable by him who has it and liable to execution process. In *Drake v. Brown*, 68 Pa. 223, the court, through Agnew, J., said:

"It is the settled doctrine in this state that all possible titles, vested or contingent, in real estate, may be taken in execution and sold, provided there be a real interest in the defendant in the execution, legal or equitable."

The requirement in the proviso of "a real interest in the defendant," it should be observed, is an essential part of the proposition laid down by the court. The testator devised the houses to his daughter Catherine Twaddell "for and during the term of her natural life and at the time of her decease to her surviving children equally share and share alike \* \* \* to hold to them, their heirs and assigns forever." The word "surviving" has relation to the death of the testator or to the death of Catherine Twaddell. It cannot relate to both. If it has relation to the death of the testator, the remainder in fee immediately on his death vested in the then living children of Catherine Twaddell, but was liable to open

during her lifetime and let in after-born children. *Minnig v. Batdorff*, 5 Pa. 503; *Chew's Appeal*, 37 Pa. 23; *Ross v. Drake*, 37 Pa. 373; *Coggins' Appeal*, 124 Pa. 10, 16 Atl. 579. In *Minnig v. Batdorff*, supra, the court, through Bell, J., said:

"When there is an immediate gift to children, those only living at the testator's death will take; but it is now settled, that where a particular estate or interest is carved out, with a gift over to the children of the person taking that interest, or of any other person, the limitation will embrace not only the objects living at the death of the testator, but all who shall subsequently come into existence before the period of distribution. Such a remainder vests in the objects to whom the description applies at the death of the testator, subject to open and let in others answering the description as they are born successively. As to the latter, the remainder is contingent until they are in esse, but then it immediately vests, and from thenceforth is attended by all the properties incidental to vested estates."

If the word "surviving" has relation to the death of Catherine Twaddell, there is only a contingent remainder in fee to such of her children now or hereafter born as shall survive her. The contention on the part of the petitioners that, even if the survivency relates to the death of Mrs. Twaddell, the remainder was vested on the death of the testator in her children, though liable to be divested by the happening of a condition subsequent, namely, their death during the lifetime of their mother, is opposed to both principle and authority. While it is true that in one or more cases language, largely if not wholly obiter, is to be found which, taken by itself, lends some color to such an idea, not only the well settled rules and tests for determining whether a given remainder is vested or contingent, but the authorities are fatal to the contention. *McBride v. Smyth*, 54 Pa. 245; *Chess's Appeal*, 87 Pa. 362; *Sager v. Galloway*, 113 Pa. 500, 6 Atl. 209; *Coggins' Appeal*, 124 Pa. 10, 16 Atl. 579; *Craige's Appeal*, 126 Pa. 223, 17 Atl. 585. Nor is this court prepared to sustain the contention on the part of the petitioners that it is wholly immaterial whether the limitation of the fee after the life estate is a vested remainder, on the one hand, or a contingent remainder, on the other. The remainder cannot be contingent unless the word "surviving" has relation to the death of the first taker. On that assumption the limitation is only to such of her children as shall be living at the time of her death. Under such a limitation it cannot be ascertained until the death of the first taker occurs whether any of the children will take anything. The happening of that event enters into and is essential to the description of the persons who, if any, will take under the limitation, and before it happens no right passes to any child which on his or her death during the lifetime of the first taker is capable of transmission under the law of descent. In *McBride v. Smyth*, 54 Pa. 245, the court, through Strong, J., said:

"It is impossible to admit that a gift to such of a number of persons as may meet a defined description, is a gift to all the persons, whether they meet the description or not. The rule of legal construction, as well as the testamentary intent in such cases, is well stated in *Smith on Executory Interests*, page 281. It is this: 'Where real or personal estate is devised or bequeathed to such children or such child or individuals as shall attain a given age, or the children who shall sustain a certain character, or do a particular act, or be living at a certain time, without any distinct gift to the

whole class, preceding such restrictive description, so that the uncertain event forms part of the description of the devisee or legatee, the interest so devised is necessarily contingent on account of the person. For, until the age is attained, the character is sustained, or the act is performed, the person is unascertained; there is no person answering the description of the person who is to take as devisee or legatee.'"

The doctrine thus enunciated has uniformly, so far as I am aware, met the approval of the supreme court of Pennsylvania. *Coggins' Appeal*, 124 Pa. 10, 16 Atl. 579; *Craige's Appeal*, 126 Pa. 223, 17 Atl. 585. In the law of contingent remainders there is a fundamental distinction between contingency as to the person who is to take and contingency as to the event on the happening of which a right, interest or estate is to be acquired under the limitation over. Where the contingency relates to the event, and not to the person, the remainder-man possesses a right or title which may indifferently be considered or termed a vested right in or to a contingent interest or estate, or a contingent right to a future interest or estate, and such a right is alienable and transmissible to heirs or personal representatives according to its nature. But where the contingency relates to the person the case is essentially different. A contingent remainder is none the less a remainder because limited to persons not in esse. But such a limitation *ex vi termini* excludes the alienability or transmissibility of the remainder so long as it remains contingent. If land be devised to one for life and at his death in fee to such of his children as shall survive him, there can be, before his death occurs, no remainder-man in esse having capacity to take. In such a case it would seem that the existence of remainder-men cannot be disassociated from their capacity to take, and that, as such capacity cannot exist before their ascertainment by the death of the first taker, they cannot be regarded as in esse before that event, so far as the alienability or transmissibility of any interest or title under the limitation is concerned. The distinction under discussion, which is also applicable to executory devises and bequests, is clearly recognized in the Pennsylvania cases. In *Kelso v. Dickey*, 7 Watts & S. 279, the contingency related to the event, and not to the person. The court, through Sergeant, J., said:

"The contingency on which the legatees over were to take was not a contingency annexed to their capacity to take: such, for example, as their living to a certain time; but an event independent of them, and not affecting their capacity to take or transmit the right to their representatives; and such a contingent interest has frequently been decided to be vested so as to be transmissible to representatives."

So, in *Hopkins v. Jones*, 2 Pa. 69, the contingency attached only to the event, and the court, through the same learned judge, said:

"There is no contingency here that affects the transmissibility. There is a contingency, which affects the right of Rebecca J. Rutter ever to take, but none that affects the vesting of her right or possibility, so as to pass to her representatives on her death before the contingency happens."

In *Chess's Appeal*, 87 Pa. 362, the court, through Sharswood, J., said:

"In the common case of a legacy or gift to A., and on his death to B., no one doubts that both interests, the present and the future, vest together at the same instant. Attaching a contingency to the gift of the second bequest



ought not and does not affect the case unless that contingency relates to the capacity of the second legatee or donee to take. In a legacy to A., and if he dies before attaining the age of twenty-one, then to B., the interest of B., though dependent upon a contingency, is transmissible. It would be different if the gift over was to B. at twenty-one, for if he should die before attaining that age, he could never take, and could therefore have nothing to transmit."

In *Sager v. Galloway*, 113 Pa. 500, 6 Atl. 209, the contingency related to the person. The court, through Trunkey, J., said:

"The property is devised to a person in fee when he is twenty-one years of age; and any person under that age, though answering the description in all other respects, can take nothing, and no person can take through or under him. \* \* \* The remainder is not limited to take effect immediately on the death of the testator's children. It is limited to take effect after their decease, and in favor of a person when he attains a given age. Should he die before arriving at that age no person claiming under him, by descent or otherwise, would have right of possession or property. Although the plaintiff is the person who will be entitled to the property if he lives long enough, the devise passes to him when he arrives at the age of twenty-one years. The particular age is made a constituent part of the description of the object of the devise, and the remainder cannot vest before. The person is not ascertained before the given age."

So, in *Coggins' Appeal*, 124 Pa. 10, 16 Atl. 579, the contingency attached to the person. The court, through Paxson, J., said:

"The gift is to those 'who shall have attained or shall attain the age of twenty-five years.' \* \* \* A grandchild who dies before arriving at twenty-five takes no interest; nothing which he can dispose of by will or otherwise; nothing which can descend to his heirs. \* \* \* The provision in regard to age is descriptive of the persons who shall take under the will, for no one can tell until that time arrives who will be entitled."

Such also was the nature of the contingency in *Craige's Appeal*, 126 Pa. 223, 17 Atl. 585. The court, through Green, J., said:

"There are no words of gift except those which also describe the legatees. \* \* \* It is therefore not the case of a previous gift and a postponement of the time of payment, but an immediate and direct gift to a class of persons who must fulfill the description contained in the very words of the gift in order to take it at all. They are not donees in any sense unless they are children of Edmund and Ann, living at the death of Edmund and Ann."

If the children who may take cannot be ascertained until the death of Mrs. Twaddell, and if they have no right, title or interest which can pass from them by alienation or descent during her lifetime, I fail to perceive that one of them who becomes a bankrupt during her lifetime could under such a limitation have any "property which prior to the filing of the petition he could by any means have transferred or which might have been levied upon and sold under judicial process against him." There would be a possibility, probability or expectation on his part of acquiring on the death of his mother an interest or estate, but during her lifetime no right or title in him, vested or contingent, to any interest or estate, absolute or defeasible, transmissible to a trustee in bankruptcy. *Bristol v. Atwater*, 50 Conn. 402; *In re Hoadley* (D. C.) 101 Fed. 233; *In re Gardner* (D. C.) 106 Fed. 670.

But on a careful review of the Pennsylvania decisions I have, though with some hesitation, reached the conclusion that the word "surviving," as employed by the testator in this case, must be re-

garded as relating to the time of his death, and consequently that the children of Mrs. Twaddell living at that time took a vested remainder in fee. In Pennsylvania the law strongly favors the early vesting of estates. In *Letchworth's Appeal*, 30 Pa. 175, the court, through Lowrie, C. J., said:

"The law always and naturally inclines to attribute the real and substantial ownership of property to some existing person, even in the case of a trust, and never to leave any part of it in abeyance. In other words, it always inclines to treat the whole interest as vested, and not as contingent; and therefore, in case of doubt or mere probability, it declares the interest vested."

And in *Chew's Appeal*, 37 Pa. 23, the court, through Strong, J., said:

"A remainder is always to be considered vested, rather than contingent, if the words of the will creating it are capable of such a construction."

The remainder is limited on the death of Mrs. Twaddell to "her surviving children," and not to her children "surviving her" or "then living." The words "her surviving children" are susceptible of two constructions, neither of which would do violence to the language of the testator. They may mean her children surviving her, or her children surviving the testator. It is not stated whom the children are to survive. There is no other provision in the will which can serve to shed light on this point. The words "at the time of her decease" are in no way coupled with the survivorship and do not postpone the vesting of the remainder, but only fix the time when it shall take effect in possession or enjoyment. *Chew's Appeal*, 37 Pa. 23; *Minnig v. Batdorff*, 5 Pa. 503. It is a general rule, liable, however, to be controlled by particular expressions in the will clearly indicating an intention to the contrary, that words of survivorship are to be referred to the death of the testator, not only where there is an immediate gift to survivors in the absence of any precedent life or other particular estate, but also where the limitation is after such a precedent estate. *Johnson v. Morton*, 10 Pa. 245; *Ross v. Drake*, 37 Pa. 373; *Woelpper's Appeal*, 126 Pa. 562, 17 Atl. 870. This rule of construction prevents the exclusion from the testator's bounty of the issue of such of the children of the first taker as die during the continuance of the precedent estate, and the partial intestacy of the testator which would thereby result in many cases, were the words of survivorship referred to the death of the first taker. The rule accords with the presumed intention of the testator and should be applied, unless it would defeat his actual intention as clearly shown by the language of the will. Here there are no particular expressions indicating an intent that the words of survivorship should not relate to the testator's death. The case stands baldly on the words "her surviving children." Under the Pennsylvania decisions, "surviving" is referable to the testator's death. I am unable to distinguish this case in principle from *Ross v. Drake*, 37 Pa. 373. There the testator provided as follows:

"Item. It is further my will that a like sum of seven hundred dollars remain in my real estate, the interest of which shall be paid annually to my son John Ross during his natural life, and such part of the principal sum as my executors may deem necessary and proper; and if any part of the said

sum of seven hundred dollars, or interest thereon, should remain unexpended at the decease of my said son John, it is my will that the same be divided equally among his surviving children, share and share alike. But if my said son John should prefer having the said sum of seven hundred dollars laid out in land for his use, then it is my will that my executors purchase a tract of land, the selection of which shall be agreeable to him, and have the title so made that he shall have the occupancy of the same during his natural life, and at his decease to go to his surviving children, their heirs and assigns forever, to be equally divided amongst them, share and share alike. Should the latter be the choice of my said son John, it is then my will that my son Washington advances the said sum of seven hundred dollars in one year after my decease, or as soon after as it may be wanted for the purpose of making the said purchase."

John Ross, the son, chose to have the sum of money mentioned laid out in the purchase of land for his use, and pursuant to the above clause of the will, land of his selection was purchased for his use during life, and for the ulterior devisees in fee, as therein directed. The land was limited to him "during his natural life," and at his decease "to his surviving children" in fee as tenants in common. While here the land is limited to a daughter for life and at her death "to her surviving children" in fee, there it was limited to a son for life and at his death to "his surviving children" in fee. No argument or consideration can be advanced in this case to show that the words "her surviving children" mean "her children surviving her," which was not equally applicable to show that the words "his surviving children" meant "his children surviving him." The two cases are in substance identical. It was held that the word "surviving" related to the death of the testator, and that a child of the first taker who died intestate after the death of the testator, but before the death of the first taker, had a vested interest in the land which on her death descended to the plaintiff in the ejectment suit, who was her son. The court, through Strong, J., said:

"The gift of the property in controversy in this case is to be treated as a devise of realty. \* \* \* The argument is that the testator intended only such children as should survive the tenant for life, and be in existence at the time when the remainder was limited to take effect in possession. This presents the inquiry, to what period does the word 'surviving' relate? Is it to the death of the first taker, or the death of the testator? If there be an immediate limitation by will of an estate to survivors of a class, or of individuals named, to take as tenants in common, a limitation not expectant upon the determination of a prior interest, there is but one period to which the survivorship contemplated can refer, and that is the death of the testator. But if there be an estate for life carved out, and a limitation of the remainder to a class or to several persons named, or to their survivors, to take as tenants in common, there are two periods to which the survivorship may refer, the death of the tenant for life, and that of the testator. It has often been made a question, to which of these two periods the will is to be construed as pointing. Down to the time of our revolution, and for at least one hundred years, it was held in England, and so decided in many cases, that the period intended is that of the death of the testator, and the doctrine was applied indiscriminately to bequests of personalty and devises of realty. \* \* \* Whether the reasons upon which this rule of construction was founded were sound or not, is of little importance, after the long-continued adherence which the English courts gave to it. In regard to bequests of personalty, indeed, a departure was made from it by Sir John Leach in *Cripps v. Wolcott*, 4 Madd. 11, and he has been followed in a few other cases. \* \* \* But the novel doctrine of Sir John Leach has not, even in England, been applied to the construction of devises of realty. \* \* \* Such is the

state of the law in England on this subject. It has been regarded as unsettled, ever since the case of *Cripps v. Wolcott*. In Pennsylvania, the new doctrine asserted in that case has been distinctly repudiated, and the old rule established before our revolution has been recognized as law. Such was the ruling in *Johnson v. Morton*, 10 Pa. 245, and a similar rule of construction was applied to a bequest of personalty in *Buckley's Adm'rs v. Reed*, 15 Pa. 85. It has at least these advantages, that it corresponds with the usual presumption in cases of doubt, that legacies and devises are vested, and that it prevents the disinheritance of a testator's descendants, by the unanticipated death of their immediate ancestor, between the death of the testator and the time fixed for the distributive enjoyment. To this may be added, that it sometimes prevents the happening of an unforeseen intestacy."

If *Ross v. Drake* was rightly decided, it is controlling here; for no distinction can be drawn between the two cases. It has never, so far as I am aware, been held by the supreme court of Pennsylvania that *Ross v. Drake* was wrongly determined; nor has the doctrine of that case ever been denied or questioned by that tribunal. On the contrary, the case has repeatedly been cited with approval. The contention is made on the part of the bankrupt that the doctrine of *Ross v. Drake* practically was repudiated in *Woelpper's Appeal*, 126 Pa. 562, 17 Atl. 870. This contention cannot, in my opinion, be sustained. Not only was there a substantial difference between the testamentary provisions involved in the two cases, but the rule applied in the earlier case was expressly recognized in the later. The court, through Mitchell, J., referred to the rule that "where there is a devise for life with remainder over to survivors, the word survivors shall be taken to refer to the period of the testator's death," and to *Johnson v. Morton*, 10 Pa. 245, as "an excellent illustration of the rule, and of the principles on which it should be applied," and to *Ross v. Drake* as a case which, "though a stronger case in favor of the application of the rule, is not essentially different in principle." The court, further referring to *Ross v. Drake*, *Johnson v. Morton*, and other cases, said:

"We concede them all their legitimate authority in conceding that they establish the general rule that the phrase 'surviving brothers and sisters' means surviving at the death of the testator, and that it shall be so construed unless it clearly appears that the testator meant it to refer to a different period. As already shown, the testator in the present case plainly meant to refer to the time of his daughter's death, and his actual intent being thus entirely clear, there is no room for any presumption, and the cases establishing that presumption have no application."

But here there are no particular expressions to rebut the presumption and, as before stated, the case stands baldly on the words "her surviving children." In *re Hoadley*, 2 Nat. Bankr. N. 704, 101 Fed. 233, and *In re Wetmore*, 99 Fed. 705; *Id.*, 108 Fed. 520, are essentially unlike this case, in that in each of them the words of survivorship expressly and unmistakably related to the death of the first taker. For the reasons given, I am of the opinion that the word "surviving" in the testamentary provision in question has relation to the death of the testator; that on the happening of that event the then living children of Mrs. Twaddell acquired a vested remainder in fee as tenants in common, though liable to open and let in after-born children; and that consequently the bankrupt had, by virtue of that provision, at and prior to the date of the adjudication, an interest

and estate in the houses constituting property which prior to the filing of the petition he could have transferred and which might have been levied upon and sold under judicial process against him. The finding and order of the referee are therefore set aside, with directions that he cause the foregoing interest and estate of the bankrupt to be included in his schedules in bankruptcy, and thereafter disposed of according to law.

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UNITED STATES v. JUNG JOW TOW.

(District Court, D. Oregon. July 20, 1901.)

No. 4,576.

CHINESE—REGISTRATION—DEPORTATION.

Act Cong. Nov. 3, 1893, amending Act Cong. May 5, 1892 (27 Stat. 25), declares it the duty of all Chinese laborers in the United States, entitled to remain there before passage of the act of 1892, to apply within six months for a certificate of residence, and that any neglecting to comply with the provisions of the act and of the act of 1892, or who after expiration of the six months shall be without such certificate of residence, shall be deemed to be unlawfully within the United States, "provided, that no Chinese person \* \* \* convicted \* \* \* of a felony shall be permitted to register under the provisions of this act; but all such persons who are now subject to deportation for failure \* \* \* to comply with the act to which this is an amendment shall be deported." *Held*, that a Chinese laborer having a certificate of residence under the act of 1892 is entitled to remain in the country, though he has no certificate under the later act.

John H. Hall and Edwin Mays, for the United States.  
J. J. Fitzgerald and Chester V. Dolph, for defendant.

BELLINGER, District Judge. The defendant applied for and received a certificate of residence as provided for by the act of congress of May 5, 1892 (27 Stat. 25). It is contended on the part of the United States that, notwithstanding this certificate, he is subject to deportation because he did not register under the amendatory act of November 3, 1893. This act provides that:

"It shall be the duty of all Chinese laborers within the limits of the United States who were entitled to remain in the United States before the passage of the act to which this is an amendment to apply to the collector of internal revenue of their respective districts within six months after the passage of this act for a certificate of residence; and any Chinese laborer within the limits of the United States who shall neglect, fail, or refuse to comply with the provisions of this act and the act to which this is an amendment, or who, after the expiration of said six months, shall be found within the jurisdiction of the United States without such certificate of residence, shall be deemed and adjudged to be unlawfully within the United States," etc.

The section of the act containing these provisions has the following proviso:

"Provided, that no Chinese person heretofore convicted in any court of the states or territories or of the United States of a felony shall be permitted to register under the provisions of this act; but all such persons who are now subject to deportation for failure or refusal to comply with the act to which this is an amendment shall be deported from the United States as in

said and in this act provided, upon any appropriate proceedings now pending or which may be hereafter instituted."

Under this proviso a Chinese laborer who has been convicted of a felony is not subject to deportation unless he has failed or refused to comply with the act amended. If, therefore, such a person has a certificate of residence issued under the act of 1892, he is entitled to remain in the country, notwithstanding the fact that he has no certificate issued under the later act, and is not allowed to have one. The unavoidable conclusion from this is that congress did not intend by the act of 1893 to invalidate certificates issued under the act of 1892. In the construction of statutes, there is a presumption against unreason and absurdity, and the act of 1893 would be a most absurd and unreasonable law, if Chinese convicts, whose registration it forbids, are exempted from deportation because of their compliance with the act of 1892, while Chinese laborers who are not convicts are subject to deportation notwithstanding such compliance on their part. It is a matter of common knowledge that the great majority of Chinese laborers entitled to registration under the act of 1892 refrained from registering upon legal advice that the law was unconstitutional, and pending a decision of that question by the supreme court of the United States in a case before it. In the meantime the time limited in the act within which certificates of residence could be procured expired. These are the circumstances under which the later act was passed, and which explain the purpose for which it was intended. But, if these facts do not fully explain the amendatory law, it is at least clear that this act was not intended to affect Chinese laborers who had fully complied with the act amended.

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In re RAYMOND.

(District Court, E. D. Pennsylvania. September 10, 1901.)

**CONVICTS—GOOD BEHAVIOR—COMMUTATION OF SENTENCE.**

On the assumption that the Pennsylvania act of May 11, 1901, entitled "An act providing for the commutation of sentences, for good behavior of convicts in prisons, penitentiaries, workhouses and county jails of this State, and regulations governing the same," is by congressional legislation applicable to United States prisoners confined in the Eastern Penitentiary of that state at the time of its enactment, a United States prisoner so confined has no right to commutation for good conduct in the absence of a report on that subject by the board of prison officials to the governor and action thereon by the latter, with the approval of the designated state officers.

(Syllabus by the Court.)

John Kent Kane, Chancellor D. Holden, and Hampton L. Carson, for petitioners.

Joseph W. Thompson and Wm. M. Stewart, Asst. U. S. Attys., and James B. Holland, U. S. Atty., for respondents.

BRADFORD, District Judge. Charles W. Raymond has resorted to a writ of habeas corpus to secure his release from alleged unlawful detention in the eastern penitentiary of Pennsylvania, a state insti-

tution for the confinement of prisoners sentenced to imprisonment for crime. In December, 1895, he was convicted in this court of the offence of willfully misapplying the funds of a national banking association, and was sentenced December 23, 1895, as follows:

"And now, the 23d day of December, 1895, all and singular the premises being seen and by the Court here fully understood, it is considered and adjudged that the defendant, Charles W. Raymond, be imprisoned and confined in the Eastern Penitentiary, of the Commonwealth of Pennsylvania, for the term of seven years and five calendar months; that he pay the costs of prosecution and stand committed until judgment be fully complied with, and that he be subject in all respects to the same discipline and treatment as convicts sentenced by the courts of the said Commonwealth."

Pursuant to the sentence he was forthwith committed to the custody of the warden of the penitentiary, where he yet remains in confinement. The principal question sought to be raised in this case is whether the act of Pennsylvania of May 11, 1901, entitled "An act providing for the commutation of sentences for good behavior of convicts in prisons, penitentiaries, workhouses and county jails of this State, and regulations governing the same", has by congressional legislation been made applicable to United States prisoners confined in the eastern penitentiary at the time of its enactment. Section 1 provides that, subject to certain exceptions not material in this connection, a prisoner "may, if the Governor shall so direct, and with the approval of the Board of Inspectors or Managers earn for himself or herself a commutation or diminution of his or her sentence or sentences" according to the specified rate.

Section 3 is as follows:

"Section 3. On any day, not later than the twentieth day of each month, the Board of Inspectors or Managers, or the warden, superintendent or keeper of each of the State prisons, penitentiaries, workhouses or county jails of this State, shall forward to the Governor a report directed to him of any convict or convicts who may be discharged the following month by reason of the commutation of his or her sentence or sentences, which shall contain the following information, namely: The full name of the convict, together with any alias which he or she may be known to have, the name of the county where the conviction was had, a brief description of the crime of which the convict was convicted; the name of the court in which the conviction was had, the name of the presiding judge, the date of the sentence, the date of the reception in the prison or penitentiary, the term and fine, the amount of commutation recommended, and the date for discharge from the prison, penitentiary, workhouse or jail, if allowed."

Section 5 is as follows:

"Section 5. The Boards of Inspectors and Managers of the State prisons, penitentiaries, workhouses and county jails in this State shall meet once every month, before the date fixed for the transmission of their report to the Governor, as hereinbefore provided, and proceed to determine the amount of commutation which they shall recommend to be allowed to any convict, which shall not in any case exceed the amount fixed by this act. They shall have full discretion to recommend the withholding of the allowance of commutation for good conduct, or of a part thereof, as a punishment for offences against the discipline of the prison, penitentiary or county jail, or for any attempt to escape therefrom. In all cases, however, where the board shall recommend the withholding of the allowance of the whole or any part of the commutation for good conduct, they shall forward with their report to the Governor their reasons, in writing, for such disallowance and the Governor may, in his discretion, decrease or increase the amount of commuta-

tion as recommended by the said board, but he shall not increase the same beyond the amount fixed by this act: Provided, however, that the Governor shall not execute any of the rights or powers herein granted unto him until the Lieutenant Governor, Secretary of the Commonwealth, Attorney General and the Secretary of Internal Affairs, or any three of them, after full hearing, upon due public notice and in open session, according to such rules as they shall provide, shall have recommended the said commutations and diminutions of sentences."

It is admitted that the petitioner's conduct while in confinement has been excellent; that he "as prisoner has so demeaned himself that he is entitled to whatever reduction of sentence is legally given to federal prisoners for good behavior;" and that, should he now receive commutation according to the rate specified in section 2 he would thereupon be entitled to his liberty. It is claimed, however, first, that the Pennsylvania act does not apply to federal prisoners, and, secondly, that if applicable to such prisoners sentenced since the date of its passage, it does not apply to those sentenced and committed prior to its passage. If it be assumed that by virtue of federal legislation the system of commutation as a whole provided for by the act is applicable to federal prisoners sentenced and committed to the eastern penitentiary prior to its passage and there remaining confined at that time pursuant to their sentences, it by no means follows that on account of uniform good behavior on their part during their confinement they will become entitled to commutation at the specified rate, or, indeed, to any commutation. Good behavior alone does not cause the act to execute itself so far as commutation is concerned. Certain proceedings required by the act are conditions precedent to the granting of commutation. First, the board of inspectors or managers of the penitentiary shall meet "and proceed to determine the amount of commutation which they shall recommend to be allowed to any convict, which shall not in any case exceed the amount fixed by this act," with "full discretion to recommend the withholding of the allowance of commutation for good conduct, or of a part thereof, as a punishment for offences against the discipline of the prison, penitentiary or county jail, or for any attempt to escape therefrom." Next, they shall within the specified time "forward to the Governor a report directed to him of any convict or convicts who may be discharged the following month by reason of the commutation of his or her sentence or sentences", containing certain information, including, among other things, the full name of the convict, "together with any alias which he or she may be known to have", the "name of the court in which the conviction was had", the "name of the presiding judge", and the "amount of commutation recommended"; and in all cases in which the board "shall recommend the withholding of the allowance of the whole or any part of the commutation for good conduct, they shall forward with their report to the Governor their reasons in writing for such disallowance." After the receipt of the report the governor with the approval of "the Lieutenant Governor, Secretary of the Commonwealth, Attorney General and the Secretary of Internal Affairs, or any three of them, after full hearing, upon due public notice and in open session, according to such rules as they shall prescribe," may "in his discre-



tion, decrease or increase the amount of commutation as recommended by the said board, but he shall not increase the same beyond the amount fixed by this act." It is admitted that the petitioner is not unlawfully restrained of his liberty unless he is entitled to commutation provided for in the act. But under the provisions of the act commutation can only be made by the governor with the approval of the designated state officers, and after a report by the board of prison officials of the penitentiary recommending the allowance or disallowance in whole or in part of the amount of commutation fixed by the act. In the case of the petitioner it was stated and admitted by counsel at the hearing, and appears from the petition for a writ of mandamus hereinafter referred to, that no report has been made by the board of prison officials, nor has his claim for commutation been officially brought to the attention of the governor. It cannot be assumed that the proceedings required by the act are merely formal. On the contrary it is evident that they are necessary to a just, intelligent and discriminating allowance of the commutation provided for. If it be assumed that the board, in omitting to report in the petitioner's case on the subject of commutation, violated the law, such a report and action thereon by the governor were nevertheless conditions precedent to the petitioner's right to a discharge. It is contended, however, on the part of the petitioner that the Pennsylvania act, in the case of a federal prisoner whose conduct during confinement is ascertained to have been uniformly good, "executes itself" in his favor, and entitles him to the maximum commutation prescribed, without any report by the board of prison officials to the governor and action thereon by the latter, and that such good conduct having been admitted in this case the petitioner is now legally entitled to a discharge. It is difficult to perceive on what ground this claim can be sustained. Certainly the act does not in any of its provisions discriminate or suggest any discrimination between state and federal convicts in the matter of commutation or of the terms or conditions on which it is to be obtained. It is a state statute providing a system of commutation or rule of credits for the penitentiaries and other prisons of Pennsylvania, and intended to apply to all prisoners legally confined therein, other than those excepted by its provisions, whether convicted in the courts of the United States or in the courts of that state. The idea that the legislature intended that, while prisoners convicted in the courts of Pennsylvania should for good conduct receive full or partial commutation only on the terms and conditions prescribed, federal convicts confined in her prisons should for good conduct have a right to full commutation according to the rate mentioned in section 2 without respect to any of the required conditions, is wholly inadmissible. In the enactment of the statute in question Pennsylvania was legislating for herself and not for the United States. But it is urged that by virtue of federal legislation the rate or rule of credits mentioned in section 2 has been adopted as the absolute and fixed measure of commutation to which federal convicts are entitled for good conduct, and that such maximum commutation must be accorded to such convicts wholly without regard to the terms and conditions required by the act for the granting of any

commutation. On the supposition that federal legislation touching commutation has application to the act of May 11, 1901, this position nevertheless is, in my opinion, unsound. Sections 5539, 5543 and 5544 Rev. St. U. S. are as follows:

"Sec. 5539. Whenever any criminal, convicted of any offense against the United States, is imprisoned in the jail or penitentiary of any State or Territory, such criminal shall in all respects be subject to the same discipline and treatment as convicts sentenced by the courts of the State or Territory in which such jail or penitentiary is situated; and while so confined therein shall be exclusively under the control of the officers having charge of the same, under the laws of such State or Territory.

"Sec. 5543. All prisoners who have been, or may be, convicted of any offense against the laws of the United States, and confined in any State jail or penitentiary in execution of the judgment upon such conviction, who so conduct themselves that no charge for misconduct is sustained against them, shall have a deduction of one month in each year made from the term of their sentence, and shall be entitled to their discharge so much the sooner, upon the certificate of the warden or keeper of such jail or penitentiary, with the approval of the Attorney-General.

"Sec. 5544. The preceding section, however, shall apply to such prisoners only as are confined in jails or penitentiaries where no credits for good behavior are allowed; but, in other cases, all prisoners now or hereafter confined in the jails or penitentiaries of any State for offenses against the United States, shall be entitled to the same rule of credits for good behavior applicable to other prisoners in the same jail or penitentiary."

Section 1 of the act of March 3, 1875, entitled "An act to provide for deductions from the terms of sentence of United States prisoners" (1 Supp. Rev. St. U. S. p. 89), provides in part as follows:

"That all prisoners who have been, or shall hereafter be, convicted of any offense against the laws of the United States, and confined, in execution of the judgment or sentence upon such conviction, in any prison or penitentiary of any State or Territory which has no system of commutation for its own prisoners, shall have a deduction from their several terms of sentence of five days in each and every calendar month during which no charge of misconduct shall have been sustained against each severally, who shall be discharged at the expiration of his term of sentence less the time so deducted, and a certificate of the warden or keeper of such prison or penitentiary of such deduction shall be entered on the warrant of commitment."

From this legislation it clearly appears that United States prisoners confined in state penitentiaries or prisons, where there is a "rule of credits" or "system of commutation", are entitled only to an equality of right with state convicts confined therein with respect to commutation. They "shall in all respects be subject to the same discipline and treatment as convicts sentenced by the courts of the State or Territory in which such jail or penitentiary is situated." They "shall be entitled to the same rule of credits for good behavior applicable to other prisoners in the same jail or penitentiary." They shall be subject to the same "system of commutation" applicable to state convicts confined therein. If a "rule of credits" or a "system of commutation" includes or necessarily involves the performance of certain conditions precedent to the allowance of the "credits" or "commutation", it is none the less a "rule of credits" or a "system of commutation"; and if congress has adopted such rule or system for United States prisoners, the latter are only entitled to the benefit of such rule or system coupled with such conditions. There is not the slightest evidence that congress intended or has attempted, in

the case of United States convicts confined in the prisons or penitentiaries of a state having a rule of credits or system of commutation, to sever the rate of commutation from the conditions prescribed by the state for its allowance, adopting the former and rejecting the latter; thereby introducing inequality and confusion in the administration of the affairs of a state institution in opposition to the general intent of the state legislation in the premises. The case made by the petitioner lacks the essential element of favorable action by the Pennsylvania authorities with respect to commutation. Without such favorable action he cannot be held to be unlawfully restrained of his liberty, and consequently cannot, as the matter now stands, secure his release on the writ of habeas corpus. He applied for a writ of mandamus in aid of the proceedings on the writ of habeas corpus, setting forth in his petition that the prison officials of the eastern penitentiary, in accordance with section 5, had "determined that the conduct of your petitioner entitles him to be recommended for the full amount of commutation provided by said act"; and that, although often requested so to do, they "refused and still do refuse to make any report to the governor of the State of Pennsylvania with respect to your petitioner as required by the said section 3 of the said act of the State of Pennsylvania," and praying as follows:

"Your petitioner therefore prays your Honorable Court to grant a mandamus upon the said Daniel W. Bussinger, Warden aforesaid, and the said Conrad B. Day, George Vaux, Jr., Alexander Balfour, William G. Huey, and James H. Gay, Inspectors aforesaid, directing and requiring them to report on your petitioner to the Governor of the State of Pennsylvania, as required by the said act of assembly of Pennsylvania or show cause why they do not to this court, and he will ever pray, etc."

Since the hearing the petitioner has abandoned his application for the writ of mandamus as not "necessary for the exercise" of jurisdiction by this court over the proceedings on the writ of habeas corpus in the sense in which those terms are employed in section 716 Rev. St. U. S. The petitioner, having failed to make a case for discharge on the writ of habeas corpus, must be remanded to custody. In view of the conclusion reached it is unnecessary, as it would be improper, to express any opinion on the question whether by virtue of federal legislation the system of commutation provided by the Pennsylvania statute is applicable to and operative in the case of a United States prisoner sentenced and committed to the eastern penitentiary prior to its enactment.

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#### UNITED STATES v. KOPP.

(District Court, D. Washington, W. D. July 24, 1901.)

#### INDIANS—STATUS OF PUYALLUPS—INTOXICATING LIQUORS.

A Puyallup Indian is not within Act Cong. Jan. 30, 1897 (2 Supp. Rev. St. p. 544), prohibiting the sale of intoxicating liquors to an Indian for whom the United States holds title to land in trust, or who is a ward of the government under charge of an Indian superintendent or agent, or over whom the government, through its departments, exercises guardianship; it appearing only that he has inherited from his mother land in the

Puyallup reservation patented in 1886, pursuant to the treaty of December 26, 1854 (10 Stat. 1132, art. 6), and though Act Feb. 8, 1887 (1 Supp. Rev. St. [2d Ed.] p. 536) § 6, confers the right of citizenship on Indians to whom allotments shall be or shall have been made. Section 5, providing that patents shall be issued to the effect that the government holds the land in trust for the Indian to whom it is allotted, applies only to patents thereafter issued.

E. E. Cushman, Asst. U. S. Atty.  
John Leo and J. P. Cass, for defendant.

HANFORD, District Judge. This case has been argued and submitted upon a motion in arrest of judgment after conviction of the defendant. The indictment contained three counts, but the first and third were quashed before the trial. The second count, upon which the defendant was tried, charges that the defendant, within the jurisdiction of this court, "did then and there wrongfully and unlawfully sell, give away, dispose of, and barter to a certain Indian, to wit, Walter Davis,—he, the said Walter Davis, then and there being an Indian to whom an allotment of land had been theretofore made, and the title to the same being then and there held in trust by the government,—certain spirituous, ardent, and intoxicating liquors, to wit, whisky; he, the said Walter Davis, being then and there a ward of the government under the charge of an Indian superintendent and agent, and he, the said Walter Davis, being then and there an Indian of mixed blood, over whom the government, through its departments, exercised and exercises guardianship." This count is founded upon the act of congress entitled "An act to prohibit the sale of intoxicating drinks to Indians, \* \* \*" approved January 30, 1897 (2 Supp. Rev. St. p. 544), the material part of which reads as follows:

"That any person who shall sell, give away, dispose of, exchange, or barter any malt, spirituous, or vinous liquor, including beer, ale, and wine, or any ardent or other intoxicating liquor of any kind, whatsoever, or any essence, extract, bitters, preparation, compound, composition, or any article whatsoever, under any name, label, or brand, which produces intoxication, to any Indian to whom allotment of land has been made while the title to the same shall be held in trust by the government, or to any Indian a ward of the government under the charge of any Indian superintendent or agent, or any Indian, including mixed bloods, over whom the government, through its departments, exercises guardianship, \* \* \* shall be punished by imprisonment for not less than sixty days, and by a fine of not less than one hundred dollars for the first offense and not less than two hundred dollars for each offense thereafter."

In support of this motion, counsel for the defendant has argued, with much learning and ability, that the statute above quoted from is unconstitutional and void, but I have reached a conclusion which makes it unnecessary for me to express any opinion on that question. I consider that there is a total failure of evidence to prove that Walter Davis, to whom whisky was furnished by the defendant, is an Indian for whom the United States government holds the title to land in trust, or that he is a ward of the government under charge of any Indian superintendent or agent, or that he is an Indian or person of mixed blood over whom the government, through its departments, exercises guardianship. The only evidence bearing upon these points

tends to prove that Walter Davis is the son of an Indian mother, born in the United States; that he is recognized as a Puyallup Indian; that he has inherited from his mother a tract of land, which was assigned and patented pursuant to the treaty of December 26, 1854 (10 Stat. 1132, art. 6), between the United States and the Nisqually and other bands of Indians; and that said land is within the Puyallup reservation, which was set apart by said treaty. The sixth article of said treaty makes provision for parceling lands to the Indians in severalty, as follows:

"The president may, \* \* \* at his discretion, cause the whole or any portion of the lands hereby reserved, or of such other lands as may be selected in lieu thereof, to be surveyed into lots, and assign the same to such individuals or families as are willing to avail themselves of the privilege, and will locate on the same as a permanent home on the same terms and subject to the same regulations as are provided in the sixth article of the treaty with the Omahas, so far as the same may be applicable."

Pursuant to this article the Puyallup reservation was surveyed into lots, and the survey was approved on the 30th of January, 1874; and thereafter, on the 30th day of January, 1886, the president signed 166 patents to Indians for tracts. These patents all contain the same recitals and operative clauses. After reciting the provision of the sixth article of the treaty above quoted, each contains the following words of conveyance:

"Now know ye, that the United States of America, in consideration of the premises, and in accordance with the directions of the president of the United States, under the aforesaid sixth article of the treaty of the sixteenth day of March, Anno Domini one thousand eight hundred and fifty-four, with the Omaha Indians, has given and granted, and by these presents does give and grant, unto the said \* \* \* and to his heirs, the tract of land above described, but with the stipulation contained in the said sixth article of the treaty with the Omaha Indians, that the said tract 'shall not be aliened or leased for a longer term than two years, and shall be exempt from levy, sale, or forfeiture, which conditions shall continue in force until a state constitution embracing such lands within its boundaries shall have been formed, and the legislature of the state shall remove the restrictions,' and 'no state legislature shall remove the restrictions \* \* \* without the consent of congress'; to have and to hold the said tract of land, with the appurtenances, unto the said \* \* \*, and to his heirs, forever, with the stipulation aforesaid. In testimony whereof, I, Grover Cleveland, president of the United States, have caused these letters to be made patent, and the seal of the general land office to be hereunto affixed. Given under my hand, at the city of Washington, this thirtieth day of January, in the year of our Lord one thousand eight hundred and eighty-six, and of the independence of the United States the one hundred and tenth.

"By the President.

Grover Cleveland,

"[Seal.]

By M. McKean, Secretary."

The reference in the patent to the sixth article of the treaty with the Omahas makes it proper to insert here that article. It is as follows:

"Art. 6. The president may, from time to time, at his discretion, cause the whole or such portions of the land hereby reserved as he may think proper, or of such other lands as may be selected in lieu thereof, as provided for in article first, to be surveyed into lots, and to assign to such Indian or Indians of said tribe as are willing to avail of the privilege, and who will locate on the same as a permanent home, if a single person over twenty-one years of age, one-eighth of a section; to each family of two, one-quarter section; to each family of three, and not exceeding five, one-half section; to each family of

six, and not exceeding ten, one section; and to each family of ten in number, one-quarter section for every additional five members. And he may prescribe such rules and regulations as will insure to the family, in case of death of the head thereof, the possession and enjoyment of such permanent home and the improvements thereon. And the president may, at any time, in his discretion, after such person or family has made a location on the land assigned for a permanent home, issue a patent to such person or family for such assigned land, conditioned that the tract shall not be aliened or leased for a longer term than two years, and shall be exempt from levy, sale, or forfeiture, which conditions shall continue in force until a state constitution embracing such lands within its boundaries shall have been formed, and the legislature of the state shall remove the restrictions. And if any such person or family shall at any time neglect or refuse to occupy and till a portion of the lands assigned, and on which they have located, or shall rove from place to place, the president may, if the patent shall have been issued, cancel the assignment, and may also withhold from such person or family their proportion of the annuities or other moneys due them, until they shall have returned to such permanent home and resumed the pursuits of industry; and, in default of their return, the tract may be declared abandoned, and thereafter assigned to some other person or family of such tribe, or disposed of as is provided for the disposition of the excess of said land. And the residue of the land hereby reserved, or of that which may be selected in lieu thereof, after all of the Indian persons or families shall have had assigned to them homes, may be sold for their benefit, under such laws, rules, or regulations as may hereafter be prescribed by the congress or president of the United States. No state legislature shall remove the restrictions herein provided for without the consent of congress."

A constitution for the state of Washington was adopted and the state government was organized in the year 1889, and at its first session the state legislature did all that it was competent for the legislature to do towards removing the restrictions upon the right of alienation contained in the patent and the treaties referred to by enacting a statute containing recitals referring to the treaty, and expressly authorizing said Indians to lease, incumber, grant, and alien their lands in like manner and with like effect as any other person may do under the laws of the United States and of this state, and providing that "all restrictions in reference thereto are hereby removed." Laws Wash. 1889-90, pp. 499-501. To become effective, this act of the legislature required the consent of congress, and consent was given conditionally, by a provision for a commission, to be appointed by the president, to select and appraise portions of the land not required for homes of the Indian allottees, and to supervise the sale thereof, contained in the general appropriation act for current and contingent expenses and fulfilling treaty stipulations with the Indian tribes for the fiscal year ending June 30, 1894 (27 Stat. 633). This statute contains, among other provisions, the following:

"That the Indian allottees shall not have power of alienation of allotted lands not selected for sale by said commission for a period of ten years from the date of the passage of this act, and no part of the allotted lands shall be offered for sale until the Indian or Indians entitled to the same shall have signed a written agreement consenting to the sale thereof, and appointing said commissioners, or a majority of them, trustees to sell the said land and make a deed to the purchaser thereof."

The sixth section of the act of congress entitled "An act to provide for the allotment of lands in severalty to Indians, \* \* \*" approved February 8, 1887 (1 Supp. Rev. St. [2d Ed.] p. 536), makes all Indians born within the territorial limits of the United States to

whom allotments shall have been made under the provisions of this act, or under any law or treaty, and all Indians born within the United States who shall have voluntarily taken up their residences separate and apart from any tribe and adopted the habits of civilized life, citizens of the United States, entitled to all the rights, privileges, and immunities of such citizens. The opinion of this court with respect to the legal status of the Puyallup Indians holding lands under patents granted pursuant to the treaty of 1854 is set forth in the opinion in the case of *Ross v. Eells* (C. C.) 56 Fed. 855; and I cannot now state my opinion upon the same questions more concisely than by repeating the principal part of that opinion, which is as follows:

"Formerly the national government had the supreme and absolute power and right to control the Indians by reason of their condition as dependents and wards of the nation, by reason of its title in fee to all the lands reserved for their use and occupation, and by reason of the plenary power vested in congress to make laws for all the people in the territories. But step by step all these controlling powers have been divested. First the patents issued by the president pursuant to the treaty made with the Indians passed the title in fee from the United States to the patentees, subject only to the restrictions and conditions subsequently expressly declared in said treaty. No estate or reversionary interest in the patented lands is reserved or now held by the United States. The restrictions prevent alienation of the lands until authorized by a law of the state to which congress must consent, otherwise than by leases for terms not exceeding two years. The conditions subsequent are that, for specified causes, any patent may be by the president canceled, and the land so forfeited may be assigned to other Indians, or sold for the benefit of all the Indians of the tribe in common. Instead of reserving the right to terminate the estate by a re-entry for breach of the condition, as is usual in conveying an estate subject to a condition, each of these patents creates a power in the president to reassign the land or sell it. This power is not inconsistent with the complete investiture of title in the patentees. Chancellor Kent says: 'Subsequent conditions are those which operate upon estates already created and vested, and render them liable to be defeated.' \* \* \* So long as these estates upon subsequent conditions continue unbroken, they remain in the same situation as if no such qualification had been annexed.' 4 Kent, Comm. (13th Ed.) 126. By this step the government lost entirely the power to control the use of the land. The second step whereby Indian proprietors of land were made citizens deprived the government of the power to coerce such Indians into making or annulling contracts, or of molesting persons upon their premises by their license, when not interfering with the operations of the government or violating any national law. The rights, privileges, and immunities of citizenship in this country include, among others, the right 'to make and enforce contracts, to sue, be parties, give evidence, and to inherit, purchase, lease, sell, and convey property.' These are fundamental rights, and of the essence of civil liberty. *Civil Rights Cases*, 109 U. S. 22, 3 Sup. Ct. 18, 27 L. Ed. 835. The third step transferred from congress to the state government the power to preserve peace and good order, and regulate the making of private contracts, and the use and descent of private property, within this state."

In that case *Ross* sued for an injunction to prevent officers of the United States from interfering with the construction of a railroad across the Puyallup reservation. The decision of this court was reversed by the circuit court of appeals upon the ground, as stated in the opinion, that the land within the boundaries of the Puyallup reservation continued to be, at the time the suit was brought, an Indian reservation, with an agent in charge, who had the right to remove all persons found there contrary to law, under the authority con-

ferred by section 2147, Rev. St. U. S. *Eells v. Ross*, 12 C. C. A. 205, 64 Fed. 417. Since the decision of the circuit court of appeals in that case the conditions have been materially changed by actual sales of a considerable part of the reservation under the provisions of the act of 1893 above referred to. It is certain that the purchasers from the commissioners appointed pursuant to that statute cannot be lawfully evicted from their property, and I hold that by the subdivision and alienation of a considerable part of the patented land the reservation has been abolished, except the part retained as a site for an Indian training school, and use of the government for other purposes. The circuit court of appeals agreed with this court in holding that the sixth section of the act of February 8, 1887, confers the right of citizenship upon the Puyallup Indians to whom lands were patented under the treaty of 1854; and, so far as the opinion delivered by Mr. Justice McKenna indicates the mind of the court, there is no disagreement with this court as to the nature of the estate granted by the patents. I feel justified, therefore, in adhering to the conclusion reached in that case,—that each patent conveyed a title in fee simple, subject to forfeiture upon conditions subsequent, and with a restriction upon the right of alienation for a period to be determined by future legislative enactments.

The statute of February 8, 1887, provides for allotments of lands to Indians located upon reservations created for their use, and the fifth section specifies that the patents to be issued to the allottees "shall be of the legal effect, and declare that the United States does and will hold the land thus allotted, for the period of twenty-five years, in trust for the sole use and benefit of the Indian to whom such allotment shall have been made, or, in case of his decease, of his heirs." To maintain this prosecution, the district attorney contends that, inasmuch as the sixth section of the act confers upon the Puyallup Indians the rights of citizenship, the fifth section must also affect them, and control the patents issued to them, and constitutes the government a trustee to hold the lands patented to them, for a period of 25 years. This argument is untenable. The words of the fifth section restrict its application to patents to be issued in the future, and require the trust to be declared in the patents; but the sixth section plainly expresses the intention of congress to confer the rights of citizenship upon the Indian allottees contemplated by that act, and also upon other Indians born in the United States to whom allotments shall have been made under any law or treaty, and also upon other Indians born in the United States who have voluntarily taken up residences separate and apart from any tribe of Indians, and adopted the habits of civilized life. Moreover, the patents granting lands to the Puyallup Indians were issued in 1886, and the government, having divested itself of the title, could not take it back in 1887. The act of 1893 also shows clearly that congress did not then consider the government as being a trustee holding the lands which had been patented to the Puyallup Indians. That act specifically requires the patentees to execute agreements in writing constituting the commissioners, or a majority of them, trustees to sell the lands and make deeds to the purchasers. This provision is



repugnant to any theory of the government being a trustee to hold these lands for a period of 25 years, but it is entirely consistent with the elementary principle that a valid power to sell and convey the title to property should emanate from the holder of the title, and is in effect an implied legislative determination that the title to the tracts which had been assigned to individual Indians was conveyed to them by the patents. The government continues to have and to exercise the right to restrict alienation of these lands, but it does not hold the title in trust. The Puyallup Indians holding lands under patents of the tenor above set forth are citizens of the United States, having all the rights, privileges, and immunities of other citizens, and they are not under guardianship of the United States government, nor under the charge of any Indian superintendent or agent; and the statute of 1897, prohibiting the furnishing of intoxicating drinks, flavoring extracts, bitters, and stimulants to Indians having the status and subject to the conditions therein defined, does not comprehend an Indian having the status and the rights, privileges, and immunities belonging to the Indian named in this indictment. An order will be entered sustaining the motion in arrest of judgment and discharging the defendant.

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WILLIAMS v. HERT.

(Circuit Court, D. Indiana. July 25, 1901.)

No. 10,005.

1. CONSTITUTIONAL LAW—INDICTMENT—JURY TRIAL.

Const. U. S. Amend. art. 5, providing that no person shall be held to answer for an infamous crime unless on a presentment or indictment of a grand jury, and article 6, providing that in criminal prosecutions the accused shall enjoy the right to jury trial, apply to federal and not to state courts.

2. SAME—INDICTMENT.

Const. U. S. Amend. art. 14, does not require an indictment by a grand jury in a prosecution for felony in a state court.

3. SAME.

The state of Indiana having been admitted into the Union "on an equal footing with the original states in all respects, whatsoever," no right of trial by jury on an indictment in felony cases is guarantied in the courts of that state by the ordinance of July 13, 1787, or Act Cong. May 7, 1800, or Act Cong. Feb. 3, 1809, relative to the government of the territory from which such state was created.

At Law.

Rooker, Hanna & Daily, for petitioner.

BAKER, District Judge. This is an application for a writ of habeas corpus. The statute (Rev. St. U. S. 1878, § 755) provides:

"The court, or justice or judge to whom such application is made shall forthwith award a writ of habeas corpus, unless it appears from the petition itself that the party is not entitled thereto."

Hence it becomes the duty of the court to examine the petition, and to determine whether the case made by it is sufficient to justify

the issuance of the writ. It is firmly settled that the writ of habeas corpus cannot be made to perform the office of an appeal or of a writ for the correction of errors. If a competent court has acquired lawful jurisdiction of the person and of the subject-matter, intervening errors committed during the progress of the trial will not deprive the court of jurisdiction and render its judgment void. Such intervening errors can only be reviewed and corrected on appeal or by writ of error. *Williams v. Hert* (Ind. Sup.) 60 N. E. 1067; *Koepke v. Hill* (Ind. Sup.) 60 N. E. 1039; *Winslow v. Green*, 155 Ind. 368-369, 58 N. E. 259. As was said in the case last cited:

"The law is firmly established that, jurisdiction being once obtained over the person and subject-matter, no error or irregularity in its exercise will make the judgment void."

This proceeding is a collateral attack on the judgment of the Madison circuit court committing the petitioner to the Indiana reformatory, and it cannot be sustained unless the judgment is absolutely void. *Crawford v. Lawrence*, 154 Ind. 288-290, 56 N. E. 673; *Winslow v. Green*, supra; *Lee v. McClelland* (Ind. Sup.) 60 N. E. 692; *Koepke v. Hill*, supra. The writ of habeas corpus cannot be used for the correction of errors and irregularities in the trial of the criminal cause which resulted in the conviction and sentence of the petitioner to the Indiana reformatory. The Madison circuit court had full and complete jurisdiction of the criminal offense with which the petitioner was charged, as well as jurisdiction of his person, and the judgment against him is not void. Indeed, in the case of *Williams v. State*, 60 N. E. 942, the supreme court of this state (Hadley, J., delivering the opinion) held the judgment against the petitioner impervious to a direct attack, and affirmed the judgment of the trial court. The supreme court, per Monks, C. J., held on a petition for habeas corpus by the petitioner in the case of *Williams v. Hert*, 60 N. E. 1067, that the petitioner had been lawfully convicted, and was not entitled to the benefit of the writ of habeas corpus. These cases decided by the supreme court of the state settle the question that under the constitution and laws of this state the petitioner was rightfully tried upon an information by the court without a jury.

But, if the prosecution and trial were proper under the constitution and laws of this state, still, if they were in violation of the constitution and laws of the United States, it would be the duty of this court to disregard the judgments of the supreme court and to set the petitioner at liberty. The petitioner alleges that he is unlawfully restrained of his liberty and imprisoned by the defendant, who is the superintendent of the Indiana reformatory, in violation of the constitution and laws of the United States. He alleges that he was tried and convicted of petit larceny, it being a felony, in and by the circuit court of Madison county, Ind., and sentenced to imprisonment in the Indiana reformatory for a term of not more than three years nor less than one year. The petitioner alleges that in his trial and conviction he was denied rights secured to him by the constitution of the United States, in the two following particulars: (1) That he was tried for a felony on an information filed by the prose-

cuting attorney, and not on an indictment presented by a grand jury; (2) that he was tried by the court, and, although he demanded to be tried by a jury, his demand was refused. The question presented is as to the right of a court of the United States to wrest from the custody of the state a person who has been lawfully convicted and sentenced to imprisonment, under the constitution and laws of the state, for a violation of its criminal laws. The question is one of the gravest concern to the dignity, peace, and security of the state. The fifth article of amendment to the constitution of the United States provides that "no person shall be held to answer for a capital or otherwise infamous crime unless on a presentment or indictment of a grand jury." The sixth article of amendment provides that "in all criminal prosecutions the accused shall enjoy the right to a speedy and public trial by an impartial jury." The grand jury provided for by the constitution and laws of the United States consists of not less than 16 nor more than 23 men, at least 12 of whom must concur in finding an indictment. The grand jury provided for by the constitution and laws of this state consists of 6 men, 5 of whom must concur in finding an indictment. The constitution and laws of this state do not provide for such a grand jury as is known to the common law or to the constitution of the United States. Every criminal convicted of a felony and undergoing imprisonment in this state has been tried either on an information or an indictment found by a grand jury composed of six men. Hence, if a person charged with a felony in a court of the state must be indicted by a grand jury constituted as required by the constitution of the United States, no one of the many hundred felons incarcerated in the prisons of the state is lawfully imprisoned. If the petitioner is entitled to be set at liberty because he was prosecuted on an information, so is every person imprisoned for a felony in the penal institutions of the state entitled to his liberty. The petitioner's contention that his trial for a felony on an information is in violation of the constitution and laws of the United States is unfounded. The constitution of the United States was not intended to deprive the states of the power to provide for the trial and punishment of criminal offenses committed in violation of their laws. These articles of amendment have reference to powers exercised by the government of the United States, and not to those of the states. The first eight articles of amendment are limitations on the powers exercised by the general government, and not on those exercised by the states. *Eilenbecker v. District Court*, 134 U. S. 31-34, 10 Sup. Ct. 424, 33 L. Ed. 801. Nor does the fourteenth article of amendment require an indictment by a grand jury in a prosecution for murder or other felony in the courts of the state. The state may authorize such prosecutions in its courts by information without violating the constitution of the United States. *Hurtado v. People*, 110 U. S. 516, 4 Sup. Ct. 111, 28 L. Ed. 232.

Counsel for the petitioner, however, strenuously contend that the principle ruled in the above cases is not applicable to prosecutions for felonies in the courts of this state. They base their contention on the ordinance of 1787, and on other acts of congress and of the

convention which formed the first constitution of the state. So much of these various acts as is material is as follows:

(1) On July 13, 1787, an ordinance for the government of the territory of the United States, northwest of the Ohio river, was duly enacted by congress, in which it was provided as follows:

"It is hereby ordained and declared by the authority aforesaid that the following articles shall be considered as articles of compact between the original states and the people and states in said territory, and forever remain unalterable, unless by common consent to wit: \* \* \* Art. 2. The inhabitants of the said territory shall always be entitled to the benefit of the right of habeas corpus and of the trial by jury."

(2) An act of congress entitled "An act to divide the territory of the United States, northwest of the Ohio river into two separate governments," approved May 7, 1800, among other things, provided:

"That there shall be established within the said territory a government in all respects similar to that provided by the ordinance of congress, passed on the 13th day of July, 1787, for the government of the territory of the United States, northwest of the Ohio river; and the inhabitants thereof shall be entitled to and enjoy all and singular the rights, privileges and advantages granted and secured to the people by the said ordinance."

(3) An act of congress entitled "An act for dividing the Indiana territory into two separate governments," approved February 3, 1809, provided, among other things, as follows:

"That there shall be established within the said territory, a government in all respects similar to that provided by the ordinance of congress passed on the 13th day of July, 1787, for the government of the territory of the United States, northwest of the river Ohio; and the inhabitants thereof shall be entitled to and enjoy all and singular the rights, privileges and advantages granted and secured to the people of the territory of the United States northwest of the river Ohio, by the said ordinance."

(4) The representatives of the people of the territory of Indiana in convention assembled at Corydon, Ind., on June 10, 1816, for themselves and their posterity ordained and declared that they did and would accept the proposition of the congress of the United States of April 19, 1816, entitled "An act to enable the people of the Indiana territory to form a constitution and state government, and for the admission of such state into the Union on an equal footing with the original states;" and the said representatives of the people of the territory of Indiana, in convention assembled, did further ordain and declare "that the said ordinance of the United States and every part thereof should forever remain irrevocable and inviolate without the consent of the United States in congress assembled first had and obtained for the alteration thereof."

(5) The constitution and state government framed as aforesaid were approved by congress, and the state of Indiana was admitted into the Union "on an equal footing with the original states in all respects whatsoever."

It is contended by counsel for the petitioner that by the foregoing ordinances and provisions the right of the people of the state of Indiana to trial by jury on an indictment by a grand jury in the case of all felonies is made an irrevocable and inviolate guaranty of their liberties. Hence it is insisted that the constitution and laws of this state authorizing the trial of felonies by the court on an informa-

tion are, invalid, because the congress has never released the state from the obligations of the foregoing acts and ordinances. It is impossible, however, to maintain that the United States holds in trust for the people of the state of Indiana all the great elemental principles of liberty contained in the ordinance, and secured by it to the people of the Indiana territory during its existence. The people of this state are sovereign, except in so far as their sovereignty has been surrendered to the national government. This state has never surrendered to the general government its power to provide for the peace and security of the people, and to define and punish criminal offenses committed in violation of its laws. It was admitted into the Union "on an equal footing with the original states in all respects whatever." The ordinance of 1787 and the other acts above quoted have ceased to operate as limitations on the powers of the state. This state possesses all the sovereign powers possessed by any one of the original states of the Union, in all respects whatever. This is affirmed in many cases by the supreme court. *Pollard v. Hagan*, 3 How. 212, 11 L. Ed. 565; *Permoli v. First Municipality of New Orleans*, 3 How. 589, 11 L. Ed. 739; *Strader v. Graham*, 10 How. 82, 13 L. Ed. 337; *Escanaba & L. M. Transp. Co. v. City of Chicago*, 107 U. S. 678, 2 Sup. Ct. 185, 27 L. Ed. 442; *Huse v. Glover*, 119 U. S. 543, 7 Sup. Ct. 313, 30 L. Ed. 487; *Bridge Co. v. Hatch*, 125 U. S. 1, 8 Sup. Ct. 811, 31 L. Ed. 629; *Bolln v. State*, 176 U. S. 83, 20 Sup. Ct. 287, 44 L. Ed. 382. The state has the power to determine what acts shall constitute criminal offenses, and to provide the manner in which such offenses shall be prosecuted and tried, and the punishment that shall be inflicted. It is settled by the judgment of the supreme court of the state that the petitioner was lawfully prosecuted on an information, and lawfully tried by a court. The state had the power so to provide, and in so doing it has violated no provision of the constitution of the United States. It follows that the prayer of the petition must be denied. So ordered.

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LEVERICH et al. v. MAYOR, ETC., OF MOBILE et al.

(Circuit Court, S. D. Alabama. November 19, 1867.)<sup>1</sup>

No. 12.

1. NAVIGABLE WATERS—RIGHT OF PUBLIC USE.

It is fundamental law throughout the United States that all navigable waters are common highways, forever free to the use of all citizens of the United States, without any tax, impost, or duty therefor.

2. SAME—TITLE TO SHORE AND SOIL UNDER—RIGHTS OF STATES.

The title to the shore and soil under navigable rivers below ordinary high-water mark is vested in the state within whose territory it lies, where there had been no valid grant of the same prior to its admission into the Union. Such title, however, does not give an absolute ownership, but is held for the conservation and protection of the rights of

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<sup>1</sup> This case is now published in this series, so as to include therein all circuit and district court cases which have been inadvertently omitted from the Federal Reporter or the Federal Cases.

the public in the use of the waters of the stream, and subject to the rights of riparian owners.

8. SAME—RIGHTS OF RIPARIAN OWNERS—MAINTENANCE OF WHARVES.

By long and uniform usage throughout the United States riparian owners on navigable waters have acquired the right to construct wharves reaching from their lands to navigable water. Such right, when exercised for the convenience of commerce, and in such manner as not to obstruct navigation, is in accord with the enlarged public policy of modern times, and has been recognized by the supreme court of the United States and by many of the states, including Alabama, where it has been recognized both by legislation and judicial decision.

4. SAME—MOBILE RIVER—POWERS OF CITY OF MOBILE.

Complainants were the owners of lands lying on the Mobile river, within the limits of the city of Mobile, by titles derived from the United States through acts of congress confirmatory of prior Spanish grants. Such titles had in a number of cases been adjudged valid by the supreme court of the United States and by the supreme court of Alabama, and as extending to the channel of the river. Complainants and their predecessors in title had also constructed and maintained for many years wharves extending to the channel of the river, which had at all times been conveyed and recognized by the courts as private property. By act of January 31, 1867, the legislature of the state granted to the city of Mobile the shore and soil under the river in trust, to direct, control, and manage the same as it should deem best for the public good. *Held*, that complainants were the owners of their wharves, both by virtue of their title to the soil on which they were built, and by their general right as riparian owners to construct and maintain such wharves in accordance with established and recognized usage, and that such act conferred upon the city no right to destroy the value of their property by making such wharves free and prohibiting the charging of wharfage for their use.

5. INJUNCTION—GROUNDS—THREATENED INJURY TO PROPERTY RIGHTS.

A court of equity has jurisdiction to grant an injunction to prevent the threatened invasion by a city of property rights of the owners of wharves within its limits by the adoption of an ordinance prohibiting the charging of wharfage for their use.

6. SAME—RESTRAINING ACTION BY CITY.

An ordinance was introduced into a city council by its president. It was drawn and recommended by the city attorney and special counsel appointed for the purpose, and recited that the owners of property on the water front who had constructed wharves had obtained possession of the shore and soil under the river, and held the same without warrant of law, and that the public should be notified that the burdens imposed on commerce by the exaction of wharfage by such owners was unlawful, and enacted that thereafter no wharfage should be charged, except such as might be prescribed by the city, sufficient to keep the wharves in repair. By order of the council the ordinance was published and action thereon postponed until another meeting. *Held*, that such action of the city constituted an interference with the property rights of the owners of wharves, who were legally entitled to maintain the same and to charge for their use, by denying their rights and inciting the public to dispute the same, and threatened further injury, which entitled such owners to maintain a suit for an injunction without waiting for the passage of the ordinance.

In Equity. On motion for preliminary injunction and on final hearing.

George N. Stewart; John A. Campbell, Messrs. Hamilton, and Dargan & Taylor, for complainants.

C. F. Moulton, City Atty., Smith & Herndon, and Boyles & Overall, for defendants.

BUSTEED, District Judge. This cause comes before me upon a motion for a preliminary injunction to restrain the corporation of the city of Mobile from proceeding under an act of the legislature of the state approved the 31st of January, 1867, granting to the corporation of the city of Mobile the shore and soil of the river Mobile within its corporate limits, and appointing the corporation a trustee to administer them for the public good. The corporation were proceeding to declare all the existing wharves in the city to be free, and to discharge all persons from paying any wharfage dues, when this bill was filed. The object of this bill is to restrain the city from the invasion of the right to wharfage, as asserted in the bill. The motion has been debated with a fullness, an amplitude of argument and authority, that has not been exceeded in the conduct of any cause that has been heard before me. The cause is one of great gravity, and it is due to the importance of the questions, and to the magnitude of the public and private interests involved, that the court shall declare the reasons for the order of injunction that has been granted.

One of the marked features in the political institutions of the United States is the freedom of their rivers. This freedom has been declared in great fundamental compacts among the states, and by authority of these is imposed upon the rivers and navigable waters within the boundaries of all of the new states. In the ordinance for the government of the Northwestern Territory passed the 17th of July, 1787, before the adoption of the federal constitution, the first of these acts became the law of the United States. It was then ordained that "the navigable waters leading into the Mississippi and St. Lawrence, and the carrying places between the same shall be common highways, and forever free, as well to the inhabitants of the said territory as to the citizens of the United States, and those of any other states that may be admitted into the confederacy, without any tax, impost or duty therefor." In the act passed the 3d of March, 1803, "for regulating the grants of land and providing for the disposal of lands of the United States south of the state of Tennessee," it was provided that "all navigable rivers within the territory of the United States south of the state of Tennessee shall be deemed to be, and remain, public highways"; and in similar acts for the disposal of the public lands in the Louisiana territory and the territory of Florida, as well as those on the Pacific Coast, similar provisions were made; and, to place this dedication beyond the reach of cavil or contest, each one of the new states, including those on the Pacific Coast and the interior of the continent, at the time of its admission to the Union, has been required to adopt a provision similar to that mentioned in the ordinance of 1787, as a fundamental condition upon which their admission to the Union depended. In the ordinance adopted by the state of Alabama at the date of the adoption of the constitution, by which it became a state and was admitted as such into the Union, it disclaimed all title to "the waste or unappropriated lands" lying within the state, and agreed "that all navigable waters within the state shall forever remain public highways, free to the citizens of this state, and of the United States,

without any tax, impost or toll therefor, imposed by the state." A writer of celebrity has said, "Here we behold the Magna Charta of the internal navigation of America which we enjoy, and have first enjoyed of all confederacies, ancient or modern." The questions of the power to regulate these rivers, and in what department of the complicated American system of government the municipal sovereignty over them resides, have been the subject of much judicial discussion, but have been finally settled by authoritative decisions of the supreme court of the United States. Their opinions were all cited and critically analyzed in the argument on this motion. I shall proceed to state my own opinion upon them.

The case of *Martin v. Waddell*, 16 Pet. 367, 10 L. Ed. 997, contains the first answer to the questions by the supreme court of the United States. This case was decided in that court in 1842, in reference to the rivers in the state of New Jersey. The supreme court in that cause determined that the grant of the lands in New Jersey to the lords proprietors, though the terms were broad and comprehensive, did not convey to the lords proprietors the soils or rights to fishery in the rivers in that state; that the right to fishery was a public right, not impaired by the grant; and that the people of the state acquired at the Revolution the sovereignty to the navigable water courses which remained in it only in so far as surrendered in the constitution of the United States. What that right is was declared in the case of *Smith v. Maryland*, 18 How. 71, 15 L. Ed. 269. In that case the supreme court say:

"Whatever soil below low-water mark is the subject of exclusive propriety and ownership belongs to the state on whose proprietary border and within whose territory it lies, subject to any lawful grants of that soil by the state, or the sovereign power which governed it before the Declaration of Independence. But this soil is held by the state, not only subject to, but in some sense in trust for, the enjoyment of certain public rights, among which is the common liberty of taking fish,—as well shell fish as floating fish. The state holds the propriety of this soil for the conservation of the public rights of fishery thereon, and may regulate the modes of that enjoyment so as to prevent the destruction of that fishery. In other words, it may forbid all such acts as would render the public right less valuable or destroy it altogether. This power results from the ownership of the soil, from the legislative jurisdiction of the state over it, and from its duty to preserve unimpaired those public uses for which the soil is held."

The court in their opinion are careful to reserve their opinion upon the extent of the powers of the federal government, and of the rights of citizens of other states in the participation in this common right. These cases arose in states that were original parties to the federal constitution. The question as to the authority of the states that have since been formed of the public domain of the United States, and in which they were the proprietors of the lands and the soils of the navigable waters, was agitated in Alabama previously to the decision in *Martin v. Waddell*, above cited, and was decided upon in a number of cases which originated in the city of Mobile before 1839. These cases were cited in the argument and are reported. *Mayor, etc., v. Eslava*, 9 Port. 578, 33 Am. Dec. 325; *Pollord's Heirs v. Files*, 3 Ala. 47; *Kemp v. Thorp*, 3 Ala. 291; *Abbot's Ex'r v. Kennedy*, 5 Ala. 393; and other cases. These opin-



ions claim for the state of Alabama that the soils under the rivers within the state are not subject to sale by the United States as "waste and unappropriated land"; that whatever right of property exists remains in the state of Alabama. "What is said by the court of a property in the shore passing to the state upon its admission to the Union cannot, when fairly interpreted, be understood to mean the absolute ownership, but merely the right of jurisdiction and control, subject to the paramount right which is repeatedly conceded, and which the United States may protect." *Kemp v. Thorp*, 3 Ala. 291. This claim for Alabama was presented to the supreme court in a series of cases, upon the right of the city of Mobile to the land between "high-water mark and the channel of the river," under the first section of an act of congress "granting certain lots of ground to the corporation of Mobile and to certain individuals of the city," approved May 26, 1824. The cases of *Mayor, etc., v. Eslava*, *Same v. Hallett*, and *Same v. Emanuel* severally presented the question, but the supreme court preferred to sustain the validity of the defendant's title under the same act. *Mayor, etc., v. Eslava*, 16 Pet. 234, 10 L. Ed. 948; *Same v. Hallett*, 16 Pet. 264, 10 L. Ed. 958; *Same v. Emanuel*, 1 How. 95, 11 L. Ed. 60. The question was again presented in the case of *Pollard's Lessee v. Hagan*, 3 How. 212, 11 L. Ed. 565. The facts of the case were that in the year 1836 an act of congress (6 Stat. 680) was passed granting to the lessor of the plaintiff a parcel of land which was covered by the waters of the river between 1819 and 1823. The defendants claimed under a Spanish grant to *Panton Leslie & Co.*, which was bounded by and extended into the river at its date. The circuit court of the state charged the jury "that, if they believed the premises sued for were below the usual high-water mark at the time Alabama was admitted to the Union, then the act of congress and the patent in pursuance thereof could give the plaintiffs no title, whether the waters had receded by the labor of man only, or by alluvion." The supreme courts of the state and of the United States approved the judgment for the defendant upon this charge. The supreme court of the United States in their opinion say:

"This right of eminent domain over the shores and the soils under the navigable waters, for all municipal purposes, belongs to the states within their respective territorial jurisdictions, and they, and they only, have the right to exercise it. To give to the United States the right to transfer to a citizen the title to the shores and soils under the navigable waters would be placing in their hands a weapon which might be wielded greatly to the injury of state sovereignty, and deprive the states of the power to exercise a numerous and important class of police powers. But in the hands of the states this power never can be used so as to affect the exercise of any material right of eminent domain or jurisdiction with which the United States have been invested by the constitution of the United States. For, although the territorial limits of Alabama have extended all her sovereign powers into the sea, it is there, as on the shore, municipal power, subject to the constitution of the United States and the laws made in pursuance thereof."

I have quoted from these various authorities to ascertain, as far as practicable, the exact question determined. They do not determine the limits of the state authority over the shores or soils of

navigable waters, but simply determine that they are not subject to be appropriated by the grant of the United States to individual ownership. They raise a very strong doubt whether they can be appropriated, except under great qualifications, by the states. The case of *Smith v. Maryland*, 18 How. 71, 15 L. Ed. 269, implies this. Nor do we derive from these decisions any assistance in determining upon the riparian rights of the owners of the shores or to the water's edge. The authority of the states to municipal jurisdiction, and to the exercise of their police power over navigable waters, has not been deemed inconsistent with a right of the owners of the bank to erect wharves which shall be in aid of commerce, and which do not impede the public navigation. In all of the New England states, from an early period, this right to improve in front of the shore by the erection of wharves has been conceded. In some of those states this right had its origin in colonial ordinances; in others, in local usage arising out of public convenience or necessity. In *East Haven v. Hemmingway*, 7 Conn. 186, Chief Justice Hosmer states the general rule:

"The right of individuals to use the soil of the shore subject to the paramount rights of the public, so far as my information extends, has never until now been disputed. The exercise of it in all of our towns bounded on navigable waters, and the enjoyment of estates under it, is known to every one. On the death of the landowner, to high-water mark, his estate in the shore, and the erections upon it, has descended to his heirs; and thus estates have been uniformly settled. On the part of the public no objection has been made. The interest of navigation has been subserved, and the consequences have altogether been salutary."

The discussion is nearly exhausted in this brief citation from the opinion of a court of the highest respectability. The right of a riparian proprietor to erect a wharf in front of his lands, and to maintain suits for its possession, has been admitted in the same court in *Nichols v. Lewis*, 15 Conn. 137, and in *Simons v. French*, 25 Conn. 346. A similar course of decision will be found in the courts of New Jersey. The case of *Martin v. Waddell*, 16 Pet. 367, 10 L. Ed. 997, before cited, established the claim of the state to control the soils and regulate the public rights to fishery. The claim of the lords proprietors was finally overturned in that decision, after being sustained in the circuit court of the United States. Immediately the inquiry was made whether the usage which the learned counsel who sustained the right of New Jersey before the supreme court referred to, as existing for the riparian owners to erect wharves, could be sustained against the prerogative of the state. This inquiry has been solved, after learned discussions in the cases of *Gough v. Bell*, reported in 22 N. J. Law, 441, and 23 N. J. Law, 624, in favor of the riparian owners. Similar discussions have arisen in Pennsylvania, Maryland, and North Carolina, with a similar result; also in California. The supreme court of the United States, in the case of *Dutton v. Strong*, 1 Black, 23, 17 L. Ed. 29, have adverted to the general prevalence of this custom on the Atlantic Coast, and have testified to its reasonableness, its salutary influence in the improvement of the country, its harmony with public and private right, and have adopted the rule as appropriate and applicable to the inclosed

seas which form so important a portion of the channels of intercommunication upon the northern border of the United States; and the local courts in the northwest have enforced the same rule as entirely compatible with the freedom of the navigable waters which formed a portion of the first constitution for the administration and government of what in 1787 was a wilderness, and which in 80 years has become an empire. Nor do I find anything in the jurisprudence or legislation of the state of Alabama to contradict these authorities. In several of the cases cited to me the supreme court advert to the facts that reclamations from the sea is a common practice, and they assign to the riparian owner the same benefits from his improvements as the law assigns to him from the accretions by alluvion. In one of the cases a suit was brought for one of the wharves of this city. In no portion of that case does it appear that the suit excited any surprise, or that the question of a right to make wharves was regarded as an open one. The fact appears on the record, and the right to make the erection was not challenged. The only inquiry was as to the title to the locus in quo under the riparian ownership. *Watkins v. Holman*, 16 Pet. 25-54, 55, 10 L. Ed. 873; *Abbot's Ex'r v. Kennedy*, 5 Ala. 393; *Kennedy's Heirs v. Jones*, 11 Ala. 63; *Dutton v. Strong*, 1 Black, 23, 17 L. Ed. 29. The legislation of the state and of the city discloses the same general facts of the recognition of these rights. The territorial government incorporated the cities of Blakely and Mobile. Their corporate powers were enlarged by the state. The care of the ports of the two cities at first, and of the city of Mobile subsequently, seems always to have commanded attention. Municipal officers were appointed with large powers over the port, and to secure order among vessels. Wharves are referred to as existing, and the removal of nuisances in and upon them directed. The arrangement of vessels at the wharves, the manner and materials of which they are to be composed and built, their extent, and the limit to which they may go, have been regulated. Powers have been given to the city to purchase them, and these powers have been renewed in a late charter. These wharves have, in some degree, been the result of necessity. The city has taxed the riparian property, has imposed charges upon it so as to make improvements indispensable to profitable ownership. The commerce of the port has been large, and consisted in bulky articles, which could only be landed upon artificial erections like these. It is a notorious fact that in all the transactions of civil, commercial, and social life, they have been regarded as property. They have been bought and sold, mortgaged, and conveyed under decrees of foreclosure of mortgage. They have been devised by last will and testament, have answered all public charges, and have borne a full share of revenue assessments, whether state, county, or of municipal corporations. The constitution of the state of Alabama contains all the provisions that have been found necessary to secure life, liberty, or property from arbitrary seizure or hasty or unregulated legislation. Therefore it could not be but what the proceedings of the corporate authorities to strip the owners of property such as this of its profitable enjoyment and value should have provoked opposi-

tion and controversy. It was an unusual mode of disposing of rights which had so substantial a foundation in law and long possession.

I have stated what I deem to be the law as found in American jurisprudence. That jurisprudence has, in a measure, modified that received from Great Britain; but it is apparent that there has been, and is now going on, a change on the same subject in Great Britain. In the *Jure Maris*, imputed to Lord Hale, it is said:

"It is admitted that *de jure communi* between the high water and low water mark doth *prima facie* belong to the king. Although it is true that such shore may, and commonly is, parcel of the manor adjacent, and so may be belonging to a subject, as shall be shown, yet it is *prima facie* the king's. Harg. Law Tracts, p. 13. Although the king hath *prima facie* this right in the arms and creeks of the sea, *communi jure*, and in common presumption, yet a subject may have such a right (1) by the king's charter or grant; and this without question. The king may grant fishing within a creek of the sea, or in some known precinct that hath known bounds, though within the main sea. He may also grant that very interest itself, viz. a navigable river that is an arm of the sea, and soil thereof."

These latter declarations of the extent of the title of the king are most seriously questioned, and the weight of the authority on the subject is entirely opposed to them. The supreme court of the United States, in the case of *Martin v. Waddell*, 16 Pet. 369, 10 L. Ed. 997, declare that the king has no power to impair the right of the public to take fish as settled by the later English authorities. Schuttles, in his work on Aquatic Rights (page 111), says "that it must be understood that soils under navigable waters are not susceptible of transfer till they become convertible and derelict"; and Woolnitz, in his work on Water Courses, states the same doctrine (page 25). Phear, in a late treatise on the same subject, says "that the ownership of the crown over the sea and its shore is of a very qualified character, and limited entirely by the interests of the public, and consequently all exclusive privileges are void, as having been made *ultra vires*, unless calculated on the whole to be advantageous to the public exercise of that right which they seem to violate." And in another place he says:

"In the possession of the land covered by tidal or navigable waters it would seem the crown simply represents the public. The crown is in fact the subjects' trustee for the purpose of securing to them collectively all the advantages and privileges which can accrue from such property." Phear, *Water*, 44, 67.

In the *Jure Maris* (page 85), in speaking of nuisances, reference is made to the damage to a port by buildings extending too far into the water where ships or vessels might have ridden. The author proceeds:

"That nuisance, or not nuisance, is a question of fact. It is not, therefore, every building below the high-water mark, nor every building below the low-water mark is, *ipso facto*, a nuisance. For that would destroy all the keys that are in all the ports in England. For they are all built below the high-water mark, for, otherwise, vessels would not come to them to unlade; and some are built below low-water mark. And it would be impossible for the king to license the building of a new wharf or key, whereof there may be a thousand of instances, if *ipso facto* it were a nuisance, because it straitens the port; for the king cannot license a common nuisance. Nay, in many cases, it is an advantage to a port to keep in the sea water from

diffusing at large, and the water may flow in shallows where it is impossible for vessels to ride."

This is the law as applied in the courts of the United States. The author of the *Jure Maris* proceeds to say, where the soil is the king's, the building below high-water mark is an encroachment upon the king's soil, which he may demolish or seize or arent at his pleasure. It is upon this question that controversy now exists in Great Britain, and which controversy has been avoided in this country by the adoption of a principle which secures improvements on the banks of navigable rivers from the owner of the bank, who is most interested in making them, and by requiring—what seems to be the tendency of opinion in Great Britain—that this proprietor shall not do anything which can be deemed a nuisance instead of a benefit. *Rex v. Russell*, 6 Barn. & C. 566; *Chad v. Tilsed*, 2 Brod. & B. 403; *Rex v. Ward*, 4 Adol. & E. 384; *Reg. v. Betts*, 16 Q. B. 1022. The remarks of Mr. Justice McLean in *Bowman v. Wathen*, 2 McLean, 376, Fed. Cas. No. 1,740, accord with the general sentiment of the country, and with that local usage which determines right and finally ripens into law. He says:

"We apprehend that the common-law doctrine as to the navigableness of streams can have no application in this country, and that the navigableness does in no respect depend upon the ebb and flow of the tide. On navigable streams the riparian right, we suppose, cannot extend generally below high-water mark. For certain purposes, such as the erection of wharves and other structures for the convenience of commerce, and which do not obstruct the navigation of the river, it may be exercised beyond this limit."

Nor is it surprising that there should be a change or modification in the laws relating to the use of water courses, according to the mutation in the wants, conditions, and ideas of different ages. The vast dominion of the Roman empire required that all the great channels of intercommunication should be free, and hence in the laws of the Romans the sea and its shores were declared to be among the things common to all men. But in the Roman law the right or usage of the riparian proprietor was respected, and interdicts were granted by the Roman prætor against those who infringed navigation or disturbed the enjoyments of the riparian proprietors alike. During the middle ages and during the empire of the feudal system—a system narrow, restrictive, unsocial, and warlike—rivers became private property, and were burdened with charges that would now be intolerable. In the *Jure Maris*, among interests of the king is mentioned "an interest of possession or recreation." The author says:

"Before Magna Charta it was frequent for the king to put as well fresh as salt waters in defense for his recreation: that is, to bar fishing or fowling in a river till the king had taken his pleasure or advantage of the writ de defensione riparie, which anciently was directed to the sheriff to prohibit riviation in any rivers in his balliwick." Harg. Law Tracts, p. 7.

In many of the countries of Europe large sections of its most important rivers were granted eo nomine to private owners. These were granted for the benefit of the rights of fishery and for the tolls of navigation. The constant struggle since Magna Charta has been to remove these impediments and to secure the public rights of navi-

gation and fishery, and along with this struggle has been the concession to riparian proprietors of all those rights which can be exercised in harmony with them. The right to alluvion, as established in the civil law, and which prevails by custom, as decided in *Rex v. Yarborough*, 2 Bligh (N. R.) 147, the right to the use of the water in its flow through the land of the proprietor, the right to embank and to reclaim low and marshy lands, and the right to make structures in ports and harbors in aid of commerce, are instances of the enlarged policy of modern times. *Lorman v. Benson*, 8 Mich. 18, 77 Am. Dec. 435; *Rice v. Ruddiman*, 10 Mich. 125; *Mayor, etc., of New Orleans v. U. S.*, 10 Pet. 717, 9 L. Ed. 573; *Banks v. Ogden*, 2 Wall. 58, 17 L. Ed. 818; *Attorney General v. Chamcers*, 27 Eng. Law & Eq. 242.

The plaintiffs in this suit, and the defendants who have been made parties as having a common right and interest, and who could not be made parties under the constitution of the court in any other mode, claim title under the United States to the bank of the river Mobile. By the act of congress of the 25th of April, 1812, entitled "An act for ascertaining the titles and claims to lands in that part of Louisiana east of the River Mississippi and Island of New Orleans," being the territory south of the Mississippi territory, and between the Iberville and the Perdido rivers, including Mobile, a commissioner was appointed to examine all the titles derived from the French, British, and Spanish governments, the former sovereigns and possessors of that country, to any lands within it. The commissioner was required to classify the claims, and to report abstracts of the title and his opinion upon them. His reports were made to the secretary of the treasury, and were submitted to congress by that officer. These reports were acted on by congress, and laws were passed, that are referred to in the bill, in 1819 and 1822. Congress recognized complete grants as valid; incomplete titles were confirmed as if they had been completed, when they were sustained by written evidence of title; and settlers were allowed a limited quantity as a donation to include their settlements. The whole line of the river Mobile within the city is held under these titles, except that small portion that was embraced in the sale of the Ft. Charlotte lots. The most important of these titles have been the subject of adjudication in the courts of Alabama and the supreme court of the United States since these recognized and confirmatory acts were made. In *Kennedy's Ex'rs v. Hunt's Lessee*, 7 How. 586, 12 L. Ed. 829, the supreme court of the United States say of the Orange Grove title of John Forbes & Co.:

"That the grant made by the intendant, General Morales, in 1807, was in itself, unaided by the sanction of congress, a valid title, we do not assert; but being reported on by the commissioner as a title complete in form, according to the usages and laws of Spain, and sanctioned by congress as a perfect title by the act of 1819 (3 Stat. 528), the courts of justice are concluded by the action of the political department, and bound to pronounce the grant to Forbes & Co. a perfect title in substance as well as in form, because the claim was within the exclusive jurisdiction of the political department in 1819, when congress acted on it."

The extent and limit of this title have been several times declared by the supreme court of Alabama as reaching to the channel

of the river, and as unaffected by any state right to the shore. *Hagan v. Campbell*, 8 Port. 9, 33 Am. Dec. 267; *Hallett v. Hunt*, 7 Ala. 882; *Magee v. Hallett*, 22 Ala. 700; *Mayor, etc., v. Emanuel*, 9 Port. 403. This grant embraces the shore of the river Mobile, in so far as granted by the act of the legislature of January 31, 1867, within the northern and southern boundaries of the grant. In all the controversies that arose upon the act of the 26th of May, 1824, before referred to, the title of the riparian proprietors under that act was sustained, in the supreme court, to the channel of the river. *Mayor, etc., v. Eslava*, 16 Pet. 234, 10 L. Ed. 948; *Same v. Hallett*, 16 Pet. 261, 10 L. Ed. 958; *Same v. Emanuel*, 1 How. 95, 11 L. Ed. 60.

It is to be noticed that Mobile is a port under the laws of the United States, and that, besides the proprietary rights of the United States in all the public domain of the state, they have a power over navigation and commerce under the constitution of the United States that renders the act of May 26th, before mentioned, an act of importance in this connection. These acts of congress affect all the city front above Church street. Besides this claim of title to the locus in quo, the general right before mentioned as belonging to a riparian proprietor is co-extensive with the limits of the city. This general right is sustained by possession, user, enjoyment, recognition in state and municipal legislation, and by general acquiescence. It is under these conditions that the invasion of this right was made, and the injunction applied for. In the case of *Attorney General v. Sheffield Gas Co.*, 17 Jur. 677, Lord Justice Bruce said:

"It seems to me right to notice the incorporation, whether completely or incompletely, of the defendants, and the quality of the persons thus associated together. They have the advantage and strength of lastingness, union, and number; and it may well be thought, nor is it new to hold and act upon the opinion, that infringements of rights in respect to lands by persons and bodies so circumstanced require especially to be watched with a careful eye and repressed with a strong hand by a court of equity when it can exercise jurisdiction."

In the case of *Dun River Nav. Co. v. North Midland Ry. Co.*, 1 Eng. Ry. Cas. 135, Lord Cattenham said:

"I am not at liberty, even if I were in the least indisposed, which I am not, to withhold the jurisdiction of this court as exercised in the first case in which it was exercised,—that of *Agar v. Canal Co.*, Coop. t. Eld. 77,—when Lord Eldon said simply on this that he exercised the power of this court for the purpose of keeping those companies within the powers which the acts gave them; and most wholesome exercise of jurisdiction it is, because, great as the powers necessarily are to enable the companies to carry into effect the works of this magnitude, it would be most prejudicial to the interests of all persons with whose property they interfere if there was not a jurisdiction continually open and ready to exercise its powers for the purpose of keeping them within that limit which the legislature has thought proper to prescribe for the exercise of the power."

In the motion before me the plaintiffs complain that the defendants, the corporation of Mobile, propose to invade rights of property derived from titles sanctioned by the government of the United States in the fulfillment of their obligations under the law of nations and in the exercise of their function to dispose of the public domain;

that these rights are sanctioned by all those acts which afford security to titles and are evidence of their validity. The pretext for the invasion of this property is a legislative grant passed without notice to the parties, and the contents of which would hardly have afforded notice, to an unprofessional mind. It is to be considered, too, in this connection, that the situation of the state of Alabama, in so far as its government is concerned, is anomalous. The effect of the invasion complained of is to disturb a long possession, to withdraw from the owners their income, and to place them in antagonistic relations with their tenants and persons landing goods on the wharves. The ordinance leads at once to everlasting and vexatious controversies and to a vast multiplicity of suits. The controversy must embarrass commerce and produce private inconvenience and distress. The court is not able to accede to the conclusion that the right to take wharfage rests upon the same foundation as the right to erect toll bridges and to establish ferries over navigable waters. The fact is notoriously otherwise. Wharves exist in every port, city, and landing place in the country, and wharfage is collected independently of any regulating act from legislative or municipal authority. The authorities in Great Britain and the United States show there is a wide difference. In *Colton v. Smith*, Cowp. 47, Lord Mansfield says in reference to a claim for wharfage:

"In this case everybody that pays has a benefit, for if they go to the wharf they have the benefit of it, and if they land their goods elsewhere within the manor they land upon the plaintiffs' private property."

The right to claim wharfage as an incident to a right of property is stated in the *Jure Maris* (page 77); and in the *Wharf Case*, 3 Bland, 361, the distinction is drawn between tolls across a navigable stream and tolls for the use of property on the land. I cannot doubt that, under the principles of a vast number of cases cited to me, the court has authority to grant an injunction. The cases of *Griffing v. Gibb*, 2 Black, 519, 17 L. Ed. 353, and *Parker v. Manufacturing Co.*, 2 Black, 546, support the conclusions of the court. For the reasons above stated, an injunction is allowed according to the prayer of the bill.

(May 18, 1868.)

This cause has been submitted for a final decree upon the bill, exhibits, answer, and proceedings in the suit, and the argument of counsel before the court. Upon a motion for a preliminary injunction the court had occasion to examine the title of the plaintiff as disclosed in the bill. In that examination it was ascertained that the river front of the river Mobile, on its west bank, within the corporate limits of the city, had been conveyed by the French, British, or Spanish governments by titles that had been recognized as valid by the United States, or had been confirmed as if complete, or had been conveyed by the United States under sales provided for by acts of congress; that under these titles the marshy lands had been filled up and reclaimed, the area of the city enlarged, its sanitary condition improved, and its commercial importance and prosperity promoted, without any impediment to the public rights



of navigation in the river. These improvements, including the wharves and quays, have been enjoyed as property, and have been purchased and sold, incumbered and charged, and have passed by descent and devise as property, during the whole period of the existence of Alabama as a territory or state, with unhesitating confidence, and that no act of the state or of the corporation until 1867 was calculated to impair that confidence. The first act of this kind was passed the 31st January, 1867, and is in these words:

"An act granting to the city of Mobile the riparian rights in the river front.

"Section 1. Be it enacted by the senate and house of representatives of the state of Alabama in general assembly convened: That the shore and the soil under Mobile river, situated within the boundary lines of the city of Mobile, as defined in section two of an act to incorporate the city of Mobile, approved February the 2nd, eighteen hundred and sixty-six, be and the same is hereby granted and delivered to the city of Mobile.

"Sec. 2. Be it further enacted, that the mayor, aldermen and common council of the city of Mobile, be and are hereby created and declared trustees to hold, possess, direct, control and manage the shore and soil herein granted in such manner, as they may deem best for the public good. Approved January 31st, 1867." Acts 1866-67, p. 307.

The body calling itself the "General Assembly," that disposed of "the shore and soil under Mobile river" within the limits of its principal commercial city, was chosen under a constitution which has not been recognized as legal by the legislative power of the Union. On the contrary, on the 2d March, 1867 (14 Stat. 428), an act of congress declared "that no legal state government exists" in a number of the states, including Alabama, and "that adequate protection for life and property" did not exist in them. If the object of the act of the so-called general assembly was to deprive the owners of this property of their title, or to impede their beneficial use and enjoyment of it, it must be regarded as an anomaly in legislation, which may, however, be accounted for by the disturbed and disordered condition of the public political affairs. No such legislation is to be found in the period when tranquillity was undisturbed in Alabama, or constitutional government existed. The corporate authorities in Mobile on the 15th March, 1867, formally accepted the act, "with all the authority, benefits, rights, privileges, and immunities" it conferred. On the same day they adopted a resolution by which the mayor and the president of the boards were authorized "to pursue such a course" and "to adopt such measures as in their judgment will be necessary and proper to protect the rights and interests of this city in and to the benefits conferred or intended to be conferred" by the act. The first measure brought to the notice of the court bears date the 4th April, 1867. This consists in the draft of an ordinance which recites the act and declares that the "city deems it best for the public good that the wharves of said city should be free to commerce without charge except such dockage as may be necessary to keep the same in a proper repair," and ordains "that hereafter it shall not be lawful to charge or collect any toll, wharfage or dockage for the use of the shores or wharves within said city except such sums as shall hereafter be allowed or prescribed by the mayor, aldermen and common council of said

city; provided that this ordinance shall not apply to such wharves as are now under lease from said city to individuals during the existence of their leases." The adoption of this ordinance was recommended by the city attorney and four gentlemen of the bar who have represented the city during the whole progress of this suit. It was adopted with but one dissenting voice by the board of aldermen. The answer states that it was not passed in the council. But on the 7th of May a draft of another ordinance, containing similar recitals, and charging that the owners of this property "have obtained and hold possession of the same without warrant of law, and much to the injury of the prosperity of the city," and "that the public should be notified that the said burdens on commerce [wharfage, dockage, etc.] are unlawful, and that said wharves shall be treated as public highways, free from charges, except such as may be necessary to keep the same in proper condition and management for the good of the public," was submitted to the council by its president. This plan of an ordinance contained the following provision:

"That it is not and shall not be lawful for any person to demand, levy, charge or receive wharfage, toll or charge of whatever kind for the use of any wharf, or wharves in the city, but said wharves shall be free for the use of commerce without any exaction for the use of the same save such charges as may hereafter be provided for by the ordinances of the city, for the proper preservation and repairs of said wharves."

The council ordered this to be published, and action was postponed for one week. In this interval, or before action upon it, the plaintiffs filed their bill. The opinion of this court was that these proceedings involved a serious invasion of rights of property, tended to array against those rights popular clamor and prejudice, and threatened to produce multiplicity of suits, irritating litigation, depression of the value of rights that had been enjoyed and were vested, and irreparable mischief. It was not necessary, in the opinion of the court, that the ordinances should be adopted, to entitle the parties to the remedial and preventive jurisdiction of the court. It was apparent that the mischief would be produced by declarations of this kind under the advice of responsible counsel, and by bodies having a large authority and potent influence over the public mind. In the conditions of public order then existing such declarations were calculated to produce acts dangerous to the public peace. The proceedings in the boards of council and aldermen were obviously directed to place the owners of this property in antagonism with all other members of the community. The public were to be notified, and were notified, that the possession and enjoyment of wharf property had imposed an onerous burden upon the city, and that it was a lawless usurpation which each individual might resist, and in resisting which the corporation was prepared to uphold and support him under the act of January, 1867. In the case of *Bonaparte v. Railroad Co.*, 1 *Baldw.* 205, *Fed. Cas. No. 1,617*, Mr. Justice Baldwin says:

"To entitle a party to this remedy [injunction] it is not necessary that there be any threat or declared intention to commit the act which will

cause the injury. It is enough that preparatory acts are done from which the inference is made of the defendant's intentions, as, if he employs a surveyor who marks trees, it is presumed to be done with the intention to cut them down; so, if he insists upon his right to do the act, or makes claim to land not his own; but the complainant's mere apprehension or belief is not enough, unless such facts appear as show them to be well founded, so as to satisfy the court that the ax is laid at the foot of the tree, and that the act will be done without their interference. Whenever that is done the injunction goes."

According to the plans submitted to the boards, there is a positive assertion of right on their part to control wharves and wharfrage, a positive denial of the title of the plaintiffs, and an invitation to the public to use the property without making any compensation to the owners. These plans were sanctioned by an unusual array of professional counsel, and claimed to be valid under an alleged act of the legislature of Alabama. This cause has been pending in this court for nearly one year, and the answer of the defendant was only filed a month ago. During this first-named period the corporate authorities have been restrained by injunction. The answer acknowledged the acceptance of the act of January, 1867, and does not dispute the accuracy of the exhibits that expose the conduct complained of in the bill, but insists that these measures are not to be regarded as acts of the corporation, because they were not adopted. The answer says:

"Respondents do not know whether the action of the boards of aldermen and common council has had any, or, if so, what, effect upon complainants' title, if they have any, on the value or availability of their property, nor what opinions the public entertained on the subject of complainants' right to collect wharfrage. No official acts have been done by respondents in the premises, except to accept the grant of the state, to take the opinion of counsel on their rights, and to employ such counsel to maintain the city's rights. Respondents again deny that they ever passed upon the question of the rights of the complainants to the wharf structure, and to keep up and use the wharves for themselves and the public, so long as the state and general government tolerated them as projections into the sea beneficial to commerce. Respondents insist that their rights are subject to the right of the state to regulate the wharfrage to be charged to the public; that the state has empowered the city of Mobile to regulate these charges; that it proposed to discharge this duty to the public; and, further than this, respondents have, under advice of counsel, forbore to interfere in any manner with the wharves or the owners."

The court, in reviewing the exhibits to the bill which disclose the purpose of the corporate authorities, as guided by the advice of counsel, is not able to give them the interpretation which is contained in the answer. When the right was asserted to declare the wharves to be free and open to all, and that no wharfrage could be collected until the corporate authorities should permit it, and that none should be collected except such as was necessary for their maintenance and repair, it seems to the court that there was a proposed interference with the wharves and their owners, and that this "legislation" was prompted by advice of counsel. The court does not concur in the conclusion that these rights of the owners are subject to what is termed the legislative powers of the corporation of Mobile. It is by no means clear that even the general assembly, so called, contemplated any such result. The grant by that body is of the shore and soil

under Mobile river, but much of the shore had already been appropriated specifically by a grant of the Spanish government recognized as valid in 1819 by congress, and by the act of 26th of May, 1824, referred to in the bill and answer. The probability is that the object of the grant was to enable the city to deepen the channel of the river, and to make improvements that would bring to the wharves larger vessels. The port of Mobile was established by acts of congress. In ports legally established, Lord Hale, in his work, *De portibus Maris*, says:

"If A. has the ripa or bank of the port, the king may not grant a liberty to unlade upon the bank or ripa without his consent, unless custom has made the liberty thereof free to all as in many places it is; for that would be a prejudice to the private interest of A., which may not be taken from him without such consent, and therefore it hath been the course to secure the interest of the shore beforehand for the building of wharfs and keys for the application of merchandise and for the building of houses of receipt." *Harg. Law Tracts*, 73, 74.

Again he says:

"Though it is true it is rare to find any port, but that the king, or the owner of the port in point of franchise, hath such a convenient portion of the shore and land adjacent, where wharfs and keys and warehouses may be built for the lading and unlading and safeguard of merchandises, yet the interests are and may be divided. However, they are several in their nature, and the duties that arise by reason of the goods when unladen and laid on the shore, or in relation thereto, are different from those that have been before spoken of. And many times it falls out that such a place within a port may be of great conveniency to make a common key or wharf, where the property of the soil may belong to a subject, whereby either his interest must be bought in by the lord of the port, or he must have those benefits that may arise by the taking or landing of merchandise."

Again he says:

"A man for his own private advantage may in a port town set up a wharf or crane, and may take what rates he and his customers can agree for crantage, wharfage, houpelage, pesage; for he doth no more than is lawful for any man to do, viz. makes the most of his own." *Harg. Law Tracts*, 76, 77.

It is true that a toll cannot be levied for passage along or across an arm of the sea or a navigable river, for the right to navigate is a common and public right. But when a riparian owner erects a landing place upon his land, and affords facilities for lading and unlading of goods, and these facilities are used, he is entitled to compensation. He grants a *quid pro quo*,—a valuable consideration for the benefit he receives, in allowing a use of his property and in maintaining the structures for use. He infringes no common right, nor does he seek to appropriate what is common for his individual use. He merely employs his property in a particular way, and, in taking compensation, only makes what he can from what is his own. 1 *Crabb*, *Real Prop.* § 109. Nor can there be any reasonable objection to the allowance of such a right to the riparian proprietors. They do not contract or impair any of those rights of navigation that have been preserved by constitutional and legal enactments. It is admitted in this case that what they have done has resulted favorably to the commerce of the port and the health of the city. On the river

above and below these improvements there are pestilential marshes, and the islands in front of them are magazines of malaria which not unfrequently exert a baneful influence on the city itself. The enterprise and capital employed by the claimants in this cause, and those from whom their title has been derived, have contributed not a little to the prosperity of Mobile. These improvements have been made and enjoyed as property for a period exceeding the longest prescription. The people of the state have assented to them and have benefited by them. Elsewhere such improvements have been regarded with favor. By the act of congress of May, 1824, the privilege was conceded, and in the judicial proceedings of the state the right has been acknowledged. The claim on the part of the city amounts to this: That private property may be taken for the public use without compensation to the owners, or, as the claim is modified by the answer, with only such compensation as the corporation may think proper to allow. Such a principle is not admissible, and it is a significant fact in this connection that in the fourteenth amendment to the constitution of the United States, which is now pending for adoption or rejection before the state legislatures, there is a clause restraining the power of the states over private property. The adoption of that amendment will place rights of property under the guaranty of the constitution of the United States, and under the protection of the general government.

In the opinion of the court, the plaintiffs, and defendants in a similar condition, have a title to the relief prayed for. I shall direct a reference to the master to ascertain the titles granted, confirmed, or recognized by the United States to the river front within the corporate limits of this city, and embraced in this controversy, to cause a map to be made showing the situation of the wharves, with the names of those who are in possession, claiming title thereto, and are parties to this suit, that the application of this decree may be defined and understood. I shall continue the injunction, and upon the coming in and confirmation of the report the same will be made perpetual. The costs of the suit must be paid by the corporation of the city.

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#### SULLIVAN TIMBER CO. v. CITY OF MOBILE.

(Circuit Court, S. D. Alabama. October 1, 1901.)

No. 227.

#### 1. EQUITY JURISDICTION—FEDERAL COURTS—MULTIPLICITY OF SUITS.

A bill cannot be maintained in a federal court of equity on behalf of several complainants to enjoin the prosecution by defendant of actions at law against complainants on the ground of preventing a multiplicity of suits, where it is not shown that the issues in such actions, as between the defendant in the bill and the several complainants, depend upon the same questions of law and upon similar facts, nor that each of the complainants is entitled, by reason of diversity of citizenship, to sue in a federal court; nor will the fact that defendant has brought two actions in ejectment against a single complainant for separate parcels of land sustain such bill.

**2. NAVIGABLE WATERS—SHORE LANDS IN MOBILE RIVER—EFFECT OF GRANT TO CITY.**

By act of January 31, 1867, the state of Alabama granted to the city of Mobile the shore and the soil under the Mobile river situated within the boundary lines of the city, in trust to hold, possess, direct, control, and manage the shore and soil therein granted in such manner as it should deem best for the public good. By subsequent decisions of the supreme court of the state construing such act, which are binding in the federal courts, it was held that the effect of the act and its amendments was to vest the city with the legal title to the shore and soil under the river as trustee; the purpose being to transfer to the city the right and power of the state over such lands, to be exercised by it as the state should exercise them for the general good in preventing the navigability of the river being impaired, and in restraining pre-emptures along the river front below the water line, by prescribing the manner and extent to which wharves and other structures should be built into and over the water. *Held*, that the transfer of title and powers made by such act did not affect the riparian or littoral rights of owners of lands bounded by the high-tide water mark on such river, which remained the same as before.

**3. SAME—RIPARIAN RIGHTS—CONSTRUCTION OF WHARVES.**

Riparian rights, when recognized as existing by the law of the state or by local usage, are a valuable property, and among those rights are the right of access to the navigable part of a river from the front of his lot by an owner whose land is bounded by or abuts on the river, and the right to make a landing wharf or pier for his own use or the use of the public, subject to such general rules and regulations as the legislature may prescribe for the protection of the rights of the public.

**4. SAME—LOCAL USAGE—JUDICIAL NOTICE.**

The state of Alabama has not, by its legislature or through its supreme court, expressly declared or defined the nature and extent of the rights of riparian owners in the shore and soil under the navigable tide waters of the state; but the supreme court has recognized the usage of riparian owners to construct wharves from the earliest times, and a court is authorized to take judicial notice of the extent to which such a usage has notoriously obtained in a given locality.

**5. SAME—RIGHTS IN MOBILE RIVER.**

The legislature of Alabama and the city of Mobile, within its jurisdiction and under the powers conferred upon it by legislature, have at all times recognized the rights claimed and exercised by riparian owners along the Mobile river within the city to construct wharves in front of their property to reach navigable water, by prescribing regulations fixing the limits of such structures, the materials of which they should be built, the manner of their operation, and wharfage charges; and the rights of an owner acquired under such usage and recognition constitute a valuable property, which cannot be arbitrarily or capriciously destroyed or impaired.

**6. SAME—CONSTRUCTION OF WHARVES—IMPLIED LICENSE.**

Where a city which held the legal title to the shore and lands under the waters of a navigable river within its limits, and to which was delegated the powers of the state over the same, recognized the right of owners to build and maintain wharves and landings over such lands to navigable water, by making no objection to such structures, and by regulating the same and the manner of their construction, its action amounted to an implied license, which was irrevocable after it had been acted upon and expenditures made in reliance thereon.

**7. SAME—EQUITABLE ESTOPPEL—CITY.**

A city which has by long acquiescence in a general custom and usage given an implied license to a riparian property owner to construct and maintain wharves in front of its lands to navigable water in a river, over shore and submerged lands below high-tide water mark, to which the city held the legal title, and has for many years regulated and

taxed the structures of such owner, is equitably estopped from asserting any claim to such lands which would dispossess the license or destroy its property rights therein.

**8. EQUITY JURISDICTION—PROTECTION OF RIPARIAN RIGHTS—ENJOINING ACTION AT LAW.**

A federal court of equity has jurisdiction of a suit to protect the riparian rights of a landowner from threatened destruction or impairment, where such rights do not rest upon a legal title, but upon a prescriptive use of shore and submerged lands lying between his boundary at high-tide water mark and the navigable water in a river, for the maintenance of wharves thereon; and in exercise of such jurisdiction it may enjoin the prosecution of an action of ejectment for the recovery of such shore and submerged lands by a city which holds the legal title, but which, by its long acquiescence in their occupation by complainant, and in the expenditure of money in improvements thereon, is equitably estopped to assert such title to the impairment of complainant's rights.

In Equity. On motion to dismiss, and demurrers to bill.

L. H. & E. W. Faith, for complainant.

Gregory L. & H. T. Smith, for defendant.

TOULMIN, District Judge. This is a bill to enjoin the further prosecution of two actions of ejectment, pending on the law side of this court, which the city of Mobile has instituted against the complainant, each for the recovery of a separate and distinct tract of land; the two tracts being held by the complainant under different titles. The case comes before the court on a motion to dismiss the bill for the want of equity, and on demurrers to the bill. The bill alleges in a general way that the lands sued for lie below ordinary high-tide water mark of the Mobile river, within the corporate limits of the city of Mobile. It does not as distinctly appear from the description of the lands in the bill itself as from the statements in the argument and briefs of counsel what the true character of the lands sued for in the ejectment suits is,—whether upland or the shore between high-tide water mark and the channel of the Mobile river; and, if the shore or the soil under the river, whether complainant has the legal title to the upland bounded by or abutting on said shore. It may, however, be inferred that the lands sued for are shore lands lying below ordinary high-tide water mark of the Mobile river; that complainant has the legal title to the upland bounded by or abutting on said shore lands; and that the wharves and other improvements made by complainant and those under whom it claims title are erected over said shore out to the channel or navigable part of the river. As it has been so assumed in the argument of the cause, I will express my views on the legal points raised by counsel, leaving the bill to be amended, if it can be done, to make more clear its allegations as to the locus in quo of the property so sued for, and the relation of complainant thereto.

The complainant seeks to support the equity of the bill upon three grounds, viz.: (1) To avoid a multiplicity of suits; (2) to quiet complainant's franchise or property right to build and wharf out over the shore and soil of Mobile river to the navigable water thereof; and (3) to enjoin the ejectment suits against it on the ground that it has an equitable defense thereto, arising out of an estoppel in pais against

the city of Mobile, the plaintiff in those suits, which it is alleged cannot be interposed at law.

There is a class of cases where a number of persons, having separate and individual claims and rights of action against the same party, all arising from some common cause and governed by the same legal rule, and involving similar facts, may unite in a single suit for the settlement of the whole matter. 1 Pom. Eq. Jur. § 245. But it does not appear from the allegations of the bill that the issue between the city of Mobile and each of those persons on whose behalf it is filed depends upon precisely the same questions of law and upon similar facts. It does not appear that such persons have a common source of title, and that the claim of the city would be good or bad against all, as it may be good or bad against any one of them. *Osborne v. Railroad Co.* (C. C.) 43 Fed. 824. Besides, it does not appear that by reason of diverse citizenship those who are sought to be made co-complainants are entitled to invoke the jurisdiction of this court, and the bringing of two actions of ejectment by the city of Mobile against complainant for separate parcels of land does not authorize the maintenance of the bill on the ground that it is to avoid a multiplicity of suits. While the bill fails to show an admission by complainant of the legal title in defendant to the lands in question,—on the contrary, it impliedly denies it,—yet the allegations of the bill show the legal title to be in defendant. The acts of the legislature of Alabama, under which the city of Mobile claims the title to the property, are set out in the bill; and the supreme court of the state, in the case of *Mobile Transp. Co. v. City of Mobile* (not yet officially reported) 30 South. 645, has construed those acts, and held that under them, by grant of the state, the legal title to the shore of the Mobile river, as described in the act of January 31, 1867, became vested in the city of Mobile; that the evidence introduced in that case showed a valid legal title to the land sued for in the city of Mobile, unaffected by limitation or an estoppel of any character; and that the city of Mobile was entitled to recover in that case the shore land sued for below the high tide. *Id.* The land granted by the act of January 31, 1867, is described therein as “the shore and the soil under Mobile river, situated within the boundary lines of the city of Mobile.” The act declares that “the mayor, aldermen, and common council of the city of Mobile are created and declared trustees to hold, possess, direct, control and manage the shore and soil therein granted in such manner as they may deem best for the public good.” The supreme court of Alabama in the case above referred to said that “the title of the city of Mobile was derived from the state of Alabama through and by the act of the legislature of January 31, 1867, supplemented by the acts of February 18, 1895, and of December 5, 1896; the latter being amendatory of the former, and confirming and vesting all rights theretofore vested in any municipal corporation of Mobile in the city of Mobile.” The title theretofore vested in the municipal corporation of Mobile was that of trustee. The substance and effect of the decision is that the state granted the fee in “the shore and soil under the Mobile river” to the city of Mobile, to be held as trustee for and in furtherance of the public interest, and that the legal title conveyed



by the grant must in that case prevail in a court of law. *Mobile Transp. Co. v. City of Mobile*, supra. In the case of *Mayor, etc., v. Moog*, 53 Ala. 568, the supreme court of Alabama, in construing the act referred to, said:

"The direct effect of the act, if valid, and its object, would seem rather to be to transfer the right and power of the state in and over the shore of the river and the soil under it, in front of Mobile, to the city, to be exercised by it, as the state should exercise them, for the general good, in preventing the navigability of the river being impaired, and in restraining purprestures along the river front below the water line, by prescribing the manner and the extent to which wharves and other structures should be built into and over the water." 53 Ala. 568.

The court, in *Mobile Transp. Co. v. City of Mobile*, further held that, on streams where the tide ebbs and flows, grants of adjoining lands only extend to the ordinary high tide along the shore. I do not understand the decision as passing on the right to accretions, or as determining the nature and extent of the riparian or littoral rights of the owner of lands bounded by or abutting on such streams. The decisions of the highest court of a state in the construction of its laws, and in the determination of the rules of property therein, are of controlling authority in the federal courts. *City of St. Louis v. Rutz*, 138 U. S. 226, 11 Sup. Ct. 337, 34 L. Ed. 941; *Knight v. Association*, 142 U. S. 183, 12 Sup. Ct. 258, 35 L. Ed. 974; *Lumber Co. v. Ott*, 142 U. S. 622, 12 Sup. Ct. 318, 35 L. Ed. 1136; *May v. Tenney*, 148 U. S. 60, 13 Sup. Ct. 491, 37 L. Ed. 368; *Minneapolis Mill Co. v. Board of Water Com'rs of City of St. Paul*, 168 U. S. 349, 18 Sup. Ct. 157, 42 L. Ed. 497; *Leovy v. U. S.*, 177 U. S. 629, 20 Sup. Ct. 797, 44 L. Ed. 914. The decision in the case of *Mobile Transp. Co. v. City of Mobile* is binding on this court, and will be followed by it.

Assuming, then, that the city of Mobile has the legal title to the lands sued for, the contention of complainant is that it has a franchise right or easement to build and wharf out over said lands to the navigable water of Mobile river, which franchise is a property right that this court of equity should protect from invasion or interference, and, further, that it has defenses of an equitable character against the claim of the city of Mobile, which are not available to it in the actions of ejectment, and hence it appeals to this court and invokes its aid in the premises. The complainant does not claim that it has the legal title to the land sued for. It does not claim that its title extends to the shore below the high-tide water mark, but its claim is that it is the owner of the upland which is bounded by and abuts on the tide-water shore sued for, and that it has rights incident to riparian ownership,—rights which attach to the ownership of land bounded by or abutting on the margin of a navigable river, whether below or above tide water. Complainant's claim for relief in this court is based on the theory that the court has jurisdiction to enjoin any intended or threatened destruction or impairment by the city of Mobile of its rights as a riparian proprietor of the tide-water shore in front of its land, and also on the theory that its equitable defense to the ejectment suits arises out of an estoppel in pais against the

city, and is not available in such suits. The bill alleges that complainant has been in the actual possession and occupancy of the land in question for many years, claiming the same as its own; that, before any improvements were made on it, it was marsh land and useless, and possessed no value except the value of the access to the Mobile river, and other littoral and riparian rights; that to make said land useful and of any practical value, and to obtain access over the same to the actual navigable waters of the river in front of complainant's upland, it was necessary to fill in and reclaim the same; that the complainant and those under whom it claims have, at great expense, filled in and reclaimed the lowland which was subject to the ebb and flow of the tide in front of its said upland, and have constructed valuable wharves, landings, and bulkheads or booms out to and fronting on the channel of Mobile river, and have erected large and permanent and valuable sawmills and other improvements on said land. The bill alleges that by an act of the legislature of Alabama the city of Mobile was vested with power to establish and declare a designated line along the river front within the corporate limits of the city, beyond which wharves or other structures shall not be erected or extended, and with power to determine and declare by ordinance to what extent and in what manner wharves or other structures along said river front shall be constructed, but provided that such ordinance should not affect any wharves already established; that, acting under said authority, the city of Mobile passed an ordinance providing that it shall not be lawful to construct any wharf within the limits of the city of Mobile which shall extend into the channel of Mobile river beyond a certain line designated and established, and further providing that, before beginning to construct or extend any wharf within the limits of the city of Mobile, the person proposing to construct or extend the same shall first obtain a permit therefor from the civil engineer of the city, in which shall be accurately given the lines established, and the wharf when constructed shall neither extend beyond nor fall short of said lines. The bill shows that subsequent to the act referred to the legislature passed another act, as an amendment thereto, conferring on the city of Mobile the power to establish and declare a designated line along the river front within the corporate limits of the city of Mobile, beyond which wharves or other structures shall not be erected or extended, unless the legislature shall create a harbor or dock commission clothed with the power of regulating wharf and boom lines in that portion of Mobile river, in which case the power of the city of Mobile in the premises shall be suspended so long as said commission is clothed with such power. The bill further shows that a short time thereafter the legislature passed an act creating a river commission for Mobile river, with the jurisdiction, power, and duty to establish from time to time bulkhead, wharf, and boom lines, and providing that it shall be unlawful for any person to build or maintain a bulkhead, wharf, boom, or similar structure otherwise than in conformity with the lines so established by said commission, or in manner and form contrary to the regulations established by the said commission. The act last referred to also provides that no one shall erect or place

any bulkhead, wharf, boom, etc., in any of the waters mentioned in the act without first making an application in writing to the commission, which application shall describe the nature and exact location of such proposed structure, giving specifications and a diagram thereof, and that the petitioner shall at the time of filing his application deposit with the city clerk certain fees provided for in the act, and calculated on the dimensions of the structure proposed to be erected. All the acts referred to are set out in the bill. The bill further alleges that the structures erected by the complainant were made in reliance upon the invitation and license granted by the state of Alabama and by the city of Mobile in the said several acts and ordinances, and in conformity with the requirements thereof. It is now well settled that the title and rights of riparian or littoral proprietors in the shore and soil below high-water mark of navigable waters are governed by the local laws of the several states, subject to the rights granted to the United States by the constitution. *Shively v. Bowlby*, 152 U. S. 1, 14 Sup. Ct. 548, 38 L. Ed. 331. In the opinion of the supreme court of the United States in the case of *Yates v. City of Milwaukee*, 10 Wall. 497, 19 L. Ed. 984, it is said that the owner of land adjoining any navigable water, whether within or above the ebb and flow of the tide, has, independently of local law, a right in the soil below high-water mark, and the right to build out wharves so far, at least, as to reach water really navigable. The court also said that "this riparian right is property, and is valuable, and, though it must be enjoyed in due subjection to the rights of the public, it cannot be arbitrarily or capriciously destroyed or impaired." This decision has been cited with approval in several succeeding opinions by the supreme court. See *Weber v. Commissioners*, 18 Wall. 64, 21 L. Ed. 798; *Potomac Steamboat Co. v. Upper Potomac Steamboat Co.*, 109 U. S. 682, 3 Sup. Ct. 445, 4 Sup. Ct. 15, 27 L. Ed. 1070; *Scranton v. Wheeler*, 21 Sup. Ct. 48, 45 L. Ed. 126. But in *Shively v. Bowlby*, supra, the court intimates that it went too far in the opinion in *Yates v. Milwaukee* in saying that the riparian owner had, independently of local law, a right of property in the soil below high-water mark, and the right to build out wharves to reach navigable water, and holds that it is now clearly established that the title and rights of riparian proprietors in the soil below high-water mark of navigable waters are governed by the local laws of the several states, subject to the rights granted to the United States by the constitution. The court says that "the common law of England upon this subject at the time of the emigration of our ancestors is the law of this country, except so far as it has been modified by the charters, constitutions, statutes, or usages of the several colonies and states, or by the constitution and laws of the United States." By the common law of England the title in and dominion over the soil of the sea, and of rivers and arms of the sea, below ordinary high-water mark, are in the king, except so far as an individual or a corporation has acquired rights in it by express grant or by prescription or usage. By that law, also, every building or wharf erected without license below high-water mark, where the soil is the king's, is a purpresture, and may, at the suit of the king, either be demolished or seized for his benefit, wheth-

er it be a nuisance and tends to obstruct navigation or otherwise. *Shively v. Bowlby*, 152 U. S. 13, 14, 14 Sup. Ct. 552, 38 L. Ed. 337. "In the colonies and original states, by various laws and usages, the owners of land bordering on tide waters were allowed greater rights and privileges in the shore below high-water mark than they had in England. But the nature and degree of such rights and privileges differed in the different colonies and states, and in some were created by statute, while in others they rested upon usage alone." *Shively v. Bowlby*, supra. The supreme court in *Shively v. Bowlby*, in commenting on several of its former decisions, in which it was held that the owner of land adjoining any navigable water had a right of property in the soil below high-water mark, and the right to build out wharves, piers, and landing places to reach water really navigable, said these cases "distinctly recognized the diversity of laws and usages in the different states upon this subject," and went no further than to say that wharves, piers, and landing places, "where they conform to the regulations of the state," and do not extend below low-water mark, have never been held to be nuisances unless they obstruct the paramount right of navigation; that the right of the riparian proprietor to erect such structures in the navigable waters of the Atlantic states has been claimed, exercised, and sanctioned from the first settlement of the country to the present time; that different states adopted different regulations on the subject, and in some the right of the riparian proprietor rests upon immemorial local usage. In *Weber v. Commissioners*, 18 Wall. 64, 21 L. Ed. 798, the court, recognizing the doctrine "that a riparian proprietor whose land is bounded by a navigable stream has the right of access to the navigable part of the stream in front of his land, and to construct a wharf or pier projecting into the stream, for his own use or the use of others, subject to such general rules and regulations as the legislature may prescribe for the protection of the public," said, "In the absence of such legislation or usage, however, the common-law rule would govern the rights of the proprietor, at least in those states where the common law obtains."

The cases cited, I think, are authority for the proposition that riparian rights, when recognized as existing by the law of the state or by local usage, are a valuable property. Among those rights are access to the navigable part of a river from the front of his lot by an owner whose land is bounded by or abuts on the river, and the right to make a landing, wharf, or pier for his own use or for the use of the public, subject to such general rules and regulations as the legislature may see proper to impose for the protection of the rights of the public. *Yates v. City of Milwaukee*, supra.

As I understand the allegations of the bill, there is no question raised in this case as to the right or ownership of the accretions or alluvion; but I may remark here that it is well settled that, where the land encroaches upon the water by gradual and imperceptible degrees, the accretions or alluvion belong to the owner of the land bounded on the waters, whether tide or fresh, and are independent of the law governing the title in the soil covered by the water. *Shively v. Bowlby*, supra; *Gould, Waters*, §§ 155, 157. Where the

accretions are artificially made, they go with the title to the soil covered by the water, and the title to them is in the owner of such soil,—to the state or its grantee. The state of Alabama has not, by its legislature or through its supreme court, expressly declared or defined the nature and extent of the rights of riparian owners in the shore and soil under navigable tide waters in the state. But the supreme court of Alabama has said that “riparian owners have claimed and exercised the right to construct wharves and landing places on navigable streams from the earliest settlement of this country, subject to the limitation that the public easement or servitude is not impaired.” *Compton v. Hankins*, 90 Ala. 414, 8 South. 76, 24 Am. St. Rep. 825. Courts may take judicial notice of matters of public notoriety and general information, and will generally take notice of whatever ought to be generally known within their jurisdiction. 1 Greenl. Ev. §§ 6-17; 2 Am. & Eng. Enc. Law (2d Ed.) 940. It is common knowledge that within the limits of the city of Mobile riparian owners have claimed and exercised the right to construct wharves, landings, bulkheads, and booms along the Mobile river front, and that such wharves and other like structures are built out to the navigable part of the river, and that there has existed here for many years a usage under which this right by such owners has been claimed and exercised. The authority of the state, and of the city of Mobile under the grant to it by the state, to exercise police power over the navigable river and its shores, is not inconsistent with a right of the owners of the bank to erect wharves or other structures which shall be in aid of commerce, and which do not impede the public navigation. The usage referred to and the rights exercised under it have been recognized by the state of Alabama and the city of Mobile in their legislation and by their conduct in relation to the same; in their legislation prescribing the manner and material of which wharves and other like structures shall be built, their extent, and the limit to which they may go and within which they shall not stop; providing for the appointment of officers to fix rules and regulations on the subject, and to see that they are complied with; in their legislation declaring wharves subject to taxation; and in the legislation of the state in reference to wharfage charges, authorizing the same, and giving liens therefor (Const. Ala. p. 66, § 25; Code, Ala. § 2514); and in its legislation authorizing the city of Mobile to obtain by contract or purchase the property in or control of the wharves and wharf property in the city of Mobile. Charter of the City of Mobile of 1866, § 60; Acts of the Legislature of 1865-66, pp. 223, 225. Such rights of the riparian owner, having been acquired by usage, and their existence being thus recognized by the state and by the city of Mobile, are a valuable property, and cannot be arbitrarily or capriciously destroyed or impaired, though they must be enjoyed subject to such general rules and regulations as the legislature may prescribe, for the protection of the rights of the public in the navigation of the river. *Yates v. City of Milwaukee*, supra; *Weber v. Commissioners*, supra; *Illinois Cent. R. Co. v. Illinois*, 146 U. S. 445, 13 Sup. Ct. 110, 36 L. Ed. 1018. In this court, more than 30 years ago, in a case involving, among others, the question of a riparian owner's right to wharf

out on the river front of the city of Mobile, the judge delivering the opinion in the case said:

"The general right before mentioned as belonging to a riparian proprietor is co-extensive with the limits of the city. This general right is sustained by possession, user, enjoyment, recognition in state and municipal legislation, and by general acquiescence." *Leverich v. Mayor, etc.* (C. C.) 110 Fed. 170.

These observations, I think, may justly be applied to this case.

It is further contended that if it be conceded that complainant had not by franchise or usage a right to build out wharves, landings, and booms to the channel or navigable part of the river, the legislation of the state and the ordinances of the city of Mobile passed pursuant to such legislation were a regulation of the exercise of the riparian rights of complainant and all other persons entitled to such rights within the limits of the city of Mobile,—a settlement of the line of navigability of the river,—and were an implied license or concession of the right to build out, possess, and occupy to the established line, which amounted practically to a qualified possessory title. While this legislation and the acts of the state and the city thereunder were not a grant, they, in my opinion, implied a license to complainant and other persons similarly situated to construct or extend a wharf or other structure into the channel of Mobile river, provided it be done in conformity with such legislation and the rules and regulations prescribed by authority of the state. There was no license expressly granted, but it was clearly implied. There was conferred on the licensee no estate or title in the shore or soil under the river over which such structures were to be constructed, but a privilege or license was given to be exercised in conformity with certain rules and regulations to be prescribed therefor. "A license, in the law of real estate, is an authority to do an act or a series of acts on the land of the person granting the license, without conferring on the licensee any estate in the land." And a license may be implied from the acts of the parties. 2 Am. & Eng. Enc. Law (2d Ed.) 1132. "The right to wharf out may rest upon passive or implied license merely." *Cohn v. Boom Co.*, 47 Wis. 314, 2 N. W. 546; *Diedrich v. Railway Co.*, 42 Wis. 262; 2 Am. & Eng. Enc. Law (2d Ed.) supra. At common law an owner of land fronting on a navigable river has a right of access to the navigable part of the river, but if he erects a wharf or other building, without license, below high-water mark, where the soil is the king's it may, at the suit of the king, be demolished or seized. Yet such owner may acquire the right to erect a wharf or other building by charter or grant or license, and also by prescription or usage. *Shively v. Bowlby*, supra, and authorities therein cited. Here, as I have said, the legal title to the shore or soil below high-water mark is in the state, or in the city of Mobile by grant of the state. As already said, there is in this state no positive law or judicial rule prescribing the nature and extent of the riparian rights of owners of land on tide water within the limits of the city of Mobile, but that it is common knowledge that such owners have by long usage been accorded and have exercised the right to build wharves and other structures upon the flats or shore lands in front of their

uplands, and out to the navigable part of the Mobile river. The exercise of such right is not prohibited by any law of the state. It may reasonably be presumed that the legislature of Alabama, recognizing the fact that such owners have by long usage, "if not from the earliest settlement of the country," claimed and exercised the right to construct wharves, landings, and other structures in front of their upland out to the navigable part of the river, enacted the legislation we have been considering for the purpose of protecting the public easement or servitude in the navigation of the river. That legislation, as we have seen, provides that it shall be unlawful to construct such wharves or other structures unless it be done in conformity with the rules and regulations prescribed by the state or under its authority. It seems to me clear that, when the state of Alabama and the city of Mobile concur in saying to any person who proposes to build or extend a wharf or other structure into the channel of Mobile river that it shall be unlawful for him to do so unless he conforms to certain rules and regulations, they virtually say to him, if he constructs his said structures in conformity with such rules and regulations, it shall be lawful for him to do so.

It is alleged in the bill that complainant constructed the wharf and other structures on the land involved in the ejectment suits under and by virtue of the invitation and license of the state of Alabama and of the city of Mobile, and that they were constructed in strict conformity with the state and city legislation on the subject, and with the rules and regulations thereunder prescribed. This license did not vest any right until exercised, and could only be exercised by one possessing riparian rights; but when executed it was a lawful exercise of a privilege or license, which became irrevocable, and especially where expenditures were made in reliance upon the license, as is alleged in the bill. 2 Am. & Eng. Enc. Law (2d Ed.) 1145; *Rhodes v. Otis*, 33 Ala. 578; *Shively v. Bowlby*, supra. To the contention of the defendant that, if any such license ever existed, it was revoked by the act of the legislature of January 31, 1867, it may be answered that the bill shows that the wharf and other structures referred to were constructed subsequent to the passage of the act, and hence the act could not have had the effect claimed for it, and, further, that the supreme court of Alabama has said that the direct effect and object of that act were to transfer the right and power of the state in and over the shore of the river and soil under it in front of Mobile to the city, to be exercised by it, as the state should exercise them, for the general good, in preventing the navigability of the river being impaired, and in restraining preposterous structures along the river front below the high-water line, by prescribing the manner in which structures should be built into or over the water. *Mayor, etc., v. Moog*, supra. All riparian rights depend upon the ownership of land which is contiguous to and touches upon the water, and in the case of tide waters, at common law, upon the ownership of the land above and adjoining the edge of the water at ordinary high-water mark. *Gould, Waters*, § 148; *Yates v. City of Milwaukee*, 10 Wall. 497, 19 L. Ed. 984. On navigable tide waters the "shore" is the space between ordinary high water and low water. It is owned by the sovereign or state. The

shore of the Mobile river within the limits of the city of Mobile is owned by the city under the grant by the state. The title of the owner of the upland stops at the high-water mark. Such owner is a riparian owner or proprietor, and possesses rights incident to such ownership. Such rights are access to the navigable water on the front of which lies his land, and for that purpose to make a landing, wharf, or pier for his own use or for the use of the public, subject to such general rules and regulations as the legislature may prescribe for the protection of the rights of the public. *Illinois Cent. R. Co. v. Illinois*, 146 U. S. 387, 13 Sup. Ct. 110, 36 L. Ed. 1018; *Yates v. City of Milwaukee*, *supra*; *Weber v. Commissioners*, *supra*; *Gould, Waters*, § 148 et seq.

A further ground of relief alleged in the bill is that by its acts and conduct the city of Mobile has estopped itself, as against complainant, from asserting any claim which would annul complainant's rights to the property in question, or would invade or impair complainant's free use and enjoyment of the same. The substance of the contention on this proposition is that the long possession of complainant and those under whom it claims; the large expenditures made by them in improvements upon the land; the acts and conduct of the city of Mobile in permitting complainant and its grantors to fill in the low or marsh land in front of its upland, and to erect valuable improvements thereon, without interference or objection; in authorizing and directing the construction of some of the improvements; in establishing and designating the limit or line to which the wharves, landings, and bulkheads, etc., constructed by complainant should be extended; the long acquiescence of the city of Mobile in complainant's possession and use of the property under claim of right; the taxation of the property as that of complainant by the city of Mobile; the staleness of the city's claim; the lapse of more than 30 years since it acquired its title; and its laches in enforcing its title,—all show a practical abandonment of all claim to the property by the city, and equitably estop it from questioning the legality of that which has been done by complainant, and from now claiming ownership of the land in question, and the right to dispossess complainant of the same to its prejudice. Equitable estoppels arise upon facts which render their application in the protection of rights equitable and just, and courts of equity recognize them in cases of equitable cognizance, but they are available at law as well as in equity. "An equitable estoppel as a defense is available at law as well as in equity in the federal courts." *Dickson v. Colgrove*, 100 U. S. 578, 25 L. Ed. 618; 11 Am. & Eng. Enc. Law (2d Ed.) 420; *Kirk v. Hamilton*, 102 U. S. 68, 26 L. Ed. 79; *Berry v. Seawall*, 13 C. C. A. 101, 65 Fed. 753. Under the rule of law in Alabama, equitable estoppels do not operate to divest the legal title of lands, and in a court of law there can be no estoppel affecting the title to land. *Standifer v. Swann*, 78 Ala. 93; *Hendricks v. Kelly*, 64 Ala. 388. But a court of equity accords full effect and operation to it. *South & North Alabama R. Co. v. Alabama G. S. R. Co.*, 102 Ala. 236, 14 South. 747. Although an equitable estoppel is an available defense to an action at law in the federal courts, it is also available in a court of equity when the



case shows some ground of equity other than the estoppel itself. *Drexel v. Berney*, 122 U. S. 241, 7 Sup. Ct. 1200, 30 L. Ed. 1219; *Wehrman v. Conklin*, 155 U. S. 314, 15 Sup. Ct. 129, 39 L. Ed. 167; *Davis v. Wakelee*, 156 U. S. 688, 15 Sup. Ct. 155, 39 L. Ed. 578.

The ground of equity on which the court takes cognizance of this case and sustains the bill is that it seeks to protect complainant's riparian rights from invasion and impairment,—rights which are undoubted elements in the value of its property, and which are intended or threatened to be destroyed or abridged by the ejectment suits which are asked to be enjoined. The right of complainant is one not protected by legal title, but in and of itself appeals to the conscience of a court of equity. In such case the court should act, and establish and protect its right. "Where equity can give relief, complainant ought not to be compelled to speculate upon the chance of obtaining relief at law." *Davis v. Wakelee*, supra. In *Railroad Co. v. Jones*, 68 Ala. 49, the court said:

"When the owner of land has knowledge of the fact that a railroad is proceeding to locate and construct its road on his lands, and allows it to expend large sums of money on improvements for the purpose without interfering or forbidding it to proceed, he will be estopped from evicting it by ejectment."

*South & North Alabama R. Co. v. Alabama G. S. R. Co.*, supra; 11 Am. & Eng. Enc. Law (2d Ed.) 428, 429.

In *Kirk v. Hamilton*, 102 U. S. 68, 26 L. Ed. 79, the court said:

"If a man knowingly, although he does it passively, looking on, suffers another to purchase and expend money on land under an erroneous opinion of title, without making known his own claim, he shall not afterwards be permitted to exercise his legal right against such person."

"Lord Mansfield would not suffer a man to recover, even in ejectment, where he had stood by and seen the defendant build on his land." *Kirk v. Hamilton*, supra.

The staleness of the claim of the city of Mobile, the lapse of time, or the statute of limitations cannot avail the complainant; that is to say, the complainant cannot avail itself, as a matter of law, of the laches of the city of Mobile, the plaintiff in the ejectment suits, in asserting its claim of title. Such laches, however, may be considered as one of the facts of the case tending to show an estoppel. *Wehrman v. Conklin*, 155 U. S. 314, 15 Sup. Ct. 129, 39 L. Ed. 167. Municipal corporations are concluded by estoppel as much as individuals. *Bissell v. City of Jeffersonville*, 24 How. 287, 16 L. Ed. 664; *Hackett v. City of Ottawa*, 99 U. S. 86, 25 L. Ed. 363; *Town of Brewton v. Spira*, 106 Ala. 235, 17 South. 606. In *Bissell v. City of Jeffersonville* the court said:

"A corporation, quite as much as an individual, is held to a careful adherence to truth in their dealings with mankind, and cannot by their representations or silence involve others in onerous engagements, and then defeat the calculations and claims their own conduct superinduced."

2 Story, Eq. Jur. § 154.

My opinion is that a case of equitable estoppel against the city of Mobile has been shown by the allegations of the bill. My conclusions are (1) that the bill cannot be sustained on the ground that it

seeks to avoid a multiplicity of suits; (2) that there is equity in the bill, in that it seeks to protect the complainant's property or proprietary rights as a riparian owner from invasion or impairment, and to settle and quiet the exercise and enjoyment of the same; (3) that the city of Mobile is equitably estopped from asserting its title to the land sued for in said actions of ejectment. The motion to dismiss the bill for want of equity is denied, and the demurrers to the bill are each and all overruled, except the demurrer thereto, in so far as it is filed on behalf of persons other than complainant, and wherein it seeks to avoid a multiplicity of suits, which said demurrer is sustained. Let a decree be entered in accordance herewith.

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CHINNOCK v. PATERSON, P. & S. TEL. CO.

(Circuit Court, D. New Jersey. February 14, 1901.)

1. PATENTS—SUITS FOR INFRINGEMENT—EQUITY JURISDICTION.

A court of equity acquires jurisdiction of a suit for infringement of a patent, where the relief sought is a temporary and permanent injunction and an accounting, and the bill contains the requisite and usual averments, notwithstanding the fact that the patent has only about four months to run when the bill is filed; and it retains such jurisdiction to grant the incidental relief prayed for, although no injunction is issued during the life of the patent.

2. SAME—PLEADING—DEMURRER.

Where a bill for infringement sets out the nature of the invention in general terms only, and makes profert of the patent, such patent will be considered as before the court for the purposes of a demurrer.<sup>1</sup>

3. SAME—INVENTION—PROCESS OF SUSPENDING CABLES.

The Chinnock patent, No. 274,562, for a process of suspending a cable or conductor so as not to subject the same to severe longitudinal strain, which consists of stretching an independent wire taut between the supports, suspending the cable under it, and progressively taking up the slack and binding it to the wire by winding them with a suitable cord, but which does not include the mechanical device by which the process is accomplished, is void on its face for lack of patentable invention.

In Equity. Suit for infringement of patent. On demurrer to bill.

Edw. I. Keasbey, for the motion.

Donald Campbell, opposed.

GRAY, Circuit Judge. This is a suit in equity brought by the complainant against the defendant for an alleged infringement of a patent right. The complainant alleges that prior to the 9th day of October, 1882, he was the original and first inventor of a certain new and useful improvement in suspending cables or conductors, not known or used by others in this country; that, upon application duly made in accordance with the laws of the United States, letters patent No. 274,562 were on the 27th day of March, 1883, duly issued to the said complainant. After a statement of the alleged infringement and notice to the defendant thereof, the complainant prays for a writ of

<sup>1</sup> Pleading in infringement suits, see note to *Caldwell v. Powell*, 19 C. C. A. 596.

injunction to restrain the said defendant from any further construction or use of the said patented improvement in violation of his rights as aforesaid, and also for an interlocutory decree for an account of the profits of the said defendant, and an assessment of the damages sustained by the complainant by reason of said infringement, and a prayer also for a preliminary injunction. No motion for a preliminary injunction has been made. The defendant has filed a demurrer to the bill of complaint, in which the causes of demurrer are set out as follows:

"(1) That the complainant has not in and by said bill made or stated such a case as entitled him in a court of equity to any discovery from this defendant, or to any relief from this defendant as to the matters contained in the said bill, or any such matters. (2) That the bill of complaint of which the letters patent therein referred to are made a part by profer thereof does not state sufficient ground for injunction, discovery, or relief, because it is apparent upon the face of the said patent that the alleged invention therein referred to is not a patentable invention, and that the alleged process therein described is not an art, within the meaning of the patent laws of the United States, and is without novelty and discloses no invention."

The first question raised under this demurrer was one of jurisdiction. The bill was filed November 22, 1899, and the subpoena was returnable January 1, 1900. The patent expired March 27, 1900. The contention is that it was impossible, under the practice of the court, to have obtained an injunction on final hearing before the patent expired. To show this, reference is made to the rules as to appearance and answer and the taking of testimony. It is quite true, as contended by complainant, that the principal relief prayed for was an injunction, and the grounds for that prayer were the ordinary and equitable ones, of the irreparable nature of the injury threatened, and the inadequacy of any remedy at law. It is true, also, that the relief thus prayed for was the sole ground of equitable jurisdiction; the accounting for profits and the assessment of damages being incidental to the principal relief. When the bill was filed the patent had four months and five days to run. Upon the allegations of the bill, equitable jurisdiction attached, on the ground of the relief prayed for. A preliminary injunction could have been asked for, and might, under justifying circumstances shown, have been granted; but, whether granted or denied, there was undoubted jurisdiction to entertain the suit. Moreover, it was possible, within the time in which the patent had to run, to have obtained a final decree. Non constat but that a decree pro confesso might have been taken. But the mere fact that in the ordinary course of equitable pleading a final hearing and decree would not be likely to be had prior to the expiry of the patent does not necessarily deprive the court of jurisdiction, or prevent the court from proceeding to grant the incidental relief which belongs to cases of this sort. If facts brought to the attention of the court induced the belief that the particular suit had been instituted as a "mere device to transfer a plain jurisdiction to award damages from the forum to which it properly belonged to a court of equity," the court would be justified, in its discretion, in declining jurisdiction. Such, however, is not the case here, and jurisdiction has been sustained in the circuit courts in cases where a much shorter period was

to elapse between the beginning of the suit and the expiry of the patent. We think, therefore, that jurisdiction has properly attached, and we cannot accede to the contention of defendant in that regard.

The second cause of demurrer, as above recited, is that the letters patent sued on did not disclose a patentable invention. The bill states that letters patent No. 274,562, executed in due form of law, and bearing date the 27th day of March, 1883, "were issued to your orator, whereby there was secured to him and to his heirs and assigns, for the term of seventeen years from the 27th day of March, 1883, the full and exclusive right of making, using, or vending the said improvement throughout the United States and the territories thereof, as by a certified copy of said letters patent in court to be produced will more fully appear." The bill contains no other description of the patent in suit, or of the particular process of the alleged invention for which the letters patent were granted. It is the duty of complainant in his bill to so describe the invention patented that the court may understand its nature and character. In the absence of such description, however, profert may be made of the letters patent, and such profert will take the place of specific allegations descriptive of the invention. Such a reference to the letters patent as is made in this bill is the usual substitute for specifically setting out the invention claimed, and for the purposes of demurrer the more technical practice of profert and the craving of oyer is unnecessary. The letters patent, then, in the present case are before the court, and the objection taken to the patentability of the invention claimed therein can properly be considered.

In the specifications of the patent the patentee sets out the nature of his invention as follows:

"The object of my improvement is to provide for suspending cables or conductors with little slack, and without exerting any severe longitudinal strain upon them. The improvement consists: First, in running a strong wire from one support to another, and drawing it taut; secondly, in hanging the cable or conductor in loose festoons therefrom; thirdly, in placing over the wire and cable or conductor a clamp for holding them together; and, fourthly, in moving this clamp, and applying tarred marline or other suitable material in rear of it, in the form of a spiral or coil, around the wire and cable or conductor."

The single claim of the patent is as follows:

"The process of suspending a cable or conductor, consisting: First, in running a wire of steel or other suitable material from one support to another, and drawing it taut; secondly, in hanging the cable or conductor in loose festoons therefrom; thirdly, in placing over the wire and cable or conductor a clamp for holding them together; and, fourthly, in moving this clamp along, and applying tarred marline or other suitable material in rear of it, in the form of a spiral or coil, around the wire and cable or conductor, substantially as specified."

There is obvious objection to directly stretching between two poles or other fixed supports any cable, cord, or electrical conductor which will not admit of strong tension or strain. But it cannot, in the opinion of the court, be considered as a matter that would tax the invention of an intelligent mechanical engineer, or of any intelligent person, though not specially concerned in mechanical

operations,—a sailor, for instance,—to string the cable or cord to be suspended in festoons from a cord or wire that had been stretched taut for the purpose between the given supports, and then to take up the slack, either by hand or by some mechanical device in the nature of a clamp, sliding the hand or clamp along the loose cable and the taut one, securing them together at intervals by seizing or by spiral winding of a light string or cord around the two. Yet this is, in short, the so-called process described and claimed in the letters patent. Each step, if steps they can be called, is mechanical, and the question of patentability of this alleged process can be fully determined upon the specifications and claim set out in the letters patent. There is no need of any testimony to determine the question. No expert or other witness could make plainer the character of the process, its object, or its utility. It is true that something in the nature of a mechanical device is called for in the claim, as well as in the specifications; but that is simply a clamp for the purpose of holding together the cable to be suspended and the taut wire, in the shape of a spool or reel, around which is wound the marine twine, which is unwound as the clamp advances, forming a spiral wrapping around both the cords. No special form of spool is described or claimed, and in fact it is expressly disclaimed in the specifications, and yet it would seem that the only novel feature described in the patent is the function of the mechanical device embodied in the clamp and spool. As such, it cannot be the subject of a patent. It is contended, however, that any device for holding together the taut wire and the suspended cable which will, as it pushes along, wind around them both in spiral form, by a connected spool or bobbin, a twine or string, will answer the purpose of the process; and it is also contended that the same process can be carried on by hand. It is claimed, therefore, to be a true process, consisting entirely of mechanical steps. As such, it belongs to a class of cases whose patentability is not unquestioned. It will not, however, be necessary to consider here the somewhat difficult and unsettled question as to the inclusion, under the patent law, of processes which consist entirely of mechanical transactions, which may be performed by hand or by any of several different mechanisms. It is enough to know that such cases are exceptional, and claims under them cannot be allowed unless they are clearly brought within the principles of the law, and disclose discovery or invention, which is not involved in the mechanism by which the result is accomplished. Apart from the clamping mechanism, the invention claimed here is nothing more than, as we have said, suspending one cable from another, by taking up the slack of the lower one gradually and winding a cord around the two as you do so. We are clearly of opinion that there is nothing new in this, and that it involves no invention. It could be done by other mechanism than the one suggested in the specifications, and it could be done by hand, and has doubtless been frequently so done in the practice of the riggers' and other arts, for it is a method too obvious to be overlooked by an intelligent person who has occasion to practice it. The claim, if allowed, would apply not only to electro cables suspended between poles, but to any cord or cable suspended between

supports. Indeed, the patentee substantially says this. In the specifications we find the following:

"While I do not wish to confine this invention to any particular cable, it is especially applicable to a cable which I have heretofore patented, comprising a number of conductive wires, coated with an insulating material," etc.

Where a patent on its face, as a matter of common knowledge, shows lack of invention, it is the duty of the court, upon a demurrer, notwithstanding the prima facies of the grant of the patent, to so declare, and not put the parties to the expense and delay of a possibly costly and protracted litigation. The process in this case not belonging, in our opinion, for the reasons stated, to a class to which the protection of the patent law extends, the patent issued therefor is void, and the demurrer must be sustained.

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### SAFETY OILER CO. v. SCOVILL MFG. CO.

(Circuit Court, S. D. New York. July 6, 1901.)

#### 1. PATENTS—CONSTRUCTION OF CLAIMS—LIMITATION BY AMENDMENT.

A limitation inserted in an application for a patent by amendment after its rejection, to meet the objections of the patent office, must be given effect in construing the patent issued on the amended application, without regard to whether it was required by the prior art.

#### 2. SAME—INFRINGEMENT—OILER.

The Hirsch patent, No. 521,614, for a safety extension oiler, claim 1, construed, and *held* not infringed.

#### 3. SAME—OIL AND SPRINKLING CAN.

The Smalley patent, No. 247,855, for an oil and sprinkling can, construed, and *held* not infringed.

In Equity. Suit for infringement of patents. On final hearing.

Alan D. Kenyon, for complainant.

John P. Bartlett and Robert C. Mitchell, for defendant.

COXE, District Judge. This is an infringement suit based upon two patents owned by complainant. The first, No. 521,614, was granted to Ludwig Hirsch, June 19, 1894, for a safety extension oiler. The second, No. 247,855, was granted to Edmund Smalley, October 4, 1881, for an oil and sprinkling can. The defenses to both patents are noninfringement, lack of invention, anticipation and misjoinder of causes of action, the defendant insisting that the devices of the two patents are incapable of conjoint use.

The Hirsch patent relates to an improved oiler for bicycles, sewing machines, etc., the spout being adapted to be opened and closed so as to supply the oil or prevent its escape from the oiler. The spout is made movable in a stuffing-box and is guided on a stationary pin at the interior of the body of the oiler, the spout being provided at its inner end with a funnel-shaped mouth to permit the discharge of the lubricating material from the oiler when the spout is drawn out to its full extent, and to prevent the escape of the same when the spout is

pushed inwardly over the stationary pin. The specification explains the method of operation with careful attention to details. It says:

"When the spout, B, is pushed into the oiler, the inner end of the same passes readily over the stationary pin, a, and is guided thereon until the mouth arrives at the opposite point of the body, so as to permit by the seating of the flaring mouth against the bottom of the body and the tight-fitting of the pin into the spout, B, the reliable closing of the oiler, so that no discharge of oil from the same is possible. When the spout is in the body, A, the oiler can be placed in any desired position without discharge or leakage of oil, so that the soiling of the pockets, clothes or fingers is obviated. When the spout is pushed in the outward direction until its enlarged mouth arrives at the inner end of the stuffing-box, the spout clears the stationary pin, a, and the oil can be readily ejected from the body through the spout to the outside by pressing on the flexible side-wall or bottom of the oiler in the usual well-known manner."

The first claim is the only one involved. It reads as follows:

"(1) An oiler, composed of a suitable body, a shifting spout or tube guided in a stuffing-box of the body, an inner elongated stationary guide-pin projecting from the bottom of the oiler in line with the spout to a point near the top of the body, said spout being adapted to be moved inwardly over the pin and seated at its inner end on the bottom of the body, or outwardly so as to clear the same, substantially as set forth."

There are many features of this controversy which naturally tend to prepossess the court in favor of the complainant and there would, probably, be little difficulty in finding a decree in its favor were it not that Hirsch has so worded the claim that it is impossible, without disregarding well-known rules of construction, to hold that the defendant has infringed. It will be noted that one of the elements of the claim is "a shifting spout adapted to be moved inwardly over the guide-pin and seated at its inner end on the bottom of the body." This language is perfectly plain and simple and can be construed in one way only, the spout is seated at its inner end on the bottom of the oiler body. To construe the word "its" in the phrase "said spout being adapted to be moved inwardly over the pin and seated at its inner end on the bottom of the body," as referring to the pin's inner end, is arbitrarily to strangle and distort the English language and disregard the elementary rules of grammar. But even this interpretation will not remedy the difficulty. The spout must be "seated," and it cannot be seated if suspended an eighth of an inch above the only seat upon which it is possible for it to rest. The word "seat" when applied to machinery means "the part on which another thing rests, as a valve-seat." 3 Knight, Mech. Dict. 2084. Construction may be resorted to when there is something to construe; when, however, the language used can have but one meaning that meaning must be adopted no matter what the consequences may be. When a patentee claims as one of the elements of his invention a valve seated on a valve seat the court is not at liberty to say that the invention is equally found in a device where the seating of the valve as claimed is an impossibility. There can be no pretense that the language of the claim was used inadvertently or that it does not express the exact meaning intended by the patentee. The drawings show the "said spout"

seated at its inner end on the bottom of the body and the description specifically points out that it must be so seated. It says:

"When the spout, B, is pushed into the oiler the inner end of the same passes readily over the stationary pin, a, and is guided thereon until the mouth arrives at the opposite point of the body so as to permit by the seating of the flaring mouth against the bottom of the body \* \* \* the reliable closing of the oiler."

Furthermore, it appears that the limitation was deliberately inserted by the patentee after his application had been rejected. The words "seating the flaring mouth against the bottom of the body" in the description, and the words "seated at its inner end on the bottom of the body" in the claim, were added after the application had been twice rejected. Unless he had acquiesced in the decision of the examiner and consented to the limitation of the claim he could not have obtained a patent at the time he did; having acquiesced and consented he cannot now ask to have the limited claim construed as if it were the broad rejected claim.

The contention that the patentee was not called upon by anything in the prior art to limit the claim as stated is wholly immaterial where there is no escape from the conclusion that he has so limited it. The law in such circumstances is too plain to admit of doubt. *Shepard v. Carrigan*, 116 U. S. 593, 6 Sup. Ct. 493, 29 L. Ed. 723; *Morgan Envelope Co. v. Albany Paper Co.*, 152 U. S. 425, 14 Sup. Ct. 627, 38 L. Ed. 500; *Royer v. Coupe*, 146 U. S. 524, 13 Sup. Ct. 166, 36 L. Ed. 1073; *Keystone Bridge Co. v. Phoenix Iron Co.*, 95 U. S. 274, 24 L. Ed. 344; *Brill v. Car Co.*, 33 C. C. A. 213, 90 Fed. 666; *Packing Co. v. Sibley (C. C.)* 15 Fed. 386.

It is admitted that there is no valve seat at the bottom of the defendant's oiler and that it is impossible for the moving spout to come in contact in any manner with the bottom of the body. It is also admitted that if the claim be construed to contain this seating element the defendant does not infringe.

The Smalley patent expired pendente lite October 4, 1898. It relates to that class of oil cans known as "squirt cans," but can be used for sprinkling clothes or flowers and analogous purposes. The specification says:

"The invention consists in the combination, with an oil or sprinkling can, having an annular stopper for closing the mouth of a sliding discharge-tube fitting in said stopper and adapted to be thrust into the can to permit of the latter being conveniently carried in the pocket or otherwise, or extended for use when desired, and a fixed valve within the can against which the inner open end of said tube is closed when the latter is slid in. The invention also consists in the combination, with the can-stopper and valve or valve-yoke, of a discharge-tube composed of telescopic sections, the outer one of which slides in the stopper and the other or others of which slide within said outer tube, and the inner ends of all of which close against said valve."

The first claim is the only one involved and is as follows:

"(1) The combination, with an oil or sprinkling can having an annular stopper for closing its mouth, of a sliding discharge-tube fitting in said stopper and adapted to be slid in or out of the can, and a valve fixed within the can, against which the open end of the discharge-tube closes when the latter is slid in substantially as specified."



The elements of this combination are: First. An oil or sprinkling can having an annular stop for closing its mouth. Second. A sliding discharge-tube fitted in said stopper and adapted to be slid in or out of the can. Third. A valve fixed within the can, against which the open end of the discharge tube closes. The defendant's oiler concededly embodies the first two of these elements, but so does the structure covered by the patent to William Dee of May 30, 1871. If the claim be broadly construed the defendant has the third element also, but so has Dee. In other words, a construction broad enough to include the defendant's structure will invalidate the claim in view of the Dee patent. It is said that the Dee device belongs to a different art, but this proposition cannot be maintained in view of the statements in both patents that the vessels can be used as sprinkling cans and to hold any liquid. The Smalley patent is in no sense a pioneer; it must be confined to the apparatus shown and described. The defendant's valve is fixed within the can, but it has no valve yoke composed of wires and the mechanism and mode of operation is very different from that of the Smalley structure. If the defendant's method of closure were taken bodily from the Dee patent it would come nearer to infringing the claim than does the method now used. Any argument which excludes the Dee device as an anticipation must exclude the defendant's device as an infringement. The bill is dismissed.

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**TIMOLAT v. MANNING et al.**

(Circuit Court, S. D. New York. July 11, 1901.)

**PATENTS—INFRINGEMENT—PORTABLE DRILLING MACHINES.**

The Moffet patent, No. 369,120, for a portable drilling machine, in which steam or compressed air is substituted for hand power in drilling holes in metallic structures, was not anticipated, covers an invention of great merit, and is entitled to a liberal construction. As so construed, *held* infringed.

In Equity. Suit for infringement of patent. On final hearing.

William Houston Kenyon and William C. Witter, for complainant.  
Samuel T. Fisher, for defendants.

COXE, District Judge. This suit is founded upon letters patent, No. 369,120, granted to John Moffet, August 30, 1887, for a portable drilling machine, which substitutes steam or compressed air for hand power in drilling holes in metallic structures. The specification states that prior to the invention the holes for bolts and rivets which it was necessary to make, after the heavy steel and iron parts were placed in position, were bored by the ordinary ratchet-drill manipulated by the hand of the artisan. This was a tedious and fatiguing process. The object of the invention is to furnish the operator with a portable drill adapted to all the positions in which it may be necessary to bore holes, the power being

furnished by a rotary engine operated by steam or compressed air. The engine is attached to the same frame that carries the boring shaft. The three claims are as follows:

"(1) In a portable boring-machine, the combination of the boring-spindle with a rotary engine, upon the cylinder of which is formed the journal-bearing for the boring-spindle, as set forth. (2) In a portable boring-machine, the combination of the boring-spindle, the rotary engine, with its cylinder, upon which is formed the journal-bearing for the boring-spindle, the gear connecting the boring-spindle and engine-shaft, and the feed-screw and sleeve-nut adapted to turn and force forward the boring-tool, as set forth. (3) In a portable boring-machine, the cylinder provided with diametric tubular connections, as set forth, in combination with the handles attached to said connections, as and for the purpose specified."

The defenses are lack of patentability, anticipation and aggregation. It is also insisted that the claims must be limited to the specific construction shown in the patent, and, if so limited, the defendants do not infringe.

There is no doubt that the device covered by the claims is an ingenious and highly useful tool. No time need be spent in discussing this proposition; it is self-evident and conceded. The tool is here; it is an actual verity. The all important question is whether Moffet or some one else is entitled to the credit of having invented it. That the inventor of a device so valuable is entitled to a large meed of praise cannot be disputed. The application was filed December 24, 1886, but the invention was conceived several years prior to this date. The complainant insists that it was over three years before; the defendant admits that it was over two years before. In September, 1883, Moffet filed an application for a patent for a rotary engine, and he testifies that prior to this date his portable drilling machine was in actual operation at the Cornell Works, but was not sufficiently perfected to warrant the filing of an application for a patent. There was not sufficient power and the speed of the machine was not satisfactory. All of the parts as they now appear were assembled at that time, namely, the engine, spindle, drill-shaft, gearing, screw, feed nut and handles. There were two handles situated on opposite sides of the engine used for holding the drill and for the inlet and exhaust for the steam or air. Moffet's statement is corroborated by two witnesses and by written evidence; it is inherently probable and it is uncontradicted. The date of the invention, then, is found to be prior to September 27, 1883. The best reference offered by the defendant's is unquestionably the patent granted to John F. Allen, October 14, 1884, for a portable drilling machine. The application was filed December 3, 1883, and there is no satisfactory testimony establishing the date of the construction of the Allen machine prior to the date of the application. It is argued that the Allen drill was prematurely patented, that he never constructed an operative machine until long afterwards, and that all his work, until after even the latest date which can be found for the Moffet invention, must be regarded in the light of unsuccessful experiments. It is, however, unnecessary, in the view the court takes of the conception of the Moffet invention, to consider this phase of the controversy. It is not pretended that the Allen pat-

ent anticipates or limits the distinctive invention covered by the third claim of the patent in suit. Next to Allen come Fullam, of July 30, 1867, Noteman, of February 27, 1883, Whitcomb, of November 1, 1881, and Jones & Wild, of December 22, 1881. It is unnecessary to discuss these patents in detail, because none anticipates, and, combined, they do not materially limit the claims in issue. The Fullam drill employs a reciprocating engine and a fly wheel, and it is not portable in the sense that the Moffet drill is portable. It is clamped to the plate which is to be drilled, and has not the thrust, the alignment, the stability, the journal bearing or the handles of the Moffet drill. The Noteman device is supported by a strap around the neck of the operator and is intended to drive an ordinary auger or screw driver. It uses a rotary engine, and this is the one point of marked resemblance between the two structures. No rational mechanic would think of using Noteman's breast auger for heavy metal boring, nor would it suggest to his mind the essentially different tool of Moffet. The Whitcomb and Jones & Wild devices are power drills used in mining. What has been already said applies with even greater force to these. Mechanical skill alone could not convert these rock borers into a successful tool for metal boring. In short, the court is convinced that Moffet was the first to construct a successful portable power drill for heavy boring. His drill seems to meet all the demands of the situation; it is capable of boring holes from over two inches in diameter down to those of the smallest size; it is easily carried about, comparatively simple in construction; not prohibitive in price, and does ten times the work of the hand drills previously employed. This result was brought about after years of patient endeavor, during which time money and brain work were freely given to the task. Moffet's contribution to the art is one of unusual value. But for him machinists, working on the great steel structures of the present day, might be using the old hand drills and making one rivet hole where they now make ten. One who has done so much, who has actually contributed something which helps on the world's work, should not be treated as if he were attempting to burglarize the storehouse of invention.

It is admitted as to claims 1 and 2 that, if they are not narrowed by limiting them to the specific structure shown in the patent, the defendants' machine infringes. As to claim 3 infringement is denied because, as argued by the defendants, their machine does not have diametric tubular connections in combination with handles attached to said connections. The elements of the first claim are First. A boring spindle. Second. A rotary engine. Third. The journal bearing for the spindle formed upon the cylinder of the engine, all in combination in a portable boring machine. The second claim is the same as the first with the following additional elements: First. The gear connecting the boring spindle and engine shaft. Second. The feed screw and the nut sleeve, so that the entire device is carried forward and not alone the boring tool. The third claim is for the following elements: First. The engine cylinder, provided with diametric tubular connections. Second. Handles attached to said

connections, all in combination in a portable boring machine. It is manifest that a portable boring machine for drilling holes in metal, operated by steam or compressed air, and possessing the other elements as above stated, will infringe these claims. There is nothing in the prior art which compels their restriction to the precise form of mechanism shown, and unless they are so limited the defendants cannot escape liability.

The third claim is intended to cover, as a special feature, the inlet and exhaust pipes, with handles attached thereto, located diametrically opposite each other on the cylinder, so that the strains, shocks and vibrations can be balanced, equalized and instantly felt by the operator. Of this arrangement the description says:

"In order that the machine may be handled, if necessary, while in a heated condition, wooden handles d d' are attached to the tubular connections a a' upon each side. Those handles, being near the center of gravity of the machine, furnish a ready and convenient means for its transportation to the different positions in which its services may be deeded."

It is true that in the drawing solid wooden handles are shown as attached to the inlet and outlet pipes, so that no air or steam can pass through the handles proper as in the defendants' borer. But the location, form and material of the handles are not of the essence of the invention, so long as they are attached to the connections in such a manner as to enable the tool, in the hands of the workman, to perform all the functions above mentioned. It is not difficult to imagine a dozen different forms of handle which might be attached to the pipes in as many different ways and still secure all these advantages. It is thought that infringement cannot be avoided by obvious changes which might be varied indefinitely to suit the fancy of the operator. The object of the handles is to enable him to grasp the pipes with ease and comfort, and if he can do this to better advantage by letting the steam enter and escape through the handles, protecting his hands by heavy gloves, as shown in one of the illustrations of defendants' tool, he is at liberty to do so, but he does not change the character of the drill by so doing. The extremely technical definition suggested in the record and in defendants' brief of the word "diametric" is not warranted by the ordinary meaning of the word, or by anything in the patent itself. The defendants' pipes are screwed into the cylinder at points diametrically opposite each other. This is enough. The complainant is entitled to a decree.

**WILCOX & GIBBS SEWING-MACH. CO. et al. v. INDUSTRIAL MFG. CO.  
et al.**

(Circuit Court, D. New Jersey. June 17, 1901.)

**1. PATENTS—VALIDITY AND INFRINGEMENT—SEWING-MACHINE TRIMMER.**

The Bigelow patent, No. 341,790, for an automatic trimmer for attachment to a sewing machine, to trim the fabric ahead of the sewing mechanism, covers a patentable combination which was not anticipated, nor is its validity affected by patent No. 263,467, previously granted on a division of the same application, and covering broadly the combination with an overseaming sewing mechanism of any shear trimmer to trim in advance of the sewing, and which expressly disclaimed the mechanism of the trimmer, as included in a separate division of the application. Such patent also *held* infringed as to all its claims.

**2. SAME—EXPIRATION—FOREIGN PATENT.**

Rev. St. § 4887, which shortens the term of a United States patent where necessary to make it expire at the same time as a foreign patent for the same invention, does not apply where the foreign patent was granted to a different person, and without the knowledge or consent of the American patentee.

In Equity. Suit for infringement of patent. On final hearing.

Howson & Howson, for Willcox & Gibbs Sewing-Mach. Co.

A. C. Paul, for trustees.

A. B. Stoughton, for defendants.

GRAY, Circuit Judge. This is a suit in equity brought by the complainants above named to restrain the defendants from further infringing letters patent No. 341,790, granted May 11, 1886, to John Bigelow, and for an accounting of damages and profits accruing from the past infringement of said patent. Complainant Willcox & Gibbs Sewing-Machine Company is the exclusive licensee under the patent in suit, and complainants Bigelow and Greenwood, as trustees, are owners of the legal title to the patent. The application upon which the patent in suit was issued was a division (division B) of Bigelow's original application, filed June 5, 1879, division A of which was patented August 29, 1882, No. 263,467. Each division contained a cross reference to the other. Prior to the patent in suit, and to previous patents to Bigelow, the patentee, there had been devised automatic trimmers attached to sewing machines for the purpose of trimming the edges of the material sewed, alongside of or after it came from the needle. To Bigelow himself, the patentee of the patent in suit, there had been issued in 1879 a patent, No. 214,354, in which shear cutters were arranged to trim alongside of or after the sewing. As appears from the testimony, there had come to be a demand for a trimming device that would trim the edges of knit goods and other stretchy material in advance of the sewing mechanism, so that a seam equally distant from the edges might be made, free from any pulling or pushing up of the material, especially on the curved seams necessary in underwear, stockings, and lace goods. This was a demand never theretofore met, particularly in connection with overseaming or buttonhole stitching. To supply this want, Bigelow, in division A of the application of June 5, 1879,

asked for the combination of any overseaming machine with any trimmer arranged to cut in advance of the sewing mechanism, his combination being the first to accomplish that result. Upon this division A of his application he obtained on August 29, 1882, patent No. 263,467, for this broad combination, irrespective of the particular construction of the elements of the combination. In the specifications of the patent he said, "Neither do I herein claim specifically the patentable elements of the trimming device shown, since I have made them the subject of division B of this case." In the specifications of the patent in suit he says, "This application being a divisional application of original application filed June 5, 1879, and patented August 29, 1882, No. 263,467." The gist of the invention covered by the patent of 1882, division A, was such a combination of any trimming device with any overseaming sewing mechanism as would successfully trim knit goods and other stretchy material in advance of the sewing, while the gist of the present invention resides in the particular form of the trimming device arranged to cut in advance of the line of sewing. It was manifest that the form of cutter must be the kind known as "shear cutters." The punching or chisel like cutters adapted for leather and other such material presenting sufficient resistance to avoid the puckering and pulling that cutting of that kind would produce in knit fabrics would clearly be unadapted for the purpose of the present patent. It was important that the point of contact of the blades, in performing the function of shear cutting, should be immediately in advance of, and as near as possible to, the mechanism that made the stitch. The reason for this is obvious, especially in respect to curved and irregular seams. It was found that the blades required frequent sharpening and renewal. The necessary grinding tended to put further away the cutting point from the sewing mechanism, and thus impair the efficiency of the combination. This difficulty was overcome by the detachable blades of the patent in suit, and their peculiar form and adjustability, devised to operate in combination with any sewing mechanism, whether for overseaming or straight sewing. In his specifications of the patent in suit, the patentee makes a general statement of his invention, thus:

"This invention relates to trimming devices for sewing machines, in which two shear-cutting edges, one stationary and the other moving or movable, are employed; and the novelty consists, more particularly, in combining with the stitch-forming mechanism of a sewing machine a shear trimmer composed of a fixed and movable cutter, the movable cutter being adjustable and devised to regulate the position of its cutting edge to the sewing mechanism and to the cutting edge of the co-operating cutter."

The claims of the patent in suit are four in number, and are as follows:

"(1) In a sewing and trimming machine, and in combination with the stitch-forming mechanism thereof, a shear trimmer comprising a fixed and movable cutter, having for its movable cutter a bar or plate provided with the cutting edge at one end, and being adjustable lengthwise on its carrier, to regulate the position of said cutting edge relatively to the sewing mechanism and to the cutting edge of the co-operating cutter, substantially as described. (2) In a sewing and trimming machine, and in combination with the stitch-forming mechanism thereof, a shear trimmer having a movable cutter or blade, and a stationary co-operating cutter or blade, each adjusta-

ble independently of the other, to regulate the position of its cutting edge relatively to the sewing machine and to the edge of the co-operating cutter; the stationary cutter or blade being formed of a bar or plate with the cutting edge at one end, and the two cutters having their edges held in contact by spring pressure, substantially as described. (3) In a sewing and trimming machine, and in combination with the stitch-forming mechanism of the sewing machine and the movable blade or cutter of the trimming device, a stationary cutter formed of a bar or plate provided with the cutting edge at one end, and being adjustable lengthwise, to regulate the position of said cutting edge relatively to the sewing mechanism and to the cutting edge of the movable cutter, said cutters having their edges held in contact with each other by spring pressure in cutting, and thereby having a shear action suited to divide knit goods and other textile fabrics, substantially as described. (4) In a sewing and trimming machine, and in combination with the work plate and stitch-forming mechanism of the sewing machine, and with the movable cutter of a shear-trimming device, a stationary co-operating cutter formed of a bar or plate, and a support below the work plate, to which support said bar is secured, said bar having the cutting edge at its upper end and being adjustable lengthwise, to regulate the position of said cutting edge relatively to the work plate and stitch-forming mechanism and to the cutting edge of the movable cutter, substantially as described."

To the suit on this patent the defendants have opposed four several defenses: (1) That the subject-matter of the claims of the patent in suit is wanting, in view of the art, in patentable novelty; (2) that the patent in suit is absolutely void, because it is for the same invention as the expired patent, No. 263,467, being division A of the application of June 5, 1879; (3) that the patent in suit expired with the British patent, No. 4,113, of 1882; and (4) noninfringement.

As to the first defense,—the lack of patentable novelty, in view of the art,—it must be admitted at the outset that defendants' counsel is right in contending that, as a general proposition, mere adjustability of parts of a mechanism or combination is not sufficient ground for the issuance of a patent. It is true, also, that the defendants have succeeded in showing that in the prior art cutters and trimmers have been made adjustable with respect to the needles and the sewing mechanism. But mere adjustability of the blades of the shear cutters is not of the gist of the invention for which the patent in suit was granted. It is for a particular form of trimmer in combination with a sewing mechanism, with the blades so adjustable as to keep the cutting point of the shear trimmer always at the same distance from the needle, and trimming either in advance of the sewing, or to one side thereof or after, with either overseam or straight sewing. The new result obtained by this combination of this adjustable trimmer with a sewing mechanism is a better and more economical automatic sewer and trimmer than had ever existed prior to the patented combination. This fact is attested by the evidence as to the extent of the use of the invention. It is in evidence, and not denied, that the device of the patent in suit has gone into very extensive use among hosiery manufacturers. In the dozen years and more of its life, the validity as well as usefulness of the patent has been apparently acquiesced in by the public. It is in testimony that there are no successful shear trimmers now in use, other than those of the patent in suit. The principle of adjustability and the adjustable blades may have been old, and the sewing mechanism may have

been old; but these elements, old or new, are so combined as to produce the new and valuable result above alluded to. We see no reason to discredit the invention as lacking the qualities of a true and patentable combination. A number of patents have been cited by defendant to support its allegation of anticipation. An examination, however, of these, does not disclose the particular combination of the patent in suit. Some of them, as notably the Woodruff and Browning patents, while showing devices for cutting and trimming in advance of the sewing, and adjustable blades or punches, do not show shear cutters of the form or kind in the patent in suit, and made adjustable in the combination described, for the successful accomplishment of the purpose specified. Mere adjustability, then, is not the thing patented, but its use in connection with the shear cutters and the sewing mechanism for the purposes of the invention make a patentable combination.

The second defense is that the patent in suit is absolutely void, because it is covered by the previous Bigelow patent, of 1882, issued as division A on the application of June 5, 1879. Bigelow, the patentee of the patent in suit, in his patent of 1879, No. 214,354, provided for a shear trimmer so arranged in combination with a sewing machine making a zigzag stitch as to trim the fabric after it was sewed. But it was not until the patent of 1882, No. 263,467 (division A of the application of June 5, 1879), that a way was discovered of combining a shear trimmer with an overseam sewing mechanism, so as to trim the fabric in advance of the stitch. The gist of this invention was the combination of any shear trimmer and an overseam sewing mechanism that would automatically and successfully trim the fabric in advance of the sewing. In the specifications he described, as one form of trimmer, and possibly the best, the adjustable trimmer that is described in the patent in suit; but he distinctly disclaims any patent for the trimmer in that branch of the application, stating that it was the subject-matter of the application for a distinct patent in division B of his application of June 5, 1879; the patentee stating specifically:

"I do not, therefore, limit the application of my invention to any special over-edge sewing machine; nor do I limit myself to the special form of trimming device shown, since other well-known devices would answer equally well; neither do I herein claim specifically the patentable elements of the trimming device shown, since I have made them the subject of division B of this case."

The claims of this 1882 patent are broad; the breadth of claim 1 fairly characterizing all three, which is as follows:

"In combination with the stitch-forming mechanism of an over-edge sewing machine, an automatic trimmer arranged to act in advance of said mechanism and in the line of the seam, so that said mechanism can operate to lay its stitches across or over the edge or edges cut by said trimmer, substantially as described."

That it was not considered by the patent office that this patent of 1882 covered the special construction of the trimming device of the patent in suit is shown (to quote from complainants' brief)—

"By the fact that an interference was declared between this application of Bigelow and an application of Stockton Borton, which resulted in patent



283,650. The Borton application showed an automatic trimmer arranged to operate in advance of the sewing mechanism and in the line of the seam,—one that was not adjustable, and was not a shear trimmer, and had only a single knife. The patent office declared an interference between Borton's application and Bigelow's application, division A. This interference was decided in Bigelow's favor. The action of the patent office in declaring this interference was equivalent to a ruling upon the part of the patent office that a device constructed in accordance with the drawings of the Borton patent would be an infringement of the claims of the Bigelow 1882 patent. Of course, if the invention of the Bigelow 1882 patent were the same as the invention of the patent in suit, the Borton device could not have been an infringement of the Bigelow 1882 patent, as no one would contend for a moment that the Borton device would be an infringement of the Bigelow patent in suit."

Naturally, as the patentee chose to illustrate his device by the form of trimmer claimed in the other division of his case, which is the patent in suit, the drawings in both patents are the same. But each patent was capable of independent use without conflicting with the other patent. Neither one necessarily infringed upon the other. As we have before said, the earlier patent, division A, was for the combination of any form of trimming device arranged to trim in advance of any over-edge sewing mechanism, while division B was for the particular form of shear cutters described in combination with any sewing mechanism, whether arranged to cut in advance of or after the stitch. The issue of a prior patent describing the invention of the patent in suit does not necessarily render the later patent void, when both were issued on applications pending at the same time. In this case not only were both applications pending at the same time, but the one distinctly referred to the other in such terms as to negate any inference of abandonment.

The third defense, that the patent in suit expired with the British patent, No. 4,113, of 1882, is also devoid of merit, in view of the testimony of Mr. Bigelow, the patentee of the patent in suit, which is uncontradicted by anything in the record. In his testimony he satisfactorily explains his agreement with Willcox, who took out the British patent, and directly and emphatically denies that he ever saw the patent, or was aware of its issue or what was included in it, until called upon to testify in this case. We do not think that section 4887 of the Revised Statutes applies to a patent taken out by another than the patentee of the patent whose term is sought to be shortened, and without his acquiescence or consent. In this we have the satisfaction to agree with Judge Putnam, of the First circuit, in the case of *Beach v. Hobbs* (C. C.) 82 Fed. 926.

This brings us to the remaining question of infringement. On this point the defendant relies upon certain language contained in the opinion of the board of examiners in chief of the patent office, which is as follows:

"There can be but little question that the matter presented is patentable, and the only trouble seems to have grown out of the apparent broad scope of the claims. It is evident that applicant is not entitled to anything beyond the specific mechanism he has shown, and the cutter blades so made adjustable. His own patented device shows trimming blades pivoted together as shears, and it is but an improvement on this which he now presents. The cutter blades are not only adjustable, but are so constructed and attached

that they are removable, so that others can be substituted in place of those worn or broken without sacrificing the more expensive and permanent parts to which they are attached. The great advantage of this adjustability in this particular device is apparent, and its improvement over anything which has gone before it is conceded. So, also, is the improvement of the spring device for holding the blades together. So, also, is the arrangement of the support for the stationary cutter below the plate. \* \* \* Drawn with the liberal use of the indefinite article, they [the claims] would seem to be intended to cover something other than what applicant has disclosed as novel and useful, but, terminating as they do with 'substantially as described,' we must suppose that 'a shear trimmer,' etc., means the trimmer, and the parts specified and shown, and the courts would so construe and limit the claims."

We think that a careful examination of the expert testimony on both sides will make it apparent that the devices covered by the four claims of the patent in suit are found in defendants' machine, and we agree with complainants' expert Metcalf in saying:

"In Exhibit Complainants' Machine and in Exhibit Defendants' Machine the stitch-forming mechanism, the trimming device, and the adjusting devices are combined and operated precisely as set forth in the patent in suit, and the result of the co-operation of these elements and mechanisms is the same as set forth in the patent in suit. The explicit statement of the comparison of complainants' machine and defendants' machine with the patent in suit, is as follows: Complainants' machine and defendants' machine each has every one of the elements named in each and every one of the claims of the patent; that is to say, each machine has a stitch-forming mechanism, and has above the work plate, and adjacent to the stitch-forming mechanism, a movable cutter bar or plate carried by a rocking carrier, and with its cutting edge on the end of the bar or plate and adjustable lengthwise in the carrier, and also has a co-operative cutter bar or plate on a support below the work plate, and with its cutting edge at its upper end and adjustable lengthwise, the adjustment of each cutter being to regulate the cutting point in relation to the stitch-forming point; and finally each of these machines has a spring-pressure means to keep the cutters in contact to do their work efficiently; and all these elements are combined together, and are provided with mechanism to operate the movable cutter substantially as and in the manner set forth in the patent."

We are therefore of opinion that the patent in suit is valid, and has been infringed in all of its claims by defendants, and that a decree should be drawn to this effect, for an injunction conformable to the prayers of the bill, and providing for a reference to a master to take an accounting of the profits and damages to which complainants are entitled, and for costs.

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**BRYANT ELECTRIC CO. et al. v. ELECTRIC PROTECTION CO.**

(Circuit Court, E. D. Pennsylvania. June 20, 1901.)

No. 37.

**1. PATENTS—ANTICIPATION—MECHANICAL COMBINATION.**

A patent for a mechanical combination is anticipated by a prior device containing the same elements, although the inventor of the latter did not describe or appreciate the advantages of using the combination in the way pointed out in the patent.

**2. SAME—OPERATION OF SPRING.**

As a mechanical movement, it is immaterial whether a spring works by contraction or extension; and a patent is anticipated by a prior

device essentially the same, except in the manner of operation of a spring.

**8. SAME—ELECTRIC SWITCH.**

The Cleveland patent, No. 391,512, for an electric switch, is void for anticipation.

In Equity. Suit for infringement of letters patent No. 391,512, granted to William B. Cleveland for an electric switch. Final hearing on bill, answer, and proofs.

John P. Croasdale, for complainant.

Ernest Howard Hunter, for respondent.

ARCHBALD, District Judge. It is admitted by the defendant's counsel that all the claims of the plaintiff's patent have been infringed except the fourth, but it is nevertheless contended that the bill cannot be maintained because the patent was anticipated by that of Combs and Rhodes in 1875. The whole patent consists in a mechanical movement by which, by the action of a spring by tension or compression, the contact bar is thrown from one side to the other as it is moved over the dead-center line, so as to make or break the electric contact by a quick snap movement, which prevents the electric current from jumping and burning the ends. As an electric device, it is, no doubt, eminently successful; but, if it is a mere adaptation, as I think it is, of that which was already known and patented, it is not entitled to protection. The declared object of the invention is "to provide an improved construction of spring movement for operating the contact bar, respectively, in its making or breaking circuit"; and the invention is said to consist, "broadly speaking, in combining together a primary actuating device and movable contact bar and a spring connected respectively with said two parts, said primary actuating device having a range of movement wherein the line of said two spring-connected points may pass respectively to opposite sides of the dead-center line of the spring movement, the spring being under compression or tension between the primary actuating device and the contact bar, thereby throwing the latter in a quick movement either to open or closed position accordingly as the line of spring power may be shifted to one side or the other of said dead center line." Stripped of particularity and verbiage, this is nothing more, in its mechanism or mechanical movement, than the Combs and Rhodes patent, the object of which, as stated, is "to form a combination of rods, levers, and spring which, by moving one lever past the dead point, will carry the opposite lever and rods to any point required." The essential thing in both is the snap spring action, throwing the lever or contact bar from one side to the other as the dead-center line is passed; and the adaptation of this to the opening or closing of an electric circuit cannot be said to be new. As held in Consolidated Bunting Apparatus Co. v. Metropolitan Brewing Co., 8 C. C. A. 485, 60 Fed. 93, a patent for a mechanical combination is anticipated by a prior device containing the same elements, although the inventor of the latter did not describe or appreciate the advantages of using the combination in the way pointed out in the

patent. See, also, *Electric Co. v. La Rue*, 139 U. S. 601, 11 Sup. Ct. 670, 35 L. Ed. 294. The only difference in any respect that I can discover between these two patents is that in the diagrams illustrating the Combs and Rhodes the spring is extended and works by contraction, while the patent in suit contemplates that it should work either by compression or extension. But, as a mechanical movement, it is immaterial whether it works one way or the other. The essential thing is the action of the spring when the dead-center line is crossed, and it matters not in which way this is obtained. Considering the patent, therefore, to have been anticipated by these, if not by other inventions in evidence, the suit must fall. Let a decree be drawn dismissing the bill, with costs.

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BOYER v. KELLER TOOL CO. et al.

(Circuit Court, E. D. Pennsylvania. June 24, 1901.)

No. 27.

**PATENTS—INFRINGEMENT—PNEUMATIC TOOL.**

The Boyer patent, No. 537,629, for a pneumatic tool, construed, and held limited, in view of the prior art, to the precise combination of elements shown, and, as so limited, not infringing by a tool made in accordance with the Keller patent, No. 647,415.

In Equity. Suit for infringement of patent. On final hearing.

Edward Rector and Frank P. Prichard, for complainant.

E. Hayward Fairbanks, for respondents.

J. B. McPHERSON, District Judge. The patent in suit is No. 537,629, granted April 16, 1895, for certain improvements in pneumatic tools; the character of the invention being described in the following quotation from the specification:

"My invention relates to that class of tools in which compressed air or other pressure medium acts upon a reciprocating piston to cause it to deliver rapid blows to the cutting tool movably held within one end of the casing or holder.

"It has for its object the production of a tool of this character which shall be of simple, compact, and economical construction, of high efficiency in operation, of the greatest possible strength and durability proportional to the size and weight of its constituent parts, and in which the shocks and jars occasioned by the reciprocation of the piston and its action upon the tool shall be reduced to the minimum. Its novelty consists in certain new constructions and arrangements and combinations and modes of operation, which will be hereinafter more fully explained and particularly pointed out in the claims.

"My new tool embodies as constituent elements a casing or holder containing a chamber in which the piston is confined and moves; a tool having its shank or stock fitted in a bore in one end of the casing, and projecting into position therein to directly or indirectly receive a blow from the piston at one end of the stroke of the latter; and an automatic valve mechanism controlling the admission and exhaust of pressure to and from the cylinder or piston chamber. In these general features my new tool resembles that heretofore patented to me by letters patent of the United States No. 277,-

448, dated May 15, 1883; and in some respects my present invention consists in improvements upon and modifications of said prior device, while in others it is a departure therefrom, and embodies entirely new constructions, arrangements, and modes of operation.

"Like my prior tool, my present one has a grasping handle secured to the end of the casing at which the valve mechanism is located, and provided with means within the grasp of the operator for controlling the admission of pressure to the tool, while at the opposite end of the casing the tool stock is fitted to reciprocate in the bore of the casing, and is adapted to be held and directed in its work by one hand of the operator while with the other he grasps the handle of the tool and admits and cuts off the pressure as necessary. The means for controlling the pressure supply in my present tool differs, however, from that of my prior one, and embodies elements of novelty which constitute certain features of my present invention, as hereinafter set forth as likewise does the means for securing the handle to the casing of the tool.

"In my prior device the piston, which operates as a hammer or striker for actuating the tool, was moved in both directions in its chamber or cylinder by the action of the compressed air; the latter being alternately admitted to and exhausted from the opposite ends of the cylinder. In my present tool the pressure supply is intermittently admitted to and exhausted from but one end of the piston chamber, to drive the piston forward to deliver its blow, while a constant pressure at the other end of the piston—preferably the mechanical pressure of a coiled spring confined within the front end of the piston chamber—is employed to return the piston to initial position. The automatic valve mechanism operates to first admit pressure to the rear end of the cylinder, behind the piston, to drive it forward and deliver a blow to the tool, and to then cut off the pressure supply and open the exhaust from said end of the cylinder, to permit the spring to throw the piston back to initial position. In my prior tool the automatic valve was operated by a mechanical connection with the piston. In my present one it is operated by pressure admitted to its opposite sides. I am aware that it is common in this art to operate the valve by such means, but heretofore in tools with which I have been familiar the pressure has been alternately admitted to the opposite sides of the valve and exhausted therefrom. In the valve mechanism which I employ the pressure medium is constantly admitted at full pressure to one side of the valve, acting upon a given area of the valve to constantly press it in one direction, and is intermittently admitted to the opposite side of the valve and permitted to act upon a greater area thereof, to overcome the opposing pressure and move the valve in the opposite direction, this intermittent admission of pressure to the valve and its exhaust therefrom being controlled by the movement of the piston in the cylinder. In my prior tool the valve chamber and valve were arranged parallel with the cylinder and piston, while in my present one they are arranged transversely across the rear end of the cylinder, between it and the grasping handle of the tool."

It will be observed—and there is no dispute upon this point—that the patent is for a combination of old and well-known devices. It has been attacked upon the ground that no invention is present, and that the patent lacks novelty; but, without deciding these points, I shall assume, for the purposes of this decision, that the patent is novel and discloses true invention. Certainly tools made under the complainant's patent, especially those made under later modifications thereof, have been very successful indeed, and have gone into extensive use. They permit much difficult work upon metal to be done at a large saving of cost and of physical exertion, and their value is sufficiently established by the general use made of them in shipyards, railroad shops, boiler works, and similar industrial establishments.

The defendants manufacture or sell pneumatic tools under patent

647,415, granted April 10, 1900; and the complainant alleges that these tools infringe two groups among the claim of his patent; claims 5, 6, 8, 10, 12, 13, 15, 16, 17, 25, and 28, constituting the first group, and claims 42 to 48, inclusive, constituting the second group. It will be unnecessary, however, to examine any other claims than 5 and 47, since these are conceded by the complainant to be typical of the respective groups.

Claim 5 is as follows:

"In a pneumatic tool, the combination of a casing or holder containing a piston chamber, and adapted to hold a reciprocating tool at its front end, a piston in said chamber adapted to deliver a blow to the tool at the end of its forward stroke, resetting means for the piston exerting a constant pressure upon the piston, and against the resistance of which the piston is driven forward to deliver its blow to the tool, and an automatic valve confined in a fixed chamber at the rear end of the casing, and operated by constant pressure at one side of it, and intermittent pressure admitted to the other, for controlling the admission of pressure to the piston chamber behind the piston, substantially as described."

Every element of this claim is old, and therefore, assuming the combination to be patentably novel, I think it follows clearly that, if the defendants' tool omits any important element in the combination, supplying its place by a distinctly different device, the charge of infringement cannot be sustained. Meritorious as the complainant's tool appears to be, especially in its later modifications, it is in no sense a pioneer invention, as has already been stated, and it is not entitled to the benefit of the doctrine of equivalents. Therefore, when it is observed that in claim 5 an element essential to the operation of the tool is "resetting means for the piston, exerting a constant pressure upon the piston, and against the resistance of which the piston is driven forward to deliver its blow to the tool," whereas in the tool manufactured by the defendants there is no such device at all, its place being supplied by means which resets the piston by intermittent fluid pressure upon the forward end,—when this is observed, I say, it seems clear to me that the defendants' tool displays a different combination of elements, and therefore does not infringe. In other words, the complainant, in view of the prior state of the art, must be restricted to the precise combination claimed; and, as the element of constant pressure applied to the forward end of the piston as a resetting means is certainly essentially different from the element of intermittent pressure applied to the same end of the piston, the conclusion already stated seems to be inevitable. As the complainant took no expert testimony upon the first group of claims, it may be that his own opinion upon this point does not differ widely from the opinion I have just announced.

A similar conclusion, I think, must be reached concerning claim 47, which reads as follows:

"In a pneumatic tool, the combination, with the tool proper, of a grasping handle secured thereto, and having the pressure supply duct extending through it, a throttle valve in the handle for controlling said duct, and a lever confined in a recess in the handle for operating said valve, and projecting outside the recess at one end into position to be pressed by the hand of the operator, substantially as described."

In view of the prior art, this claim also should be narrowly construed, and confined to the exact device claimed by the patent. This seems to have been the complainant's own position while the application was pending in the patent office, and this group of claims was being considered there. Claim 47 had been rejected by the examiner, and in successfully urging a re-examination the complainant said:

"These patents [referring to those quoted by the examiner in support of the rejection] show it to be old to provide a tool of this character with a throttle valve controlled by means within the grasp of the operator's hand upon the handle of the tool; but applicant's claims and this feature of his invention are specifically limited to a construction in which the pressure supply duct extends through the handle, and has a throttle valve located within the grasping portion of the handle for controlling said duct. In none of the references, including the English patent, does the pressure supply duct extend through the grasping portion of the handle, nor in any of them is the throttle valve located therein. If applicant were broadly claiming means within the grasp of the operator's hand for controlling or operating the throttle valve, as would seem to be the examiner's idea of the claims, the references above referred to would all be pertinent; but, in view of the specific language of the claims and the explanation above given, it is thought the claims will be found allowable."

The claim was thereupon allowed. It seems to me that, in accordance with the established rule upon this subject, the complainant cannot now enlarge his claim so as to go beyond the specific limitation thus imposed; and, if this be true, I think it is clear that the handle of the defendants' tool is different in at least two respects: The pressure supply duct does not pass through the grasping portion of the handle, and the throttle valve differs in construction and method of operation.

With regard to the affidavit of Mr. Keller, it is proper to say that I have given it no weight, for the following reasons: It was made in another suit against different defendants, and refers to two other patents, neither of which is involved in this controversy. If relevant at all, it could only be admissible to contradict Mr. Keller; but he was asked no questions about the affidavit or its contents in his examination, and of course, therefore, the paper is not competent evidence for purposes of contradiction. Moreover, Mr. Keller is not a party to this suit, and therefore his ex parte affidavit, made in a suit to which the present defendants were not parties, cannot be admitted to their prejudice. It would have been easy for the complainant to examine the witness directly upon matters contained in the affidavit, and in that event such answers as were relevant would have been heard under the safeguard of cross-examination. But to decline such examination, and to attempt to supply its place by the introduction of the affidavit, cannot be permitted.

There being no infringement of the complainant's patent, the bill must be dismissed at his costs.

## THE VALENCIA.

(District Court, D. Washington, N. D. July 26, 1901.)

**1. CARRIERS—STEAMSHIP—OVERCROWDING PASSENGERS—DAMAGES.**

Where a steamship company having accommodation for and authorized to carry only 375 steerage passengers sells tickets to and receives 475 such passengers, and by reason of such overcrowding the passengers are delayed and injured, the company is responsible for such damage, since such crowding beyond the point at which the passengers could be safely carried is a breach of the contract to safely carry them.

**2. SAME—INSPECTOR'S CERTIFICATE—EVIDENCE.**

An indorsement on an inspector's certificate that a steamship had been provided with accommodations for additional passengers should be rejected as evidence of the fact that such accommodations had been provided, when all the testimony shows conclusively that there were no such accommodations on the ship.

**3. SAME—DEFENSE.**

When permission of inspector was obtained to crowd a vessel beyond the limit of accommodation provided for passengers, such permission is not a defense to an action for damages to passengers sustained by reason of such overcrowding.

**4. SAME—CONTRACT—LANDING—PUBLIC POLICY.**

A provision in a contract between a ship and its passengers that the landing shall not be deemed a part of the voyage is contrary to public policy and void, and does not relieve the carrier from liability for loss of baggage or delay in delivery.

P. P. Carroll, for libelants.

Gorham & Gorham, for claimant.

HANFORD, District Judge. The libelants and interveners are waging these suits to recover damages for breach of contracts for the transportation of themselves, their baggage and freight, on board the steamship Valencia from San Francisco to Nome, in the year 1900. For convenience and brevity, they will all be referred to in this opinion as libelants. The grounds of complaint are lack of sufficient accommodations on the ship for transportation comfortably of the number of second-class passengers who were received on board and made the voyage; lack of ventilation in the compartments in which the sleeping berths of the second-class passengers were located, and in which their meals were served; neglect to keep said compartments clean; lack of a sufficient number of water-closets, and the filthy condition in which those used by second-class passengers were suffered to remain; bad cooking and slovenliness in serving the food, and failure to supply second-class passengers with sufficient wholesome food and with sufficient drinking water; incivility on the part of the officers and crew of the vessel towards the second-class passengers; unreasonable delay in delivering the baggage and freight belonging to the libelants on arrival at the terminus of the voyage, in consequence of which they were without the use of tents and other conveniences for comfortable living, and were exposed day and night to the elements, and obliged to incur additional expense, and were made sick.

From the pleadings and evidence I find that each of the libelants purchased a ticket at San Francisco entitling him to travel second-



class on the Valencia to Cape Nome, and paid therefor \$75. The words "second-class" are printed in bold type on each ticket, and each of the libelants understood at the time of entering into his contract that he was securing second-class accommodations, but they did not understand second-class to be the same as steerage, or expect to be treated as steerage passengers. Some of the tickets were sold to them by ticket brokers who persuaded them to take passage on the Valencia by the arts usually employed by solicitors and hustlers, assuring them that they would be assigned good berths, have the liberty of the ship, and that they would be fed as well as the first-cabin passengers, except that they would not be permitted to eat at the same time. The Valencia was well equipped for the voyage, so far as being furnished with everything needful for her navigation, and she had on board an abundance of good provisions and good water. Her officers, including the captain and steward, were men of experience and in every way competent, and excellent discipline was maintained throughout the entire voyage. There was no incivility shown to the passengers, unless in a few instances by petty officers or servants. A considerable part of the testimony is disgusting, and I am convinced that the libelants and their witnesses have grossly exaggerated in matters of detail. Their testimony with reference to some of the important and material facts is necessarily and obviously false. I will refer to one matter only, as a sample. They have given positive testimony that all of the closets were kept locked and reserved for officers and employes of the ship, except two, and that these two, to which several hundred passengers were obliged to resort, were constantly filthy. The evidence to the contrary is convincing, and I do not believe that such a condition could possibly have continued during the time required for the voyage. The indisputable evidence, however, makes it clear to my mind that these passengers did suffer great discomfort, the cooking was undoubtedly bad, and they did suffer for want of palatable food, and they were so crowded in the quarters in which they all had to sleep, and in which their meals were served, that they must have greatly annoyed each other, and undoubtedly by their own irritableness aggravated the general discomfort. These compartments were below the main deck, and their discomfort was further aggravated by a large number of horses carried on the same voyage, stabled on the fore part of the main deck, over the quarters of these passengers. In my opinion, these conditions constitute a violation of the implied agreement on the part of the carrier to provide reasonably commodious accommodations for the number of passengers engaged to be carried, and to not subject the passengers to such treatment as all men must condemn as inhuman. The certificate of inspection shows that this ship was provided with accommodations for and was authorized to carry 128 first-cabin passengers and 375 steerage passengers. On the voyage referred to all of the passengers who purchased second-class tickets were treated as steerage passengers, and the number carried was 475; that is, 100 in excess of the number for which accommodations existed according to the certificate of inspection. The claimant, having succeeded, with the help of ticket brokers whom it author-

ized to sell tickets for a commission, in securing passengers in excess of the number authorized by her certificate of inspection, was evidently unwilling to forego such an opportunity to increase the profits of the voyage, and therefore obtained from the inspectors at San Francisco permission to carry an increased number of passengers. The certificate bears an indorsement, made on the face of it, and signed by the inspectors, to the effect that the Valencia had provided accommodations for and was authorized to carry 99 second-cabin passengers. This indorsement must be rejected as evidence of the fact that accommodation for the additional passengers had been provided, because all the testimony in the case proves conclusively that the Valencia did not have accommodations for any second-cabin passengers. The steamer came into Seattle on her way north, and, finding a crowd here waiting for transportation to Nome, made some additions to her total earnings by taking on still other passengers to the full limit allowed by the inspectors, and the testimony shows that the local inspectors at Seattle increased the limit up to 615. The scheme of obtaining official permission to crowd the ship beyond the limit of accommodations provided for passengers may be a protection against any prosecution for the statutory penalty prescribed for excessive overloading of passenger ships, but it is not a ground of defense in a suit like this, to recover damages for injuries to passengers resulting from overcrowding.

The libelants went to Nome as gold seekers, and each of them took along something in the way of an outfit, including tents, tools, and such supplies and necessities as would enable him to work placer mining claims and live in a new mining district. These outfits were carried as baggage under a stipulation stamped on their tickets, entitling each man to have 250 pounds of baggage. Some of them had machinery and implements, which were shipped as freight. There are no wharves at Nome, and the passengers, their baggage and freight, had to be landed by the use of lighters; and owing to the great rush in the season of 1900, and the lack of a sufficient number of lighters, and rough water, there was considerable delay in landing all the baggage and freight which belonged to the libelants. I believe that the officers and crew of the Valencia did the best they could, under the conditions existing at Nome, to discharge the ship promptly; but the conditions were made worse by the overcrowded condition of the ship, and most of these libelants suffered great privations and were subjected to losses by reason of the delay, which might have been unnecessary if the ship had not been unnecessarily overloaded. In this case the carrier has attempted to secure exemption from liability by stipulations in its contracts that the landing shall not be deemed part of the voyage. But landing is necessarily a part of the contract for transportation; and such stipulations, whether expressly assented to or not by passengers and shippers, are void, because it is contrary to public policy to permit owners of ships to carry people to remote places without providing efficient means for delivering them at their places of destination, with their belongings. The proposition that passengers might be sent ashore in a place like Cape Nome, with the conditions existing there

in the early part of the season of 1900, and all their outfits retained on board of the ship, is too shocking to be admitted as a defense by any court of justice.

Some of the libelants have failed to introduce any evidence to prove their allegations as to particular damage. The court, therefore, can do no more than decree that they recover the amount paid for their tickets, with interest. The evidence introduced in behalf of others is sufficient to create a belief in my mind that they suffered in consequence of the conditions I have described, and were made sick, and lost opportunities for employment, and were compelled to incur increased expenses, which would have been unnecessary if the carrier had fulfilled its contracts with them. I therefore direct that a decree be entered in favor of each of the libelants as follows: John T. Grismore, for \$500; Isaac R. Birt, for \$500; Francis M. White, for \$500; A. C. Porterfield, for \$300; Charles Scott, whose true name is Charles Weldon, \$250; Richard L. Lewis, for \$250; and to George C. Grismore, George Sandmann, J. L. Kizsee, Frank J. Murphy, James L. Morris, each \$75, with interest at 7 per cent. from the 1st day of July, 1900,—the several sums awarded being, in my opinion, reasonable compensation for personal discomfort, extra expenses, losses of baggage and freight, and consequential losses on account of delay in delivering their baggage and freight; and in fixing the amount of the damages I have made due allowance for exaggerations in the evidence, for contributory negligence on the part of the libelants, and for unnecessary expense to the claimant in defending the ship, on account of claims for excessive damages.

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#### THE RED JACKET.

(District Court, E. D. Pennsylvania. August 22, 1900.)

**1. DEFECTS IN SHIP—INJURY TO STEVEDORE—NEGLIGENCE.**

There is negligence rendering a ship liable to a stevedore injured while taking off the covers of a hatch by a section falling in because of an athwartship being sprung out of line, so that when one of the covers was taken off it failed to support the remaining covers; there having been no inspection of the hatch for years, and the defect being one that an inspection would have shown.

**2. SAME—CONTRIBUTORY NEGLIGENCE.**

A stevedore injured while removing the covers of a hatch by the falling in of a section thereof because of an athwartship being sprung out of line, so that when one of the covers was taken off it failed to support the other covers, is not chargeable with contributory negligence, though he had an opportunity to notice the defect during the three days preceding the accident, when he assisted in removing or replacing the covers, or was present while it was being done; he in fact not having noticed the defect.<sup>1</sup>

In Admiralty.

Willard M. Harris and T. L. Cobaugh, for libelant.

Biddle & Ward and N. Dubois Miller, for respondent.

<sup>1</sup> Negligence of both master and servant, see note to Wm. Johnson & Co. v. Johansen, 30 C. C. A. 678.

J. B. McPHERSON, District Judge. During the latter part of February and the early part of March, 1900, McBride, the libellant, with other stevedores, was unloading the cargo of the steamship Red Jacket, then lying at Girard Point wharves. The ship has four hatches; No. 2, at which the injury complained of occurred, being 24 feet long by 12 feet wide. No repairs had been made to the hatches for at least five years.

The wooden covering of No. 2 hatch was in three sections, supported by two athwartships, or strongbacks, running athwart the ship; and each section was supported in the middle by an iron fore and after, which fitted into cleats in the athwartships. The forward fore and after fitted into a cleat on the fore part of the combing, and ran to the forward athwartship, where it rested in a cleat; and on the other side of the forward athwartship the middle fore and after was placed, running to a cleat in the aft athwartship, on the other side of which the aft fore and after was placed in a cleat and extended to the aft combing. These rods and beams formed a framework upon which 24 wooden covers, 2x6 feet in breadth and length, and about 2½ inches thick, were placed, fitting into grooves in the combing on the side of the hatch and on the fore and afters. The athwartships were 12 feet in length, about 3 feet high, and half an inch thick, beaded on the top and bottom to strengthen them, and weighed about 500 pounds apiece. The forward fore and after and the aft fore and after were of equal length, and weighed about 150 pounds. The middle fore and after was longer and heavier. When the wooden covers were all arranged along the grooves in the combings and the fore and afters, they presented a solid surface, sloping to each side of the hatch to allow the water to run off. Each wooden cover contained two rings fixed at diagonally opposite corners,—one near the central fore and after in a corner, and the other near the combing in another corner. Between the forward end of the combing and the mast was placed a steam winch, with a rope or fall running from the winch to a block in the mast and out to the end of a boom, where it dropped into the center of the hatch.

The libellant was the foreman of No. 2 hatch, and had been directing the stevedores in the removal of cargo from this particular hatch during the three days preceding the accident. At the conclusion of work on March 1 the stevedores had replaced the hatches in the usual manner, putting in their respective cleats the three fore and afters and the 24 wooden covers. They had not met with any difficulty or accident on the half dozen occasions when they had removed and replaced the hatches, each time walking on the covers while they were in place. On the morning of March 2 they started to take off the hatch covers, beginning with the aft section; one man standing on the covers on each side of the fore and after, leaning over and catching hold of the rings fixed near the fore and after, and sliding the covers off with the assistance of a man standing on deck. The wooden covers had been entirely removed from the aft section, the fore and after had been lifted out of its place by the aid of the steam winch, and two men holding on to each end were about to land it on the deck. The two men on the hatch covers—the libellant

and another stevedore—had moved to the middle section of the covering, and McBride was about to lift the first cover of this section, when the whole section, covers and fore and after, fell into the hatch, precipitating both men a distance of some 16 or 17 feet, and thus doing the injury complained of. The reason why the hatch gave way was undoubtedly the fact that the aft athwartship had in some way become sprung out of line, so that, when the bracing pressure of the aft fore and after was removed, the athwartship sprang an inch or two out of place, and failed to support sufficiently the remaining covers of the hatch.

The questions for decision are whether the ship negligently permitted this condition of the hatch to exist, and, in that event, whether the libellant was guilty of contributory negligence. So far as the first question is concerned, I have no hesitation in answering it in the affirmative. It was the duty of the ship to exercise reasonable care in inspecting the covering of its hatches, and in seeing that they were in fit condition to bear the weight properly imposed upon them. The respondent denies, in general terms, that the athwartship was sprung; but as it would have been very easy for the ship to make exact measurements, and thus to furnish the court with precise information upon this subject, and as no such testimony is forthcoming, I lay little weight upon this general denial. It is, I think, impossible to account for the accident, except upon the theory that the athwartship was sprung so far out of place as to be incapable of affording proper support to the covers, unless the aft fore and after was in place. So far as appears, no inspection of the hatch had been made for several years, and I cannot but believe that such failure to inspect—or, if inspection had actually been made, the failure to repair—must be held to be negligence. It seems to me an irresistible inference that, if the hatch had been inspected, the defect would have appeared; and, certainly, if the defect had thus become known, as no attempt was made to remedy it, the negligence of the ship could scarcely be denied.

As to the second question, I am not able to hold that the libellant should be charged with contributory negligence. He had the opportunity of observing that the athwartship was sprung, because he either assisted in removing and replacing the covers during the three days preceding the accident, or was present when the covers were taken off and put on by other persons; but I am disposed to accept his positive testimony that he did not notice that anything was wrong, and I cannot say that, under all the circumstances in proof, his failure to observe the defect was a breach of legal duty.

The case must go to a commissioner to ascertain the damages upon the testimony already taken and such additional evidence as may be offered.

## THE MALING.

## THE S. A. McCAULLEY.

(District Court, D. Delaware. June 1, 1901.)

**1. PUBLIC IMPROVEMENTS—NEGLIGENCE OF CONTRACTORS—LIABILITY.**

While damage or loss resulting from the making with proper care and prudence of a public improvement pursuant to law is *damnum absque injuria*, contractors for such improvement, to avoid liability for resultant damage, must as far as practicable employ reasonably safe means and methods, and the doctrine of *damnum absque injuria* is wholly inapplicable where loss results to third persons from the negligent employment of unsafe methods unnecessary to the conduct of the work.

**2. COLLISION—IMPROPER SIGNALS.**

A close and literal compliance with the requirements of the regulations for preventing collisions is imperatively demanded, and the use by a vessel at anchor, and not in extremis, of a passing signal is a gross fault.

**3. SAME—MUTUAL FAULT—DAMAGES.**

As a general rule, subject to qualification in special cases, where three vessels are all in fault for a collision resulting in damage to only one of them, the total damage and costs should be equally divided between all of them; but where one of them, other than the damaged vessel, although not so related to or connected with the latter as to be a mere inert, passive or helpless instrument, without accountability for the movements or signals of the latter, nor her mere servant, but a free agent, not bound to obey the directions of the latter, has been induced by the latter to do the precise thing which constitutes her fault, the share of the damage and costs which she would otherwise be obliged to pay must be borne by the damaged vessel causing her to commit such fault.

(Syllabus by the Court.)

In Admiralty.

Lewis C. Vandegrift, for Alexander Burke.

J. Parker Kirlin, for the Maling.

John F. Lewis and Francis C. Adler, for the S. A. McCaulley.

James J. Macklin, for Norwood Insurance Company and others.

BRADFORD, District Judge. On the evening of November 26, 1897, the British steamship Maling collided with the dredge Pacific while at anchor in the Delaware river a short distance above the mouth of the Christiana river, striking the dredge on the starboard quarter and doing serious damage. At the time of the collision the steam tug S. A. McCaulley was lying on the westerly side of the dredge, not at anchor, but fastened to the dredge by a line. The master of the dredge filed his libel against the Maling on the night of the collision. Subsequently, on the petition of the claimant of the Maling, the tug was brought in as a defendant under rule 59 in admiralty, and afterwards certain marine insurance companies which had severally paid to the owner of the dredge certain moneys on account of the damage resulting from the collision against which they had insured him, were joined as co-libelants with the master. For several months prior to the collision the dredge had been employed under a contract with the United States government in deepening a certain part of the ship channel on the westerly side of the Delaware river, known as Cherry Island channel or Cherry Island cut. The

work of dredging had been carried on along and parallel to the line or, as it has been termed, the axis of the Edge Moor range lights. The water in the dredged portion of the channel had a depth of twenty six feet at mean low water, and such dredged portion above the point where the dredge had ceased to work on the day of the collision was two hundred and sixty five feet wide, ninety feet being on the westerly, and one hundred and seventy five feet on the easterly side of the axis of the range lights. Below that point the dredged portion of the channel was two hundred and twenty feet wide, ninety feet being on the westerly, and one hundred and thirty feet on the easterly side of such axis. The dredged portion of the channel extended from a point about a mile and a third above to a point nearly a mile below the position of the dredge when it last stopped work before the collision. In that position its bow pointed down the river, its sides were parallel to the axis of the range lights, and it was distant from such axis about one hundred and thirty feet eastwardly. The dredge was kept in place by means of a stern line, a starboard breast line, a starboard quarter line, a port breast line, and a port quarter line, each attached to its own anchor. During the progress of the work on the easterly side of the axis of the range lights, at the close of each day's dredging the dredge was moved some distance to the east by hauling on the port or easterly lines, the starboard or westerly lines being slackened or paid out at the same time. Both while at work and during the night the starboard lines were so weighted as to rest on the bottom. The port lines, if weighted at all, were not sufficiently weighted to cause them to rest on the bottom. The object in hauling the dredge to the eastward at night was to remove it from that portion of the channel which was most frequently traversed by steam vessels and other craft of considerable draft. On the day of the collision the dredge was hauled eastward shortly before five o'clock in the afternoon to the place of collision, a distance of about two hundred and twenty feet from her position while at work, or to a point distant about three hundred and fifty feet from the axis of the range lights. The collision occurred shortly after six o'clock at which time the bow of the dredge was pointing down the river, her sides being parallel to the axis of the range lights. For some ten or fifteen minutes immediately preceding the collision the tug McCaulley had been lying alongside of the dredge, made fast thereto by a line. During the progress of the work the principal employment of the tug was towing mud scows between the dredge and dumping ground. She had returned to the dredge after taking away a scow at the close of the day's work, and was waiting to take the master of the dredge ashore with the report of the government inspector in charge of the work. The Maling with a cargo of grain left Philadelphia at three p. m. on the day of the collision bound for Rotterdam. She is a steel vessel 325 feet long and 47 feet 6 inches in breadth of beam. She was on the day and at the time of the collision loaded by the stern, drawing 19 feet 6 inches forward and 20 feet 8 inches aft. On her way down the river she passed the red buoy opposite Edge Moor at or a few minutes before six p. m. This buoy was distant from the place of collision upwards of a mile and a third,

and probably a mile and a half. At the time of passing the buoy and until after the collision, all of the Maling's usual navigation lights were properly set and brightly burning. It was a dark but clear night, and there was nothing to obscure or obstruct the lights of the steamship from those on the dredge or the lights of the dredge from those on the steamship. It is averred in the libel and is not disputed that "the lights on said steamer were visible to those on said dredge for a couple of miles up the river before she reached said dredge and there was nothing that intervened between said dredge and said steamship to obstruct the view of the lights of said dredge from said steamship as said dredge was then and there lying at anchor as aforesaid." The tide was half ebb and running at about two and a half miles an hour. After the Maling rounded the red buoy and steadied herself in her new course the lights of the dredge bore about a point on her starboard bow. They were regarded at that time by those on the Maling as the lights of a vessel at anchor, and in fact were recognized by the pilot in charge of the Maling as the lights of the dredge. An overwhelming preponderance of evidence shows that the steamship from the time she steadied herself after rounding the buoy until she ported her helm, as hereinafter stated, steadily held her course, keeping the dredge a little on her starboard bow, and that had she continued to hold the same course instead of porting her helm the collision would not have occurred. But when she was between four and five lengths from the dredge she suddenly put her helm hard aport, swung to starboard and, narrowly failing to clear the dredge, struck it a glancing blow on its starboard quarter with the bluff of her port bow. What caused the Maling to port her helm is one of the vital questions in the case, and it is important to consider the circumstances under which it was done. Lockwood, the watchman on the dredge, testifies that when he first noticed the Maling she was coming down the river between Edge Moor and the dredge; that he first saw her white light and shortly afterwards a green light; that when he saw the green light he got his lantern "and started to wave it for her to go to the westward"; that he "saw she was making for the lines before I got the lantern waved for her to go to the westward"; that "the lines were out on the port side and the starboard side both, but on the starboard side they were sunken down"; that there was no danger of the cutting of the lines on the starboard side by passing boats because they were sunken; that there was danger of the cutting of the lines on the easterly or port side of the dredge if the Maling came too near on that side; that he waved the lantern because he "did not want him to run over those lines and cut us adrift"; that he meant by the waving of the lantern that those on the Maling should know that he wanted them to pass to the west of the dredge; that he did not see a red light on the Maling until after he had waved the lantern; that the Maling started to go to the westward as soon as he waved the lantern; and that he waved the lantern seven or eight times, and each time from east to west. The witness nowhere states either positively or as matter of belief that, if the Maling had held her course without porting her helm, she would have struck the dredge. The reason



and the only reason assigned by him for signaling the steamship to go to the westward excludes such an idea. Indeed, the facts as testified to by him demonstrate the physical impossibility of such a result; for prior to the porting of the Maling's helm he had seen of her two side lights only the starboard, and this was continuously visible for some time before she began to swing to the westward, during all of which time her port light was shut in, showing that at that moment she was considerably to the eastward of the dredge and on a safe course so far as risk of collision was concerned. A suggestion rather than a forcible contention is made on the part of the libelants that, if the Maling had held her course and struck the easterly port lines of the dredge, the latter vessel would have been drawn by the tension on the lines into collision with the former. But this is largely speculation, and receives but slight support from the evidence. It certainly does not represent the understanding of the watchman, whose fear was that the dredge would be cut adrift. The only line of the dredge struck by the Maling was the stern line and that parted. The suggestion may, therefore, be dismissed without further notice. There can be no reasonable doubt on the evidence that it was owing to the fact that the port lines of the dredge extended several hundred feet eastwardly and were not weighted so as to rest on the bottom, and consequently were liable to be cut asunder by a vessel passing close enough on that side, that the lantern was waved as a signal to the Maling to port her helm, and had it not been for the position of the port lines of the dredge no such signal would have been given. A seriously disputed point in the case is whether the tug McCaulley, almost immediately after the watchman began to wave the lantern on the dredge, did not blow a single blast as a signal to the Maling to pass to the westward. Careful examination of the direct and circumstantial evidence bearing on this point has convinced me that the tug did give such a signal to the steamship at that time. It is true that the master of the tug, while admitting that she blew a number of toots as a danger signal before the collision, positively denies that any single and independent blast was blown by the tug or that he heard any such blast from the Maling. There is also considerable testimony to the same effect from others on the tug and those on the dredge. The self-contradictions and general recklessness of statement disclosed in the evidence of the master of the tug largely detract from the weight it might otherwise possess, and much of the testimony from others tending in the same direction as that of the master, even when taken by itself, is loose, contradictory and unsatisfactory. By way of illustration, Charles, fireman on the tug, states in effect that he was at supper in the galley when he heard the tug blow four short blasts; that he paid no attention to this signal; that it was repeated and he then came out on deck; that it was customary for the tug to blow only one short blast in order to attract the attention of those on the dredge; and that the reason why he paid no attention to the first signal was that he thought it was given for that purpose. Lockwood, the watchman on the dredge, states in effect that he heard the tug blow four blasts before she tooted; that "they were longer than the blasts that she tooted" and had longer intervals between

them; that these blasts were blown about the time he was waving the lantern; and that "they were little longer blasts than toots would be. Toots come quick." Testimony of this kind is far from convincing, particularly in view of the fact that a clear preponderance of the evidence shows that the tug did not begin to toot until after the Maling had put her helm hard aport and had so far swung to the westward as to render both her side lights visible to those on the dredge and tug. The evidence on the part of the Maling is abundant and positive that the tug blew a single blast just after the watchman on the dredge began to wave his lantern, and that the Maling promptly answered with a single blast, and forthwith put her helm hard aport. Such affirmative evidence is much more persuasive than the negative testimony to the contrary. For the latter amounts only to a statement that the witnesses testifying did not hear a blast from the tug and an answering blast from the Maling. One may not hear a blast, or, if he hears it, it may not impress itself on his memory or even attract his attention; and a sincere statement by him that it was not blown may be perfectly consistent with mistake on his part. The evidence on the part of the Maling is supported by the inherent probabilities of the case. The tug and dredge were employed in different branches of the same work. The tug was then lying fast to the dredge waiting to take the master of the latter and the report of the government inspector ashore. The master of the tug knew that the port lines of the dredge extended eastwardly, were not sunken, and were liable to be parted by a vessel passing close to her on that side. He also knew that the watchman was waving his lantern as a signal to the Maling to pass to the westward. He says that before he blew the tug's whistle he had noticed "the watchman waving a white light for the steamer to go to the westward"; that he understood what the watchman meant; that the latter wanted the Maling to change her course and pass down to the westward; that "she was going to the eastward of the course that she should have been on"; that the dredge had lines out from her side several hundred feet to the eastward; and that if the Maling had changed her course to the westward when the tug first whistled she would have had no difficulty in safely passing to the westward of the dredge. He thus admits that in his opinion a signal to the Maling to change her course to the westward just after the watchman on the dredge had begun to wave his lantern would have been timely. On his own showing a violent presumption arises that he gave the signal which those on the Maling testify in the most positive manner they heard. The testimony on this subject of those who were in immediate direction and control of the movements of the Maling from the first waving of the lantern on the dredge until the collision is strong and convincing. In their case there is no room for mistake. The pilot, master, chief and second mates, helmsman and lookout of the Maling testify with clearness and particularity to the effect that, after the lantern had been waved on the dredge and considerably before the tug tooted or gave any danger signal, the tug gave a single blast which was answered by the Maling with a single blast, the helm of the latter vessel was immediately put hard aport and she began to

change her course to the westward. On the testimony as a whole I am satisfied that when the Maling was about five lengths or, roughly speaking, a distance of a third of a mile, from the dredge, the lantern was first waved; that very shortly afterwards and before the Maling had moved more than her own length the tug blew one blast which was forthwith answered by the Maling, and the helm of the latter vessel ported; and that it was only after the Maling had so far changed her course as to be bearing down on the dredge, with both her side lights visible, that the toots or danger signals were given by the tug. It seems that the significance of the waving of the lantern was not fully appreciated by all those on the Maling who saw it. Wright, the master, states that when he saw the lantern he asked the pilot what signal it was, and, the latter replying that he did not know, the witness said, "it looks as though he wants us to pass the other side;" and, further, that it was the blast from the tug in conjunction with the waving of the lantern that caused the porting of the Maling's helm. Clampit, the pilot, states that he does not think he would have ported the Maling's helm on account of the waving of the lantern had the tug not blown the blast which was answered by the Maling and that it was done on account of the blast following such waving. Richardson, the chief mate, states that the Maling did not respond to the waving of the lantern, and that it had nothing to do with the porting of her helm. It is, however, comparatively unimportant what impression the waving of the lantern produced on the master and chief mate. The pilot had sole charge and direction of the movements of the Maling and he acted upon the blast in combination with the waving. But it is immaterial so far as the decision of this case is concerned whether, on the one hand, the blast from the tug, or, on the other, such blast in conjunction with the waving of the lantern, was the cause of the porting of the Maling's helm. The tug and the dredge co-operated in effectuating an intent common to both of them, namely, the diversion of the Maling westward from her course, and the exposed condition of the port lines of the dredge was the proximate cause of the waving of the lantern and, in conjunction with such waving, of the blowing by the tug of the single blast immediately preceding the porting by the Maling of her helm. If that blast was the moving cause of the porting of the helm the dredge was in the same predicament on the question of the existence of liability on her part as if such moving cause had been the waving of the lantern. The contention is made on the part of the dredge and of the tug that the immediate cause of the porting of the Maling's helm was not the waving of the lantern or any blast from the tug, but the discovery by the pilot in charge of the Maling that she was considerably to the east of her proper course and in danger of running aground unless she promptly changed her course to the westward; and, further, that the only effect the waving of the lantern or any blowing of her whistle by the tug had was to arouse the pilot from his inattention and cause him by glancing at the range lights to discover and, when too late, attempt to rectify his error. But the position thus taken is conjectural and is opposed to the decided weight of the evidence, both direct and circumstantial. It has, indeed, no direct evi-

dence to support it. The principal, if not only, circumstance that lends some color to this contention is the fact that the pilot supposed that the dredge was lying on or nearly on the "ranges" or axis of the range lights instead of considerably to the east of that line, as was the fact. The essential inquiry in this connection is not whether the pilot was in error as to the location of the dredge relatively to the axis of the range lights, but whether, save for the waving of the lantern and the single blast from the tug, the Maling would not have continued on her course without porting her helm. It could not have been a matter of legal concern to the dredge or tug if the Maling by holding her course had run aground. It is clearly established, as before stated, that from the time the Maling turned the buoy off Edge Moor until she ported her helm after the blast from the tug, she steadily held her course, the dredge bearing a point or so on her starboard bow. The direct evidence shows, and it also appears from the fact that the Maling failed to clear the dredge after swinging several points on a port helm, that if she had continued to hold her course she could not have collided with the dredge, but, with sufficient depth of water, would have passed a short distance to the east of the latter vessel. The pilot testifies positively that, until he was diverted from his purpose by the single blast from the tug following the waving of the lantern, he had intended to hold the Maling to her course, without change before passing the dredge, and that at the then stage of the tide there was an abundance of water to allow her to pass at least two hundred feet east of the position of the dredge as shown by the evidence. If his testimony in this connection is to be accepted as true, it wholly excludes any idea that he thought either before or after the porting of the Maling's helm that she would incur or would have incurred any danger of running aground by holding to her original course. On the evidence I am satisfied, not only that the pilot thought at the time that there was enough water to allow the Maling to pass in safety on the easterly side of the dredge, but that he was right in so thinking. With an experience of more than twenty years in piloting vessels up and down the Delaware river it must be assumed that he had some competent knowledge of the general depth of water at and in the vicinity of the place where the dredge lay. It is true that he has a strong interest in maintaining the propriety of his course on the occasion in question. But this circumstance cannot of itself discredit his testimony. No actual measurement of the depth of the water at or to the east of the place of collision appears to have been made. The evidence discloses a number of loose expressions of opinion on the depth of the water, entitled to little or no weight; but it will be found that even these, when carefully considered as a whole, tend to sustain rather than contradict the pilot's statement. The dredged portion of the channel by no means included the whole or even the greater portion of the width of the channel navigable by vessels of considerable size; and the part of the channel where the dredge lay at the time of the collision and the adjacent waters on either side, although to the east of such dredged portion, were navigable and were navigated by such vessels. It is an error to suppose that

vessels in navigating a channel provided with range lights are under any legal or other obligation to confine their course to the line or axis of such lights. Range lights are in aid of navigation; but such a rule, if it existed, would tend rather to cause than prevent collisions. The dredged portion of the channel had a depth, as before stated, of twenty six feet at mean low water; but other portions of the channel could safely be and were properly navigated by vessels not of such draft as to be confined to the dredged portion. At the time of the collision the dredge lay 220 feet east of the easterly side of the dredged portion of the channel, yet the Maling did not run aground; and there is no satisfactory evidence that the water so shoaled eastward from the dredge as to prevent the free passage of a vessel of the draft of the Maling at the distance of two hundred feet or even much further from the easterly side of the dredge. At the time and place of collision the tide was about half ebb and four feet above mean low water. An official chart of the river corrected to October, 1898, was put in evidence by the libellant. There is no evidence of any deepening of the channel east of the easterly side of the dredged portion between the day of the collision and the issue of the chart as corrected, and in the absence of evidence no assumption to that effect can be made. It appears from that chart, not only that at that stage of the tide there was ample depth of water for the Maling to hold her course in perfect safety to herself and the dredge without going to the westward of the latter vessel, but that the Maling in swinging to starboard under a port helm passed without grounding through shallower water than any she would have encountered had she continued on her course without porting her helm. Under these circumstances it must be held that the porting of her helm was the direct and immediate result of the blast from the tug following or in combination with the exhibition of the lantern on the dredge. Was not the dredge at fault? Those in charge of her knew that the portion of the river in which she lay after being hauled eastward on the conclusion of the day's work was liable to be traversed by both steam and sailing vessels. It was the duty of her watchman to watch for, and guard against danger to the dredge and her lines from, approaching vessels. If it be assumed that the dredge had a right to occupy at night several hundred feet of the channel to the east with her unweighted lines and to stop the navigation by other vessels of the part of the channel so occupied, it was, at least, her duty either to indicate in some manner intelligible to approaching vessels, if practicable, the part of the channel so occupied, or promptly to use such proper signals as should be adequate to the protection, not only of herself and her lines, but of such approaching vessels. She did not adopt any means to inform other vessels of the length and position of her port lines. Possibly it was impracticable to do so. This rendered it all the more important that she should have been vigilant to avert disaster. Now her watchman certainly was negligent in the discharge of his duty. As soon as he saw the starboard side-light of the Maling he got his lantern, which was close at hand, and began to wave it in the manner before stated. It was

on his own showing the work of but a moment. When the lantern was first waved the Maling was about five lengths distant from the dredge, yet the evidence shows that the lights of the Maling could be seen on that clear night by those on the dredge from the time the former vessel turned the buoy off Edge Moor, and had the watchman been vigilant he should have noticed the green light of the Maling much earlier than was the case. Had he done so and promptly waved his lantern, although an improper and unauthorized signal, in all human probability no collision would have occurred. The Maling would have had ample opportunity to slow down or to clear the dredge to the westward. It seems to have been tacitly assumed on the part of the libelants that because the dredge was engaged in making a public improvement by the authority of the government no culpable negligence can be attributed to her on account of the disposition she made of her port lines, and that all vessels at their own peril were bound to avoid not only her but her lines, whether the position of the latter was or was not known to them. But such an assumption involves a clear misconception of the law. It is true that what the law authorizes to be done cannot be considered either illegal or wrongful, and that damage or loss resulting from the making with proper care and prudence of a public improvement pursuant to law is *damnum absque injuria*. But contractors for such an improvement, to avoid liability for resultant damage, must as far as practicable employ reasonably safe means and methods. The doctrine of *damnum absque injuria* is wholly inapplicable where loss results to third persons from the negligent employment of unsafe methods unnecessary to the conduct of the work. If it was necessary that the port lines of the dredge should at night extend several hundred feet eastwardly, there is no evidence showing or tending to show that those lines could not have been weighted and sunk to the bottom out of the way of passing vessels as were her starboard lines. In the absence of such evidence it cannot be assumed that it was impracticable so to dispose of the port lines. But even if it was impracticable so to weight and sink those lines there is nothing in the evidence showing or tending to show that it was necessary to have them extend so far to the east. The unnecessary obstruction of so much of the channel with unweighted lines was a negligent and wrongful act on the part of the dredge for the consequences of which the Maling should not be made to suffer unless she as well as the dredge was at fault. To this negligence were due both the waving of the lantern and the signal blast from the tug. But further, the waving of the lantern was an irregular and improper signal. Article 11 of the regulations for preventing collisions enacted by Congress (30 Stat. 96) prescribes the lights for vessels at anchor. Article 12 is as follows:

"Art. 12. Every vessel may, if necessary, in order to attract attention, in addition to the lights which she is by these rules required to carry, show a flare-up light or use any detonating signal that cannot be mistaken for a distress signal."

The use made of the lantern was wholly unauthorized by law. It was evidently a passing signal and, in view of the fact that the

vessel on which it was made was at anchor, was of a grossly misleading character. A close and literal compliance with the requirements of the regulations for preventing collisions is imperatively demanded. The waving of the lantern did not fall within the category of improper signals resorted to only in extremis. Certainly the mere fact that the lantern was waved is not evidence that matters were in extremis at that time; for it appears that it was customary on the dredge to wave it on the approach of vessels. As stated by the witness Coombs, "that was what the watchman was supposed to do, take his lantern and wave them off if they came near us." Further, it is admitted by the proctors for the dredge that "the distance between the vessels at the time the signal was given was ample to permit the steamer to avoid the dredge if the course of the former had been changed when the lantern was first waved." It was a fault on the part of the dredge to use a lantern as a signal and that action in combination with the blast from the tug which it induced was the direct cause of the porting of the helm of the Maling and the consequent collision. Section 6, c. 69, of the Delaware Revised Code contains the following provision:

"Vessels anchoring in any river, or creek, shall do so out of the channel, and as near the shore as they can with safety; and, when necessary, shall moor parallel with the channel, so as to leave a free passage, or they shall be held liable, as for gross negligence, in case of collision."

It may be a serious question whether this statute, in the absence of any regulation of Congress to the contrary, was not applicable to the dredge, and that vessel in fault for not complying with it. *Green v. The Helen* (D. C.) 1 Fed. 916. Anchoring in such depth of water as to permit the Maling to collide with her certainly was not anchoring out of the channel and as near the shore as could be done with safety. This case is clearly distinguishable from *The Armonia*, 81 Fed. 227, 26 C. C. A. 338, and *The Le Lion* (D. C.) 84 Fed. 1011. Here the dredge was anchored, not in the Delaware bay, but in the river proper and within the territorial jurisdiction of Delaware. But in view of the conclusions already reached respecting the fault of the dredge it is unnecessary to decide this question. The tug as well as the dredge was in fault and proximately contributed to the collision. A single blast such as was blown by the tug is prescribed by rule 1, article 18, of the regulations for preventing collisions, as the signal to be given in the case of steam vessels approaching each other end on or nearly so in such a manner as to involve risk of collision, and such signal and the answering blast of a similar character from the other vessel embody and express the intention and agreement of both vessels to pass to starboard or, in other words, on the port side of each other. It is a passing signal, altogether improper and deceptive when used by a vessel at anchor; and, if so used and a collision occurs, the burden rests upon the vessel using it clearly to prove that it did not contribute to such collision. Here the proof is the other way. It is unnecessary to discuss other alleged faults on the part of the tug.

I now come to the question whether the Maling was not also at fault. Article 25 of the regulations for preventing collisions (30 Stat. 96) is as follows:

**"Art. 25. In narrow channels every steam-vessel shall, when it is safe and practicable, keep to that side of the fair-way, or mid-channel which lies on the starboard side of such vessel."**

It is contended on the part of the Maling that this article applies only to the case of two or more vessels in motion and passing each other in opposite directions in narrow channels. But there is no such restriction in the language of the act nor is any reason perceived why such a restriction should be implied. The provision was, in my judgment, applicable to Cherry Island channel a short distance above the place where the dredge was lying, and had the Maling obeyed it the collision would not have occurred; for in coming down the channel she would have been so far to the west that after reaching the point where the channel widens to the east she could not have collided with the dredge without an unnecessary and aimless change of course. It would have been "safe and practicable" for the Maling to keep to the westerly side of the channel and there were no "special circumstances" rendering a departure from the rule "necessary in order to avoid immediate danger" in the words of article 27 of the above act. The Maling was, therefore, at fault in being on the easterly side of the channel at the time of the waving of the lantern and the blowing of the signal blast by the tug. But this was not her only fault. The evidence shows that when she was thus signaled she was, with her speed through the water and with the ebb tide, moving over the ground at the rate of not less than ten miles an hour. As soon as the lantern was exhibited the master of the Maling asked the pilot, "What signal is that?", and on the pilot's replying that he did not know, said to him "It looks as though he wants us to pass the other side." Matters were not at that time in extremis. The Maling was heading clear of the dredge and at a distance, as before stated, of about a third of a mile. A seriously contested question, on which much evidence has been adduced, is whether the side-lights of the tug were not in position and visible to those on the Maling when the lantern was first waved. The view I have taken of the case has rendered it unnecessary to decide this question. If, however, those lights were visible to the pilot and he was led to believe that the dredge and tug were then moving eastward his duty was obvious. In that event, without waiting for any signal from the tug he should immediately have ported the helm in order to pass to the westward. But if the tug's side-lights were not at that time visible and he then, as he had theretofore, recognized the dredge as a stationary vessel, he should without waiting until the blast came from the tug, unless sure of his ability to clear the dredge by porting, instantly have ordered the stopping and reversal of the engines. Had this course been pursued without any subsequent porting of the helm the collision would have been avoided even if the headway of the Maling had caused her to part the port lines of the dredge and set her adrift,—a matter of comparatively small moment in view of the fact that the tug with steam up was then lying fast to her. Or had the helm been ported only after such stoppage and reversal of the engines it would have been problematical at least whether the collision would have occurred, or whether the damage would have been serious if it had occurred.



It is unnecessary to discuss other alleged faults on the part of the Maling. For the reasons above given the Maling, the dredge and the tug were all in fault and each contributed to the collision which would not, in my opinion, have occurred had it not been for the fault of all of them.

The only remaining question relates to the division of damages and costs. On this point I have had some doubt whether there should not be an equal division between the dredge and the Maling. As between the tug and the dredge it would be grossly inequitable that the tug should be made to suffer for doing only what she was induced by the dredge to do through the waving of the lantern in conjunction with the exposed condition of her port lines. The faults of the dredge and tug respectively were not wholly separate and independent of each other. There was a causal connection between the waving of the lantern and the blast from the tug. There was co-operation between the dredge and the tug in inducing the Maling to port her helm. On full consideration, however, I am satisfied that on both principle and authority the right of recovery on the part of the libelants as against the Maling is limited to one-third of the total damages and costs. All three vessels were in fault. Originally the Maling was the only defendant. The tug was brought in as a co-defendant by petition on the part of the Maling pursuant to rule 59 in admiralty. The rule provides that when a vessel is brought in the "suit shall proceed as if such vessel \* \* \* had been originally proceeded against," and that such a decree shall be "rendered by the court in the suit as to law and justice shall appertain." It can, therefore, be assumed, for the purpose of ascertaining the proportionate liability of the several vessels, that the tug and Maling were originally libeled as co-defendants. Unlike the rule at common law, contributory negligence in a collision case in admiralty does not defeat a recovery. In such a suit between two vessels only, if both were in fault, the entire damages resulting from the collision must be equally divided between the parties. As stated by Mr. Justice Bradley in delivering the opinion of the court in *The Alabama and The Game-cock*, 92 U. S. 695, 697, 23 L. Ed. 763, 764, "the safety of navigation requires that if they are both in fault, they should bear the damage equally, to make them more careful." This rule of equality is enforced without regard to any disparity in value or in degree of fault as between the two vessels. In *The Atlas*, 93 U. S. 302, 313, 23 L. Ed. 863, 865, the court said:

"Under the second of the foregoing rules,—when both vessels are in fault, —the sums representing the damages are added together, and the amount is equally divided between the parties: and that rule prevails in all cases where there is mutual fault, even though one of the vessels may have been much more in fault than the other. Fault being imputed to both vessels, and the charge being proved, the inquiry which was most to blame is immaterial, as the damages must be divided between the two, according to the rule provided in the admiralty courts."

If a vessel free from fault be injured through the concurring and co-operating faults of two other vessels all the damages resulting from the collision may be recovered from either or both of the latter. If only one of them be proceeded against and the other be not brought in as a co-defendant, there may be a recovery in solido

from the vessel libeled. But if both of the offending vessels be proceeded against, the decree must primarily apportion the total damages and costs equally between them, reserving to the libellant the right, in case of the insufficiency of either of the two vessels to pay her moiety, to collect the deficiency from the other. *The Washington and The Gregory*, 9 Wall. 513, 516, 19 L. Ed. 787; *The Alabama and The Game-cock*, 92 U. S. 695, 697, 23 L. Ed. 763; *The Juniata*, 93 U. S. 337, 340, 23 L. Ed. 930; *The City of Hartford and The Unit*, 97 U. S. 323, 329, 24 L. Ed. 930; *The Civilta and The Restless*, 103 U. S. 699, 26 L. Ed. 599; *The Sterling and The Equator*, 106 U. S. 647, 1 Sup. Ct. 89, 27 L. Ed. 98. In the last case Mr. Chief Justice Waite, delivering the opinion of the court, said:

"The well-established rule in such cases is to apportion the damages equally between the two offending vessels, the right being reserved to the libellant to collect the entire amount from either of them to the extent of her stipulated value, in case of the inability of the other to respond for her portion."

The same considerations of policy and convenience which require an equal division of damages and costs between two vessels in fault, where the owner or master of one of them proceeds against the other, require a similar division between two vessels in fault, where the owner or master of a vessel not at fault proceeds against them for damages on account of collision, subject to the paramount right of the innocent party to receive full compensation by resorting, so far as one of the offending vessels is insufficient to pay her moiety, to the other in order to make up the deficiency. It is true that the innocent party should not be made to suffer by the application of the rule of equality as between wrongdoers. In *The Alabama and The Game-cock*, *supra*, the court, speaking of the innocent party, said:

"He ought not to suffer loss by the desire of the court to do justice between the wrong-doers. In short, the moiety rule has been adopted for a better distribution of justice between mutual wrong-doers; and it ought not to be extended so far as to inflict positive loss on innocent parties."

But, subject to the right of an innocent party, when necessary for obtaining full compensation, to recover from one of two offending vessels more than her portion of the damages and costs, the rule of equality is strictly enforced as between the wrong-doers without regard to inequality of fault or of value between them. Such being the settled law in case of collision where the libel is filed on the part of a vessel without fault against two vessels in fault, it seems to follow as a necessary consequence that, if all three vessels have been guilty of fault contributing to the collision, the total damages and costs must be equally divided between them. Precisely the same considerations of policy and convenience which require equality of division as between two offending vessels where one is libeled on the part of the other, or between two offending vessels where both are libeled on the part of a vessel not in fault, demand equality of division as between three vessels all of which are in fault, where two of them are libeled on the part of the third. Certainly the filing of the libel by one of them against the other two cannot entitle the first to an advantage or an immunity with respect to damages and costs not possessed by each of the others,

when all of them have been in fault. The circumstances of the collision remaining the same, the quantum of liability of any one of the three vessels cannot be enlarged or diminished by the position she occupies on the record as a co-defendant, on the one hand, or as plaintiff, on the other. Were it otherwise, the mere arrangement of the parties on the record would have the effect of substantially altering their liability. Where in a case of collision three vessels have by their fault contributed to the disaster and they are all before the court, no other rule than that of equality of division of damages and costs can, in my judgment, consistently with the doctrine to be extracted from the cases decided by the supreme court or with principle be applied. If this rule is not applicable, the determination of the proportionate liability of the several vessels must necessarily be left to the discretion of the court. Such I do not believe to be the law. The rule of equality commends itself both on principle and on authority. *The Brothers*, 2 Biss. 104, Fed. Cas. No. 1,969; *The Peshtigo* (D. C.) 25 Fed. 488. Had the tug not been brought in as a co-defendant the damages and costs must, under the settled doctrine of the supreme court, have been equally divided between the dredge and the *Maling*. The latter vessel, in order to relieve herself of a portion of the burden in the event of her being adjudged in fault, brought in, under the rule prescribed by the supreme court, the tug as a co-defendant, alleging fault on her part contributing to the collision. That the tug was in fault I have no reason to doubt. It is true that the tug was induced to give her deceptive signal to the *Maling* by the dredge; but the tug in doing so did not act on compulsion. She was a free agent. She was not the mere servant of the dredge, bound to obey its orders. In fact no order appears to have been given by the dredge to the tug to blow her whistle; but had it been otherwise she was not bound to yield obedience. The tug is not embraced in the category of vessels so related or connected with others as to be mere inert, passive, helpless instruments, without accountability for their movements or signals. All the vessels having been in fault, the *Maling* cannot be visited with more than one-third of the damages and costs. Another third must in any event be borne by the dredge. The remaining third would properly be recoverable from the tug, had not the latter been induced by the dredge to do the precise thing which constitutes her fault. As before stated, it would be grossly inequitable that the tug should at the instance of the dredge be made to suffer in consequence of the action of the latter vessel. Here the libelants are seeking to obtain compensation for the injuries sustained by the dredge. They are precluded, not by estoppel in a strict sense, but by the substantial justice and equities of the case, from any recovery against the tug. But the fact of the inability of the libelants to recover a third of the damages and costs from the tug cannot enlarge or in any manner change the primary liability of the *Maling* for only one-third of the damages and costs. For the reasons given all the damages and costs must be divided between the *Maling* and the dredge; the *Maling* to bear one-third and the dredge the remaining two-thirds.

Let a decree be prepared in accordance with this opinion.

## MANLEY v. TOW et al.

(Circuit Court, N. D. Iowa, W. D. September 6, 1901.)

**1. PUBLIC LANDS—JURISDICTION OF COURTS—CONCLUSIVENESS OF DECISION OF DEPARTMENT.**

A court of equity has jurisdiction to grant appropriate relief to a complainant, who has been deprived of land to which he is entitled under the public land laws through an erroneous construction of the law by the land department as applied to the facts found, although as to the facts the findings of the department are conclusive.<sup>1</sup>

**2. SAME—RAILROAD GRANT—REVERSION OF UNEARNED LANDS.**

Act May 12, 1864 (13 Stat. 72), granting lands to the state of Iowa for the purpose of aiding in the construction of two lines of railroad, one of which was from Sioux City to the south line of the state of Minnesota, provided that the lands should be patented as earned by the construction of sections of the road, to be certified by the governor, and that, if the roads were not completed within 10 years of their several acceptances of the grant, the lands granted and not patented should revert to the state for the purpose of securing the completion of said roads within such time, not to exceed 5 years, and upon such terms as the state should determine: "provided, further, that, \* \* \* should the state fail to complete the said roads within 5 years after the 10 years aforesaid, the said lands undisposed of as aforesaid shall revert to the United States." In 1866 the lands apportioned to the Sioux City Line were granted by the state to the Sioux City & St. Paul Railroad Company, which constructed a portion of the line, but ceased work in 1872. In 1882 the state declared the unearned portion of the grant forfeited, and resumed the same, but no action was thereafter taken by the state to secure the completion of the line. *Held*, that under the terms of the original grant by congress such unearned lands reverted to the United States, and became subject to Act March 3, 1887 (24 Stat. 556), providing for the forfeiture of unearned lands generally, and that the adverse claims of persons entering such lands under the public land laws and those claiming through purchase from the railroad company must be determined by the provisions of that act.

**3. SAME—ACT CONFIRMING TITLE OF PURCHASERS—RIGHTS OF SUBSEQUENT PURCHASERS.**

Act March 3, 1887 (24 Stat. 556), which declared a forfeiture of all unearned lands covered by railroad grants, and required their adjustment, but which provided in section 4 "that as to all lands \* \* \* which have been sold by the grantee company to citizens of the United States the person or persons so purchasing in good faith \* \* \* shall be entitled to the land so purchased," does not entitle one who purchased unearned lands from a company after the passage of the act to protection as against an actual settler under the homestead laws, whose settlement and improvement of the land antedated such purchase.

**4. SAME—CONSTRUCTION OF GRANT—EFFECT OF PATENT TO STATE.**

Act May 12, 1864 (13 Stat. 72), granted lands to the state of Iowa, as trustee, to secure the building of a line of railroad from Sioux City to the Minnesota state line, but expressly declared that the lands should be used for no other purpose, and should not be incumbered or disposed of until patented, and provided that they should only be patented as earned by the construction of coterminous sections of the road. *Held*, that a patent issued to the state for lands coterminous with a completed section of the road, but which had not been earned by reason of the failure of the company to complete the road, and which, for that reason, the state had refused to convey to the company, was limited by the con-

<sup>1</sup> Conclusiveness of decisions of land department, see notes to *Hartman v. Warren*, 22 C. C. A. 38, and *Carson City Gold & Silver Min. Co. v. North Star Min. Co.*, 28 C. C. A. 344.

ditions of the grant, and did not operate as a conveyance "to or for the use of" the company, within the meaning of section 5 of Act March 3, 1887 (24 Stat. 556), and that under said section, in a contest between a purchaser from the company and a prior settler claiming under the homestead laws, preference should be given to the latter.

**5. SAME—HOMESTEAD ENTRY OF UNEARNED LANDS—GOOD FAITH.**

The good faith of a homestead settler is not impeached by the fact that the land, when he settled upon it, was within the limits of a railroad grant, under which it had been withdrawn from market, where he had knowledge that the terms of the grant had not been complied with, nor the land earned thereunder, and good reason to believe that it would soon be restored to the public domain, as in fact it was.

**6. SAME—BONA FIDE PURCHASERS FROM RAILROAD COMPANY—NOTICE OF RIGHTS OF SETTLER.**

Under the provisions of Act March 3, 1887 (24 Stat. 556), confirming the titles of bona fide purchasers of lands from a grantee railroad company whose title failed, or permitting such purchaser to enter the lands where the company had no title, a purchaser from a company is chargeable with notice of the rights of one who at the time of the purchase was in the actual occupancy of the land, claiming as a settler under the homestead laws, and he is not a bona fide purchaser, within the meaning of those provisions, as against such settler, but acquires only the title and rights of his grantor.

In Equity. On demurrer to bill.

J. H. King and M. B. Davis, for complainant.

W. P. Jewett, B. L. Wick, and Carr & Parker, for defendants.

SHIRAS, District Judge. This case, and a number of others now pending in this court, arise under the provisions of the act of congress of March 3, 1887 (24 Stat. 556), providing for the readjustment of land grants in aid of railways, and for the forfeiture of the unearned portions of such grants; the contest being between settlers on the land, claiming under the homestead laws of the United States, and purchasers from the Sioux City & St. Paul Railroad Company. The bill herein filed sets forth at length the acts of congress, of the general assembly of the state of Iowa, of the land department, and the decisions of the courts, state and federal, which affect the disposition of the land described in the bill, to wit, the N. W.  $\frac{1}{4}$  of section 25, township 95 N., of range 41 W., situated in O'Brien county, Iowa. By the recitals in the bill it is shown that under date of May 12, 1864, congress passed an act granting to the state of Iowa, for the purpose of aiding in the construction of a line of railway from Sioux City to the south line of the state of Minnesota, every alternate odd-numbered section of land within 10 miles of the line of proposed road, with authority to the secretary of the interior to select indemnity lands from the odd-numbered sections within 20 miles of the line named. In the same act congress also granted to the state, for the benefit of the McGregor Western Railway Company, lands to aid in the construction of the line of railway from McGregor westerly. It is declared in the act (13 Stat. 72) that the lands granted shall be subject to the disposal of the legislature of Iowa for the purposes named in the bill, and for no other; it being further provided that the lands granted should be disposed of by the state in the manner following, namely:

"When the governor of the said state shall certify to the secretary of the interior that any section of ten consecutive miles of either of said roads is completed in a good, substantial and workmanlike manner as a first class railroad, then the secretary of the interior shall issue patents to the state in like manner for a like number, \* \* \* and when certificates of the completion of additional sections of ten consecutive miles of either of said roads are, from time to time made as aforesaid, additional sections shall be patented, as aforesaid, until said roads, or either of them, are completed, when the whole of the lands hereby granted shall be patented to the state for the uses aforesaid and none other: \* \* \* provided further, that if the said roads are not completed within ten years from their several acceptance of this grant, the said lands hereby granted and not patented shall revert to the state of Iowa for the purpose of securing the completion of the said roads within such time, not to exceed five years, and upon such terms as the state shall determine; and provided further, that said lands shall not in any manner be disposed of or incumbered, except as the same are patented under the provisions of this act, and should the state fail to complete the said roads within five years after the ten years aforesaid, that the said lands undisposed of as aforesaid shall revert to the United States."

By the provisions of the act of April 3, 1866, adopted by the general assembly of Iowa, the Sioux City & St. Paul Railroad Company was authorized to undertake the construction of the line from Sioux City to the Minnesota state line; and that company, beginning the construction at the state line, built the road to the town of Le Mars, in Plymouth county, but no further, ceasing the work of construction in 1872. By an act approved March 16, 1882, the general assembly of Iowa declared:

"That all lands, and all rights to lands, granted or intended to be granted to the Sioux City and St. Paul Railroad Company by said acts of congress, and of the general assembly of the state of Iowa, which have not been earned by said railroad company by a compliance with the conditions of said grant, be, and the same are hereby, absolutely and entirely resumed by the state of Iowa, and that the same be and are absolutely vested in said state as if the same had never been granted to said railroad company." Act 19th Gen. Assem. c. 107, § 1.

By an act approved March 27, 1884, the general assembly enacted that all lands and rights to lands resumed by the act of 1882 were relinquished and conveyed to the United States, the governor of the state being directed to certify to the secretary of the interior all lands patented to the state, but which had not been patented to the Sioux City & St. Paul Company by the state; it being, however, provided "that nothing in this section contained shall be construed to apply to lands situated in the counties of Dickinson and O'Brien." The reason for this exception of the land in the named counties is to be found in the fact that the Chicago, Milwaukee & St. Paul Company had succeeded to the rights of the McGregor Western Company, the original beneficiary of the grant contained in the act of congress of May 12, 1864, in aid of the line from McGregor westerly, and as such successor had built the road up to and past the point of intersection with the Sioux City Line; and the Milwaukee Company was asserting a claim to the lands in O'Brien and Dickinson counties on the ground that it had not received the full amount of lands it had earned, and that, upon the failure of the Sioux City Company to earn the same, they would pass under the grant to the McGregor Western. It may be said, in passing, that this claim on part of the Milwaukee

Company was denied by the ruling of the supreme court in the case of Chicago, M. & St. P. Ry. Co. v. U. S., 159 U. S. 372, 16 Sup. Ct. 26, 40 L. Ed. 185, it being therein held that lands granted in aid of the line from Sioux City to the state line, but not earned by reason of the failure to construct the road between Le Mars and Sioux City, could not be claimed and held by the Milwaukee Company under the grant in aid of the line from McGregor westward. It may be further said that the rights of the companies in the lands within the overlapping limits of the grants at the place of intersection had been settled by the decision of the supreme court in the case of Sioux City & St. P. R. Co. v. Chicago, M. & St. P. R. Co., 117 U. S. 406, 6 Sup. Ct. 790, 29 L. Ed. 928, in pursuance of which a partition of lands had been made, and confirmed by a decree of the circuit court for the District of Iowa. In 1889 a bill was filed in this court by the United States against the Sioux City & St. Paul Company for the purpose of adjusting the land grant under the provisions of the act of congress of March 3, 1887, and the case was carried to the supreme court, it being finally held by that court that the railway company, through its failure to complete the entire line to Sioux City, had not become entitled to claim all the lands embraced within the grant, but only the proportionate share based upon its completion of five sections of the road; that the facts showed that there had been patented to it by the state more land than it was entitled to, and therefore the company was estopped from asserting any right or claim to the lands in O'Brien and Dickinson counties, which had been patented to the state, but had not been patented by the state to the company; thus, in effect, holding that these lands were unearned through the failure to complete the road, and, as such, they reverted to the United States under the terms of the original grant of 1864, as well as under the provisions of the act of 1887. The decision of the supreme court was under date of October 21, 1895. *Sioux City & St. P. R. Co. v. U. S.*, 159 U. S. 349, 16 Sup. Ct. 17, 40 L. Ed. 177. The commissioner of the land office, by a letter dated November 18, 1895, called the attention of the register and receiver of the local office at Des Moines, Iowa, to the status of these lands, stating that the decision of the supreme court showed that the title thereof was in the United States, and the lands were subject to the disposal of the department, and to that end directed that a list of the lands be published, with notice that the same would be subject to entry on a day to be named, and that all persons making claims to any part thereof must give notice thereof, and make proof thereof, and in cases of conflicting claims the usual method of hearing the same would be followed. The complainant made claim to the land in dispute in this case under the provisions of the homestead law, setting forth her settlement on the land, the continued occupancy and improvement thereof, and giving proof of her qualifications to make the entry claimed. The defendant Andrew Tow asserted a claim to the land under a contract of purchase made with the Sioux City & St. Paul Company under date of March 15, 1887. The contest thus initiated was heard in due form before the register and receiver of the local office, and thence carried before the commissioner of the land office, who found in favor of the complainant, giving her

homestead entry a preference over the right asserted by Andrew Tow. The latter appealed the case to the secretary of the interior, who, by an opinion filed February 16, 1900, reversed the ruling of the commissioner, holding that under the proper construction of section 4 of the act of congress of March 3, 1887, the rights of Tow, as a purchaser from the railway company, were superior to those of complainant as a settler under the homestead act, and that Tow was entitled to a confirmatory patent for the land in dispute. The secretary, in his opinion, states the facts to be that the complainant, Mrs. Manley, with her husband, entered into possession of the land in July, 1885, at which time they established their residence thereon, which was continued until complainant was deserted by her husband, from whom she obtained a divorce in 1890; that for a time after such desertion complainant lived with her mother on the adjoining land, but then resumed the actual occupancy of the premises, living thereon with her children; that the land had been cultivated and improved by the Manleys long prior to the date of Tow's contract to purchase; and that, when the contract of purchase was made, Tow knew that the Manleys were in possession of the premises. By the bill filed the complainant challenges the construction placed by the secretary of the interior on the provisions of the act of 1887, claiming that it was an error of law to hold that the statute, as applied to the facts, gives the preference to Tow, whose contract of purchase was not made until after the date of the act of March 3, 1887, and the purchase being of a tract of land which had never been conveyed to the railway company, and which had never been earned by the railway company under the terms of the grant of 1864, and which was in the actual possession of complainant, as a settler, when the contract of purchase was entered into by the defendant.

The defendants interpose a general demurrer to the bill, and in support thereof some question has been made in the argument upon the point whether the controversy is within the jurisdiction of the court, under the rule recognizing the finality of the action of the land department in the disposal of the public lands. It is well settled that the conclusiveness of the decisions of the land department is confined to matters of fact, or, as is said by the supreme court in *Moore v. Robbins*, 96 U. S. 530, 24 L. Ed. 848, that, as to the facts upon which the decision of the department is based, in the absence of fraud or mistake, that decision is conclusive, even in courts of justice, when the title afterwards comes in question; but that in this class of cases, as in all others, there exists in the courts of equity the jurisdiction to correct mistakes, to relieve against frauds and imposition, "and in cases where it is clear that those officers have, by a mistake of the law, given to one man the land which, on the undisputed facts, belonged to another, to give appropriate relief." The allegations in the bill do not charge that any fraud or imposition has been practiced upon the officers of the land department, and therefore the facts found by them cannot be questioned in this proceeding. The bill does charge, in effect, that the secretary erred in his construction of the act of 1887, and as a result of that error he reversed the ruling of the commissioner in favor of complainant, and directed the is-



suance of a patent to the defendant; and thus it is made plain that the controversy presents questions of law of which the court can rightfully entertain jurisdiction.

On behalf of complainant it is contended that under the peculiar language of the land grant act of 1864 the state of Iowa had the right, upon the failure of the company to complete the construction of the entire line of railway from Sioux City to the state line, to resume the unearned portion of the grant, and to regrant it for the purpose of securing the completion of the proposed road; and therefore it must be held that, when the state legislature adopted the act of 1882, resuming the unearned portions of the grant, it thereby adjusted this grant in such sense that it is excepted from the operation of the readjustment act of 1887, the first section of which directs the secretary of the interior to immediately adjust "each of the land grants made by congress to aid in the construction of railroads and heretofore unadjusted." While the action of the state undoubtedly affected the status of the lands, and if the state, after the adoption of the resumption act of 1882, had regranted the unearned lands, specifically describing the same, to another company, thereby securing the completion of the line of railway, the rights of the latter might be measured by the action of the state, yet such grant was not made, and the United States continued to hold an interest therein; for under the terms of the grant of 1864 the unearned lands were to revert to the United States. Under these circumstances it was open to the United States to ascertain the extent of the interest which the railway company had acquired in the lands embraced within the grant, and to that end the land department could rightfully act under the power given by the readjustment statute of 1887, which power and right was the basis of the suit brought by the attorney general in the name of the United States against the railway company, and which, being carried to the supreme court, resulted, as already stated, in the ruling that the company had no right to or title in the unearned lands. Without further consideration of this point, it must be held that the rights of the adversary parties to this suit are to be determined by the construction of the act of 1887.

The first question to be considered is whether the provisions of section 4 of the act are applicable to persons who did not purchase lands from the railway company until after the adoption of the readjustment act of March 3, 1887. In the opinion filed by the secretary of the interior it seems to be assumed that persons purchasing from the railway company after the adoption of the act are entitled to the same protection as are those who bought before the passage of the act. Section 4 declared "that as to all lands, except those mentioned in the foregoing sections, which have been sold by the grantee company to citizens of the United States, \* \* \* the person or persons so purchasing in good faith, his heirs or assigns, shall be entitled to the land so purchased." It will be kept in mind that one of the purposes of the act of 1887, as declared in its title, was to provide "for the forfeiture of unearned lands," and the question presented by the facts of this case is whether congress, when it undertook to provide the means whereby lands not earned under the terms of the grant, and

which, in all good faith, belonged to the United States, should be restored to the public domain, it nevertheless intended to recognize the right of third parties to purchase the unearned lands from the defaulting companies without providing any limit of time upon such right, and, furthermore, to give to such purchasers preference over actual settlers in possession of the lands so purchased. In the case already cited of *Sioux City & St. P. R. Co. v. U. S.*, 159 U. S. 349, 16 Sup. Ct. 17, 40 L. Ed. 177, it is said:

"If the terms of an act of congress granting public lands admit of different meanings,—one of extension, and the other of limitation,—they must be accepted in a sense favorable to the grantor; and, if rights claimed under the government be set up against it, they must be so clearly defined that there can be no question of the purpose of congress to confer them. *Leavenworth, L. & G. R. Co. v. U. S.*, 92 U. S. 733-740, 23 L. Ed. 634. Acts of this character must receive such construction as will carry out the intent of congress, however difficult it might be to give full effect to the language used if the grants were by instruments of private conveyance. *Railroad Co. v. Barney*, 113 U. S. 618-625, 5 Sup. Ct. 606, 28 L. Ed. 1109. Nothing is better settled, this court has said, than that statutes should receive a sensible construction, such as will effectuate the legislative intent, and, if possible, so as to avoid an unjust or an absurd conclusion. *Lau Ow Bew v. U. S.*, 144 U. S. 47-59, 12 Sup. Ct. 517, 36 L. Ed. 340. Giving effect to these rules of statutory interpretation, we cannot suppose that congress intended that the railroad company should have the benefit of more lands than it earned."

The natural construction of the words used in the fourth section, to wit, "that as to all lands \* \* \* which have been sold by the grantee company," would limit the application of the section to the lands that had been sold previous to the date of the act. If it be held that the section applies also to lands sold after the act took effect, then, by construction, the rights of the grantees and purchasers holding under it are enlarged as against the rights of the grantor, to wit, the United States. Furthermore, if the provisions of section 4 are held to apply to unearned lands sold after the adoption of the resumption act of 1887, then it will result in giving the preference to speculating purchasers over actual settlers, who have spent time, labor, and money in the building up homes upon these lands, and will be a complete reversal of the rule heretofore followed by congress, by the land department, and the courts in dealing with the disposition of the public domain, to wit, to give the preference to the actual settler. Thus, in *Lytle v. Arkansas*, 9 How. 314, 13 L. Ed. 153, it is said, speaking of a claim under the pre-emption statute:

"It is founded in an enlightened public policy, rendered necessary by the enterprise of our citizens. The adventurous pioneer, who is found in advance of our settlements, encounters many hardships, and not infrequently dangers from savage incursions. He is generally poor; and it is fit that his enterprise should be rewarded by the privilege of purchasing the favorite site selected by him, not to exceed 160 acres. That this is the national feeling is shown by the course of legislation for many years."

In *Clements v. Warner*, 24 How. 397, 16 L. Ed. 696, it is declared that:

"The policy of the federal government in favor of settlers upon public lands has been liberal. It recognizes their superior equity to become purchasers of a limited extent of land, comprehending their improvements, over that of any other person."

In *Rector v. Gibbon*, 111 U. S. 276, 4 Sup. Ct. 605, 28 L. Ed. 427, it is said:

"Whenever congress has relieved parties from the consequences of defects in their title, its aim has been to protect those who, in good faith, settled upon public lands, and made improvements thereon. \* \* \* There has been in this respect in the whole legislation of the country a consistent observance of the rules of natural right and justice."

In *Railroad Co. v. Amacker*, 175 U. S. 564, 20 Sup. Ct. 236, 44 L. Ed. 274, we find the statement that:

"It was long ago said by this court 'that the policy of the federal government in favor of settlers upon the public lands has been liberal. It recognizes their superior equity to become the purchasers of a limited extent of land, comprehending their improvements over that of any other person.' *Clements v. Warner*, 24 How. 394-397, 16 L. Ed. 695. And, in a later case that, 'The law deals tenderly with one who in good faith goes upon the public lands with a view of making a home thereon.' *Ard v. Brandon*, 156 U. S. 537, 15 Sup. Ct. 406, 39 L. Ed. 524."

In *Moss v. Dowman*, 176 U. S. 413, 20 Sup. Ct. 429, 44 L. Ed. 526, the declaration is that:

"The obvious purpose of the pre-emption and homestead statutes of the United States is to secure to the actual settler the land upon which he has settled, and to give him the prior right to perfect title by purchase or continued occupation. While, undoubtedly, under the provisions of the statutes and the regulations of the land department, there are opportunities for a speculator to obtain title to public lands, it must be always remembered that in the eye of the public land laws of the United States the speculator is never an object of favor. Pre-emption and homestead laws were enacted for the benefit of the actual settler, and to that end they should be construed and administered. The plaintiff herein contends that this tract of land was withdrawn for five years from settlement by mere successive entries in the land office, and could be kept thus withdrawn in the future indefinitely, while speculators wait such time as it becomes convenient to them to perfect title by settlement and occupation. The proposition thus made is so offensive to the spirit and purpose of the land laws of the United States that, unless the statutes make such a result necessary from a true construction of their language, it ought to be rejected. Again and again has this court affirmed the proposition that the settler is the beneficiary of the pre-emption and homestead laws of the United States."

A construction of the readjustment act of 1887, which would result in giving preference to persons whose claims originated after actual possession had been taken by the settler, would certainly be against the rule followed in all previous legislation and in the judicial decisions based thereon, and could not be justified unless the language of the act is so clear to that end that the legislative intent to change the existing rule is clearly manifested. I can conceive of no equity existing in persons purchasing portions of the unearned lands after the time when congress, by adopting the act of 1887, had declared its purpose to forfeit the unearned lands, which calls for protection either against the United States, or against actual settlers whose occupancy and improvements antedate the purchase from the delinquent railway company; and in view of the settled rules that in the construction of grants of the public domain in cases of doubt the interpretation most favorable to the government must be adopted, and as between rival claimants preference will be given to the actual settler, there seems to be no reason calling for an enlarged construc-

tion of section 4 of the act, so as to extend its benefits to persons who have become purchasers of portions of the unearned lands after the date of the adoption of the act. It is not meant by this that one purchasing after the adoption of the act may not have equities which will be recognized under some circumstances, but the view taken is that such a purchaser cannot avail himself of the provisions of section 4, which gives to the purchaser of lands "which have been sold by the grantee company" a right to a patent relating back to the date of the original certification or patenting, and thus enables the purchaser to defeat the rights and equities of third parties coming into existence before the date of the purchase, but subsequent to the date of the original certification or patenting to the railway company. If the construction of section 4, thus indicated, be the correct one, it follows that the secretary of the interior erred in holding, as a matter of law, that the defendant Tow, who did not become a purchaser of the land in dispute until after the adoption of the act of 1887, was entitled to a patent under the provisions of section 4, thus preferring him over the rights and equities of complainant, which had attached to the land long prior to the date of Tow's purchase. If, however, the construction indicated of section 4 cannot be sustained, then we are brought to a consideration of the meaning of the words "certified or patented by the United States to or for the use or benefit of any company," for in section 5 of the act it is declared:

"That where any said company shall have sold to a citizen of the United States, \* \* \* as a part of its grant, lands not conveyed to or for the use of such company, said lands being the numbered sections prescribed in the grant, and being coterminous with the constructed parts of said road, and where the lands so sold are for any reason excepted from the operation of the grant to said company, it shall be lawful for the bona fide purchaser thereof from said company to make payment to the United States, and thereupon patents shall issue therefor to the said bona fide purchasers, his heirs or assigns. Provided, that all lands shall be excepted from the provisions of this section which at the date of such sales were in the bona fide occupation of adverse claimants under the pre-emption or homestead laws of the United States, and whose claims and occupation have not since been voluntarily abandoned, as to which excepted lands the said pre-emption and homestead claimants shall be permitted to perfect their proofs and entries and receive patents therefor."

The lands in dispute in this case are coterminous with the completed sections of the railway, are of the odd-numbered sections named in the original grant, but, in effect, have been excepted from the operation of the grant by reason of the failure to construct the road from Le Mars to Sioux City; and hence it follows that, if they have not been conveyed to or for the use of the Sioux City & St. Paul Company, within the meaning of section 5, the rights of the homestead claimant must be preferred over those of the purchaser from the company. It will be remembered that the state of Iowa never conveyed or transferred to the railway, or to any one for its use or benefit, the unearned lands in O'Brien and Dickinson counties. These lands were patented to the state, it being recited in the patent that they were for the use and benefit of the Sioux City & St. Paul Railroad Company; but, owing to the failure of the company to complete the line from Le Mars to Sioux City, the state refused to

patent them to the company, and the legal title thereto never passed to the company. It is strongly contended on part of the defendant that the transfer to the state was a conveyance for the use and benefit of the company, but the true intent and meaning of this patent is to be derived from a consideration of its real purpose, and of the authority, with reference to this grant, conferred by the act of congress of 1864 upon the land department and the state of Iowa. The act of congress did not name the Sioux City & St. Paul Company as the grantee or beneficiary of the donation thereby made. The act granted the lands to the state of Iowa, as a trustee, to secure the building of a line of railway from Sioux City to the Minnesota state line; and it is expressly declared in the act that the lands are granted to the state, "subject to the disposal of the legislature of Iowa for the purposes aforesaid, and no other"; and in the fourth section of the act it is declared:

"That if the said roads are not completed within ten years from their several acceptance of this grant, the said lands hereby granted and not patented shall revert to the state of Iowa for the purpose of securing the completion of said roads within such time, not to exceed five years, and upon such terms as the state shall determine: and provided further, that said lands shall not in any manner be disposed of or be incumbered except as the same are patented under the provisions of this act."

It would have been a violation of the terms of the grant if the state had conveyed these unearned lands to the company. The secretary of the interior had no authority to issue a patent of the lands to the state, except for the purposes of, and subject to the limitations contained in, the grant, and therefore the patent issued to the state must be construed in the light of the limitations contained in the act of congress, which was the source of the authority of the secretary with respect to these lands.

The statement in the patent that the lands named therein are conveyed to the state for the use and benefit of the railway company means only that the lands are conveyed to the state to be disposed of for the use and benefit of the railway company according to the provisions of the original grant. If the company had earned the lands by completing the entire line of railway provided for in the grant, then it would have been the duty of the state to have conveyed the lands to the company; but it was equally the duty of the state not to convey the lands to the company except as they were earned under the terms of the grant, and, the company having failed to earn them, it acquired no title or right, legal or equitable, thereto, and it became the duty of the state to hold the lands for the benefit of the United States, to whom they reverted under the express provisions of the act of 1864. Thus, in the case of *Sioux City & St. P. R. Co. v. U. S.*, 159 U. S. 349, 16 Sup. Ct. 17, 40 L. Ed. 177, it is said by the court:

"Another contention is that, upon the issuing of the patents of 1872 and 1873 to the state for the use and benefit of the railroad company, the title vested absolutely in the company, and the lands were thereby freed from restraints of alienation, from conditions subsequent, or from liability to forfeiture. In support of this contention reference is made to *Bybee v. Railroad Co.*, 139 U. S. 663, 674, 676, 11 Sup. Ct. 641, 35 L. Ed. 305; *Van Wyck v. Knevals*, 106 U. S. 360, 1 Sup. Ct. 336, 27 L. Ed. 201; *Wisconsin Cent. R. Co. v. Price Co.*, 133 U. S. 496, 10 Sup. Ct. 341, 33 L. Ed. 687; *Salt*

Co. v. Tarpey, 142 U. S. 241, 12 Sup. Ct. 158, 35 L. Ed. 999; St. Paul & P. R. Co. v. Northern Pac. R. Co., 139 U. S. 1, 6, 11 Sup. Ct. 389, 35 L. Ed. 77. But these are cases, as an examination of them will show, in which the grant was directly to the railroad company, or in which the act of congress required that the patents for lands earned should be issued, not to the state for the benefit of the railroad company, but directly to the company itself. In the case now before us the statute directed patents to be issued to the state for the benefit of the company. So that, until the state disposed of the lands, the title was in it, as trustee, and not in the railroad company. *Schulenberg v. Harriman*, 21 Wall. 44, 59, 22 L. Ed. 551; *Iron Co. v. Cunningham*, 155 U. S. 372, 15 Sup. Ct. 103, 39 L. Ed. 183. See, also, *Railroad Co. v. Brown*, 39 Iowa, 655; *Sioux City & St. P. R. Co. v. Osceola Co.*, 43 Iowa, 318, 321. In the case last named the Sioux City Company was relieved from the payment of taxes upon some of the lands patented to the state for its benefit, upon the ground that the legal title was in the state, and the lands for that reason were not taxable. The question is altogether different from what it would be if patents for these lands had been issued, or if the state had conveyed them directly, to that company."

As I construe section 5, it was intended thereby to give the preference to claimants under the homestead and pre-emption laws, whose rights of occupancy were in existence at the date of the purchase from the railway company, as to all unearned lands the title to which had not been conveyed to the company, or, for its use, to some third party. To give the preference to the purchaser under the provisions of this section, it must appear that at the date of the sale to him by the railway company the title to the land purchased had been conveyed by the United States to the company, or to some one for its use and benefit. A conveyance by the United States of land to a third party as a trustee, to be held by the trustee in order to ascertain whether the railway company will earn the lands, it being the duty of the trustee to reconvey the lands to the United States if the conditions of the grant are not performed, is not a conveyance to the company, or for its use, within the meaning of section 5 of the readjustment act. The mere transfer of the lands to the state as a trustee did not vest a title thereto in the railway company, nor did the company ever occupy a position which enabled it to rightfully demand a conveyance of the lands from the state. It is well known that the company made vigorous efforts to secure a conveyance of the lands from the state, but wholly failed. In the case of *Sioux City & St. P. R. Co. v. Osceola Co.*, 43 Iowa, 318,—a case arising under the same grant,—it was held by the supreme court of Iowa "that, as the performance of the conditions annexed to the grants by the state was left to the determination of the governor of the state, the railroad companies acquired no property in the land granted until the governor had issued a patent or certificate, as required by the statute, showing that the corporations had earned the lands by the completion of the road, or parts thereof, as prescribed by the conditions of the grant." A person purchasing any part of these unearned lands from the company would be making a purchase from a grantor in whom the title had not vested as a matter of law, and who had not created an equitable claim to the lands by a performance of the conditions of the grant; and by such a purchase the legal title would not pass to the purchaser, nor would he thereby become possessed of an equity superior to the actual settler, who was in possession of the premises

at the date of the purchase. If this is the correct construction of this section, then it follows that, if the complainant was, at the date of the purchase by the defendant Tow, a bona fide occupant of the premises under the homestead laws, she is entitled to be preferred in the disposition of this land. The only objection urged against the good faith of the occupancy upon which the complainant bases her claim is that at the time such occupancy began the land was withdrawn from entry by operation of the grant contained in the act of 1864, and the action of the land department based thereon; it being contended that she was a mere trespasser upon the premises. This question is put at rest by the ruling of the supreme court in *Iron Co. v. Cunningham*, 155 U. S. 354, 15 Sup. Ct. 103, 39 L. Ed. 183, wherein it is said:

"But it is said by the counsel for the company that it was not a bona fide homestead claim, because at the time the defendant entered upon the land he understood that it was a part of a railroad grant. \* \* \* If he did, he knew that this railroad grant had been outstanding thirty-two years, that the land was to be restored to the government if the road was not completed within ten years, and that twenty-two years had passed since the time fixed by congress for the completion of the road, and nothing had been done. His expectation was (and, under the circumstances, not an unreasonable one) that congress would at some near time interfere to remove all this outstanding claim. Under those circumstances, and in expectation of such removal, he enters upon the land. Can it be said that this entry and occupation was with the view of depriving anybody of title, or that it was, as against the company, a wrongful entry? If the construction contended for were accepted, it would exclude from the benefit of the act any settler upon these lands who knew that the land he entered upon was within a railroad grant. But legislation respecting the public lands is to be construed favorably to the actual settler, and the construction contended for by the canal company seems to us too narrow. If a party entering upon a tract, although he knew that it was within the limits of an old railroad grant, did so under the honest belief and expectation that the grant, if not technically extinguished by lapse of time, had remained so long unappropriated by any beneficiary that congress would shortly resume it, and in that belief determined to make for himself a home thereon, with a view of perfecting his title under the land laws of the United States when the forfeiture should be finally declared, it must be held, we think, that he is, within the terms of this confiscatory act, a bona fide claimant of a homestead."

In the case at bar the facts are that the Manleys settled upon the land in dispute in July, 1885, long prior to the date of the purchase by the defendant. There was, therefore, no claim to bar the right of entry by the Manleys, except such as might be asserted on behalf of the railway company under the grant of 1864; but the company had ceased work in 1872, and the state had declared a forfeiture of the unearned lands in 1882, and therefore the Manleys might well assume that the lands would in due time be restored to the public domain, as in fact they were, and therefore, under the ruling in the case just cited, the complainant must be held to be a bona fide claimant of a homestead, and as such, to be protected under the provisions of section 5 of the act of 1887. Can it be said, under the facts of this case, that the defendant Tow is a bona fide purchaser, within the meaning of the term as used in section 5? In the case of *U. S. v. Winona & St. P. R. Co.*, 165 U. S. 463, 17 Sup. Ct. 368, 41 L. Ed. 789, the acts of 1887 and 1896 were under consideration, and it was therein held that:

"Our conclusion is that these acts operate to confirm the title to every purchaser from a railroad company of lands certified or patented to or for its benefit, notwithstanding any mere errors or irregularities in the proceedings of the land department, and notwithstanding the fact that the lands so certified or patented were, by the true construction of the grants, although within the limits of the grants, excepted from their operation, providing that he purchased in good faith, paid value for the lands, and providing, also, that the lands were public lands in the statutory sense of the term, and free from individual claims."

In the case of *Winona & St. P. R. Co. v. U. S.*, 165 U. S. 483, 17 Sup. Ct. 381, 41 L. Ed. 798, it is said, referring to the acts of 1887 and 1896:

"It is essential to the protection of these statutes that the party purchasing from the railroad company has no notice by any fact subsequent to and independent of the certification or patent of any defect in title. Such a purchaser cannot claim to be one in good faith if he has notice of facts outside the records of the land department disclosing a prior right."

It is true that in the case just cited the court was dealing with a case wherein the rights of the settlers had attached before the right of the railway company under the grant, but the ruling is to the effect that the purchaser will be bound by notice of facts existing outside the records of the land department. In other words, these acts do not change the ordinary rule that one who buys land, which at the time is in the actual and known possession of a third party, is chargeable with notice of the rights of such occupant. Therefore, when the defendant Tow entered into the contract of purchase with the railway company,—which was on the 15th of March, 1887,—he knew that the complainant was in the open, actual possession of the land, using the same as a home for herself and her family. To defeat the rights of the complainant, he must become the purchaser of a title which was superior to and would defeat the rights of complainant under the homestead laws of the United States. The title he in fact bought was that of the railway company, and at the time of the purchase this alleged title was of no avail against the rights of complainant. At the date of the contract of purchase entered into by the defendant in 1887, the company had wholly ceased work on the road for fully 15 years. The title to the land had never been conveyed to the company. In 1882 the state had resumed the unearned lands, and the resumption act of 1887 had been adopted. It cannot, therefore, be said, in any just sense, that the defendant was a bona fide purchaser of these lands, as against the rights of the complainant, she being an actual settler and claimant under the homestead act. It is the fact of actual settlement for the purpose of creating a home that creates the equity which is given priority in the disposition of the public domain, and this actual occupancy may be based upon a purchase from the railway company as well as upon an entry under the pre-emption or homestead laws of the United States. This was the principle recognized in the case of *Linkswiler v. Schneider* (C. C.) 95 Fed. 203. In that case the facts were that Schneider had purchased the land in dispute in that case from the railway company in 1887, had entered into the open occupancy thereof, and had spent time, labor, and money in building a home upon the premises, and then, in 1896,



Linkswiler endeavored to make an entry of the land as a homestead in the land office at Des Moines, which entry was refused by all the departments in the land office, and the ruling was affirmed by this court. In the case now under consideration the settler claims under the homestead laws, but that difference does not weaken the weight to be given to the fact that the complainant was in the actual and known possession of the land when Tow endeavored to create a right thereto by entering into a contract of purchase with the railway company. A person cannot be deemed to be a bona fide purchaser or a bona fide entryman under the homestead law if at the time he makes his purchase from the railway company, or attempts to make an entry in the land office, another person is in the actual, open, and known possession of the land. In other words, under such circumstances the would-be purchaser or entryman is charged with notice of the rights and equities of the actual occupant.

In the case at bar the conclusion reached is that, as it is shown that when Andrew Tow made his contract of purchase with the railway company the complainant was in the actual and open possession of the premises, to the knowledge of the defendant Tow, the latter cannot, as against the complainant, be deemed to be a bona fide purchaser of the premises; and, furthermore, that the land in dispute, being part of the unearned lands, had not been conveyed to the railway company, or for its use, within the meaning of section 5 of the act of 1887; and, as the defendant did not enter into the contract of purchase until after the adoption of the act of 1887, and until after the unearned lands had been declared to be forfeited by the legislature of Iowa, he cannot be held to be a purchaser in good faith in such sense that he is to be preferred over the complainant. If the conclusions thus reached are well taken, it follows that the construction given to the provisions of the act of 1887 by the secretary of the interior cannot be sustained as a matter of law, and the allegations of the bill show that it was an error of law to award the confirmatory patent to the defendant. In other words, the bill makes a case entitling the complainant to relief in equity against the erroneous issuance of the patent to defendant, and the demurrer must therefore be overruled.

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WESTINGHOUSE MACH. CO. v. PRESS PUB. CO. et al.

(Circuit Court, W. D. Pennsylvania. June 10, 1901.)

FOREIGN CORPORATIONS—JURISDICTION OF FEDERAL COURTS—SERVICE ON AGENT.

A federal court does not acquire jurisdiction over a corporation of another state, domiciled therein, which maintains no regular or established place of business or agent within the district where the suit is brought, by service of process on a person not in fact its agent within the district.<sup>1</sup>

In Equity. Sur motion to set aside service and dismiss bill as to the Marinette Iron Works Manufacturing Company.

<sup>1</sup> Service on foreign corporations, see note to *Eldred v. Palace Car Co.*, 45 C. C. A. 3.

Bakewell & Bakewell and J. Snowden Bell, for complainant.  
Way, Walker & Morris and Whitaker & Prevost, for defendant  
Marinette Iron Works Mfg. Co.

ACHESON, Circuit Judge. The Marinette Iron Works Manufacturing Company, specially appearing by counsel for the sole purpose of objecting to the jurisdiction of the court, moves the court to set aside the service of the subpoena and dismiss the bill as to it. The bill shows that this company is a corporation of the state of Wisconsin, and domiciled therein, and it clearly appears that it has no regular or established place of business in this district, and has no agent in this district. It further appears that R. W. Beardslee, upon whom the marshal served the subpoena as "local representative of Marinette Iron Works Manufacturing Company," is not the local representative of the company, and does not in any manner represent it. It is clear that as to the Marinette Iron Works Manufacturing Company the service here must be set aside, and, under the authorities, the bill as to it should be dismissed for want of jurisdiction. *Eldred v. Palace Car Co.* (C. C.) 103 Fed. 209; *Eldred v. Palace Car Co.* (C. C. A.) 105 Fed. 455; *Mecke v. Mineral Co.*, 35 C. C. A. 151, 93 Fed. 697. And now, June 10, 1901, it is ordered, adjudged, and decreed that as to the Marinette Iron Works Manufacturing Company the service of the subpoena be, and is, set aside, and the bill is dismissed.

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SMEDLEY v. SMEDLEY et al.

(Circuit Court, N. D. Georgia, W. D. July 3, 1901.)

REMOVAL OF CAUSE TO FEDERAL COURT—SEPARABLE CONTROVERSY.

Plaintiff, in suit against H., E., and S., sought to recover land, the petition alleging that S. made a parol gift of the land to plaintiff, and put him in possession; that plaintiff remained in possession over seven years, without any claim by S.; that after the gift, and while plaintiff was in possession, S. deeded the land to E., without plaintiff's knowledge, and that thereafter E. deeded it to H., after H. had received notice of plaintiff's claim. The petition asserted plaintiff had complete title to the land, and prayed, if he had not, that he have a decree against all the defendants for specific performance of the promise of S. to give him the land. It also prayed for decree for the land, and for cancellation of the deeds to E. and H. *Held*, that there was not a separable controversy between plaintiff and defendants, so as to allow of removal of the cause to the federal court.<sup>1</sup>

On Motion to Remand Cause to State Court.

T. A. Atkinson and D. J. Gaffney, for plaintiff.

Payne & Tye, J. A. Noyes, and Longley & Longley, for defendants.

NEWMAN, District Judge. This is a motion to remand a case removed from the state court. On April 15, 1901, W. T. Smedley brought suit in the superior court of Troup county, Ga., against

<sup>1</sup> Separate controversy as ground for removal, see notes to *Robbins v. Ellenbogen*, 18 C. C. A. 86, and *Mecke v. Mineral Co.*, 35 C. C. A. 155.

W. M. Hadaway, of the state of Alabama, the Equitable Securities Company, of the state of New York, and J. M. Smedley, of Troup county, Ga. The object of the suit is to recover a certain tract of land in Troup county, Ga., together with the rents and profits of the same for four years, of the yearly value of \$150. The petition for removal states the value of the land to be \$1,500, and this amount, with the rents and profits of the land for four years (if this is the proper period) at \$150 a year, would make \$2,100,—more than the necessary jurisdictional amount.

The character of the suit is as follows: The plaintiff, W. T. Smedley, claims that his father, J. M. Smedley, who, in 1882, was in possession of and owned the land in controversy, made a parol gift of the same to the plaintiff, and put him in possession thereof, and the plaintiff remained continuously in the exclusive possession of the land, without the payment of rent, from about January 1, 1882, for the space of seven years, and without any claim of dominion by plaintiff's father acknowledged by the plaintiff, and without any disclaimer of title to the land on the part of the plaintiff; that the plaintiff made valuable improvements on the land, of a permanent character, consisting of a dwelling house, outhouses, stables, and barn, and other houses of like character, of the value of \$600, or other large sum; that subsequently to the parol gift and the taking possession of the land by the plaintiff as stated, his father, J. M. Smedley, on the 9th day of February, 1889, without the knowledge or consent of plaintiff, executed to the Equitable Mortgage Company, a foreign corporation, of the state of New York, a mortgage deed or lien upon this land, together with other lands of said Smedley to the extent of about 1,000 acres, to secure certain money borrowed from it, and, after giving said mortgage lien, said J. M. Smedley, finding he was unable to pay the debt, on the 1st of December, 1898, executed an absolute deed of conveyance to the Equitable Securities Company, which had absorbed the Equitable Mortgage Company, in extinguishment of his debt and of the mortgage lien, all without the knowledge or consent of the plaintiff, and while he was in possession of the land. The plaintiff says that the improvements he placed on the land were put there before J. M. Smedley executed his mortgage thereon; that on the 1st day of November, 1899, the Equitable Securities Company sold to W. M. Hadaway, and executed to him a deed to, the land in controversy, without the plaintiff's consent, and while plaintiff was in possession, and claiming title to the same; that before the execution of the deed to Hadaway plaintiff put Hadaway on notice that the land belonged to plaintiff, and that he intended to enforce his rights by legal proceedings, if necessary; that counsel for the defendant mortgage company advised the plaintiff that he could not hold the land against Hadaway, whereupon plaintiff made a rent contract with Hadaway, but with the proviso that it should not in any way affect his rights in regard to the land. The plaintiff asserts that he has complete title to the land, but if, for any reason, he has not, he claims that he is entitled to a decree for specific performance of the voluntary promise of J. M. Smedley to give him the land in controversy, against J. M. Smedley, the Equitable Securities Com-

pany, and Hadaway. The further prayers are that the plaintiff have a decree for the land, and that the deed from Smedley to the Equitable Securities Company, and the deed from the Equitable Securities Company to Hadaway, be decreed to be null and void, and be delivered up and canceled as a cloud on plaintiff's title; that the rent contract between plaintiff and Hadaway be declared null and void, and of no force; and that such further relief be granted him as he may be, in equity and good conscience, entitled to; and that he may have a judgment for the value of the improvements, and \$600 rent for said land, against the said Equitable Securities Company and Hadaway. At the May term, 1901, of Troup superior court, W. M. Hadaway and the Equitable Securities Company filed their petition for removal on the grounds of diverse citizenship and of a separable controversy as between them and W. T. Smedley. The plaintiff being a citizen and resident of Georgia, and J. M. Smedley being also a citizen and resident of Georgia, the claim in the petition for removal is that:

"This cause, being of a civil nature, as aforesaid, is wholly between citizens of different states, for the reason that the defendant J. M. Smedley, named in said suit as a defendant, and alleged to be a resident of said state of Georgia, is only a formal party, and one against whom no substantial relief is sought or can be obtained, and whose presence in the suit is neither necessary nor proper as a party therein, the only necessary and proper parties to said suit being your petitioner Equitable Securities Company, who was at the time of the commencement of this suit, and still is, a corporate body under the laws of the state of New York, then and now a resident and citizen of the state of New York, and a nonresident of the state of Georgia, and your petitioner W. M. Hadaway, who was at the time of the commencement of this suit, and is now, a resident and citizen of the state of Alabama, and a nonresident of the state of Georgia, and plaintiff, who was and still is a citizen of Georgia, as your petitioner avers."

It is then claimed that:

"In said suit there is a controversy which is wholly between W. T. Smedley, as plaintiff, and your petitioner Equitable Securities Company, and your petitioner W. M. Hadaway, as defendants, and that said controversy can be wholly determined between said parties above named without the presence of the other party to the suit as named therein."

The petition then states the manner in which the separable controversy exists, as follows:

"(1) A controversy whereby W. T. Smedley, as plaintiff, seeks to recover from your petitioner Equitable Securities Company and W. M. Hadaway the land and improvements thereon described in said suit, of the value of fifteen hundred dollars, as shown by affidavits hereto attached, and also mesne profits or rents of said premises, of the value, as alleged in said petition, of six hundred dollars. The total amount involved in this controversy, exclusive of interest and costs, exceeds the sum and value of two thousand dollars, and is the sum of two thousand one hundred dollars. (2) A controversy whereby W. T. Smedley, as plaintiff, seeks to compel specific performance on the part of J. M. Smedley, a resident and citizen of Troup county, Georgia, of an alleged parol agreement on the part of said J. M. Smedley to convey to him, W. T. Smedley, the lands described in said petition. (3) A controversy whereby W. T. Smedley, as plaintiff, seeks as against your petitioners Equitable Securities Company and W. M. Hadaway, as defendants, to have canceled and declared null and void a certain deed from said Equitable Securities Company to said Hadaway. (4) A controversy whereby W. T. Smedley, as plaintiff, seeks to have canceled and declared null and void as against

your petitioner W. M. Hadaway a certain contract of rent entered into by said W. T. Smedley as tenant of W. M. Hadaway."

I think this statement of the Equitable Securities Company and Hadaway in their petition for removal of the grounds upon which they claim a separable controversy as between themselves and W. T. Smedley shows on its face that, while there may be somewhat distinct issues in the case, there is no separable controversy, under the authorities, with reference to the right of removal. The language of the supreme court of the United States in *Torrence v. Shedd*, 144 U. S. 527, 12 Sup. Ct. 726, 36 L. Ed. 528, is quite pertinent here:

"But, in order to justify such removal on the ground of a separate controversy between citizens of different states, there must, by the very terms of the statute, be a controversy 'which can be fully determined as between them'; and by the settled construction of this section the whole subject-matter of the suit must be capable of being finally determined as between them, and complete relief afforded as to the separate cause of action, without the presence of others originally made parties to the suit. *Hyde v. Ruble*, 104 U. S. 407, 26 L. Ed. 823; *Corbin v. Van Brunt*, 105 U. S. 576, 26 L. Ed. 1176; *Fraser v. Jennison*, 106 U. S. 191, 1 Sup. Ct. 171, 27 L. Ed. 131; *Winchester v. Loud*, 108 U. S. 130, 2 Sup. Ct. 311, 27 L. Ed. 677; *Shainwald v. Lewis*, 108 U. S. 158, 2 Sup. Ct. 385, 27 L. Ed. 691; *Ayres v. Wiswall*, 112 U. S. 187, 5 Sup. Ct. 90, 28 L. Ed. 693; *Deposit Co. v. Huntington*, 117 U. S. 280, 6 Sup. Ct. 733, 29 L. Ed. 898; *Graves v. Corbin*, 132 U. S. 571, 10 Sup. Ct. 196, 33 L. Ed. 462; *Brown v. Trousdale*, 138 U. S. 389, 11 Sup. Ct. 308, 35 L. Ed. 987. As this court has repeatedly affirmed, not only in cases of joint contracts, but in actions for torts, which might have been brought against all or against any one of the defendants, 'separate answers by the several defendants sued on joint causes of action may present different questions for determination, but they do not necessarily divide the suit into separate controversies. A defendant has no right to say that an action shall be several which a plaintiff elects to make joint. A separate defense may defeat a joint recovery, but it cannot deprive a plaintiff of his right to prosecute his own suit to final determination in his own way. The cause of action is the subject-matter of the controversy, and this is for all the purposes of the suit, whatever the plaintiff declares it to be in his pleadings.' *Railroad Co. v. Ide*, 114 U. S. 52, 56, 5 Sup. Ct. 735, 29 L. Ed. 63; *Pirie v. Tvedt*, 115 U. S. 41, 43, 5 Sup. Ct. 1034, 1161, 29 L. Ed. 331; *Sloane v. Anderson*, 117 U. S. 275, 6 Sup. Ct. 730, 29 L. Ed. 899; *Little v. Giles*, 118 U. S. 596, 601, 602, 7 Sup. Ct. 32, 30 L. Ed. 269; *Hedge Co. v. Fuller*, 122 U. S. 535, 7 Sup. Ct. 1265, 30 L. Ed. 1235."

This language is cited with approval in *Railway Co. v. Martin*, 178 U. S. 245, 20 Sup. Ct. 854, 44 L. Ed. 1055. And again, in the opinion in *Torrence v. Shedd*, this language is used:

"What the plaintiff wants is not partial relief, settling his rights in the property as against this defendant alone, but a complete decree, which will give him a sale of the entire property, free of all incumbrances, and a division of the proceeds as the adjusted equities of each and all the parties shall require. The answer of this defendant shows the questions that will arise under this branch of the one controversy, but it does not create another controversy. The remedy which the plaintiff seeks requires the presence of all the defendants, and the settlement, not of one only, but of all the branches of the case."

In the case at bar the plaintiff elects to have all the parties to the transaction antagonistic to his contention before the court, and he is probably right in making this election. He sets up a parol contract with his father, J. M. Smedley, and, notwithstanding the fact that he has had, by his claim, seven years' possession (Code Ga.

§ 3571), it is not at all clear (*Harvey v. West*, 87 Ga. 553, 13 S. E. 693, and cases cited) that the plaintiff should not have a decree against J. M. Smedley for specific performance, or a decree in the nature of specific performance, as part of, and as necessary to, relief against the Equitable Securities Company and Hadaway. Certainly, J. M. Smedley is more than a mere nominal party. The plaintiff claims substantial relief against him, and really has no case against the Equitable Securities Company and Hadaway unless he has the right claimed against J. M. Smedley. As important in this connection, see *Causey v. Causey*, 106 Ga. 188, 32 S. E. 138. The case was not removable on the ground of diverse citizenship, nor was it removable on the ground of a separable controversy. In addition to this, there is some doubt as to whether the necessary jurisdictional amount is involved in the case. It may be that it should not be remanded on this ground alone, but it is impossible to ascertain from the record in this case how the plaintiff can recover rent for four years, or for any time prior to December 1, 1898, which would make about two and one-third years, and only amount, at \$150 a year, to \$350; and this, added to the \$1,500, which is alleged in the petition for removal to be the value of the land, would only make \$1,850. It is ordered that the case be remanded to the superior court of Troup county, from which it was removed.

**WESTERN ASSUR. CO. OF TORONTO, CANADA, v. HALLIDAY et al.**

(Circuit Court, S. D. Ohio, E. D. June 4, 1901.)

**1. TAXATION—FOREIGN INSURANCE COMPANY—BONDS DEPOSITED.**

Where negotiable bonds are deposited with the insurance commissioner by a foreign insurance company, as required by Rev. St. Ohio, § 3660, and held by him as trustee for the benefit of policy holders and creditors in the United States, such bonds are taxable in that state, under Const. Ohio, art. 12, § 2, providing that laws shall be passed taxing by a uniform rule all moneys, credits, investments in bonds, and real and personal property, according to its true value, and Rev. St. Ohio, § 2731, providing that such property be so taxed, since not only the bonds, as evidence of credits due the company, but all elements of value in such bonds and the credits represented thereby, are transferred to and vested in such commissioner in trust, and hence situated in such state, and subject to its laws.

**2. SAME—TAX ON PREMIUMS—DOUBLE TAXATION.**

While Rev. St. Ohio, § 2745, requiring every foreign insurance company to pay, as tax, each year, a specified percentage of its premium receipts, was in force, section 2731 was enacted, requiring such companies to deposit municipal bonds with the insurance commissioner for the benefit of policy holders and creditors in the United States. *Held*, that the payment of such tax on premiums under section 2745 did not affect the liability of the property of the company brought into the state under section 2731 to taxation.

**3. SAME—LIST FOR TAXATION—TRUSTEE—COUNTY AUDITOR.**

Where the Ohio insurance commissioner has failed to list for taxation the bonds of a foreign insurance company deposited with him for the benefit of policy holders, and held by him as trustee, under Rev. St. Ohio, § 3660, as required by section 2734, the county auditor may list such bonds as provided in sections 2781, 2782.

**On Demurrer to Amended Bill.****J. H. Cabell, for plaintiff.****Ross & Davis and A. F. McCormick, for defendants.**

THOMPSON, District Judge. The complainant is a foreign fire insurance company doing business in Ohio. As a condition upon which it is permitted to do business in Ohio, and in compliance with the provisions of section 3660 of the Revised Statutes of Ohio, it deposited, and has now, and during the years 1895, 1896, 1897, 1898, and 1899 had, on deposit with the superintendent of insurance of the state of Ohio \$100,000 in bonds, of which \$50,000 are in municipal bonds of the city of Toledo, Ohio, and \$50,000 in municipal bonds of the city of Columbus, Ohio. The defendant William H. Halliday is auditor of Franklin county, Ohio, and the defendant Nelson A. Sims is the treasurer of that county. Halliday, as such auditor, claiming to act in pursuance of the laws of Ohio, and upon the ground that the above-mentioned bonds are taxable property within the state, has assessed them for taxation in Franklin county, Ohio, for the years 1895, 1896, 1897, 1898, 1899, and 1900, and has levied taxes thereon for said years, aggregating the sum of \$16,350, which has been certified to Sims, as such treasurer, for collection, and which Sims, as such treasurer, will proceed to collect unless restrained by the decree of this court.

Taxable property is described and defined by section 2731 of the Revised Statutes of Ohio, as follows:

"(Property subject to taxation; when public lands become taxable.) All property whether real or personal in this state, and whether belonging to individuals or corporations; and all moneys, credits, investments in bonds, stocks, or otherwise, of persons residing in this state, shall be subject to taxation, except only such as may be expressly exempted therefrom; and such property, moneys, credits, and investments shall be entered on the list of taxable property as prescribed in this title: all tracts of land set apart for school or ministerial purposes, and sold by and under authority of law, and all lands which shall be hereafter sold by the United States shall be subject to taxation as other lands in this state immediately after such sale; but school or ministerial lands shall not be sold for taxes until the purchase money therefor shall be fully paid, but shall be returned as delinquent, and continue on the duplicate, with the taxes of each year charged thereon, and added to the tax and penalty due when the same became delinquent, until payment be made by the purchaser or his assigns, of such purchase money, with the tax and penalty, or the lands resold by the county auditor, pursuant to the laws now or hereafter in force for the sale of such lands. [56 v. 175, § 1; 71 v. 96, § 78; S. & C. p. 1433 (S. & S. 757).]"

And the general rule as to who shall list and how they shall list personal property for taxation is prescribed by sections 2734 and 2735 of the Revised Statutes of Ohio, as follows:

"(Who shall list personal property.) Every person of full age and sound mind shall list the personal property of which he is the owner, and all moneys in his possession, all moneys invested, loaned or otherwise controlled by him, as agent or attorney, or on account of any other person or persons, company or corporation whatsoever, and all moneys deposited subject to his order, check, or draft, and all credits due or owing from any person or persons, body corporate or politic, whether in or out of such county; all money loaned on pledge or mortgage of real estate, although deed or other instrument may have been given for the same, if between the par-

ties the same is considered as security merely; the property of every ward shall be listed by his guardian, of every minor child, idiot, or lunatic having no guardian, by his father, if living; if not, by his mother, if living; and if neither father nor mother be living, by the person having such property in charge; of every wife by her husband, if of sound mind, if not, by herself; of every person for whose benefit property is held in trust, by the trustees; of every estate of a deceased person, by his executor or administrator; of corporations whose assets are in the hands of receivers, by such receivers; of every company, firm or corporation, by the president or principal accounting officer, partner or agent thereof; and all surplus or undivided profits held by any society for savings or bank having no capital stock, by the president or principal accounting officer. [62 v. 105, § 4; 75 v. 441, § 1; 76 v. 28, § 2; S. & S. p. 756 (S. & C. p. 1441).]"

Section 2735: "(Where personal property shall be listed.) Every person required to list property on behalf of others shall list the same in the same township, city, or village, in which he would be required to list it if such property were his own; but he shall list it separately from his own, specifying in each case the name of the person, estate, company, or corporation, to whom it belongs; all merchants' and manufacturers' stock, and all personal property upon farms shall be listed in the township, city, or village in which the same may be situated; and all other personal property, moneys, credits, and investments, except as otherwise specially provided, shall be listed in the township, city, or village in which the person to be charged with taxes thereon may reside at the time of the listing thereof, if such person reside within the county where the same are listed, and if not, then in the township, city or village where the property is when listed. [62 v. 105, § 4; S. & S. 756.]"

How certain corporations shall list their property is directed by section 2744 of the Revised Statutes of Ohio, as follows:

"(Corporations generally; their returns.) The president, secretary, and principal accounting officer of every canal or slackwater navigation company, turnpike company, plank road company, bridge company, insurance company, telegraph company, or other joint stock company, except banking or other corporations whose taxation is specifically provided for, for whatever purpose they may have been created, whether incorporated by any law of this state or not, shall list for taxation, verified by the oath of the person so listing, all the personal property, which shall be held to include all such real estate as is necessary to the daily operations of the company moneys and credits of such company or corporation within the state, at the actual value in money, in the manner following: In all cases return shall be made to the several auditors of the respective counties where such property may be situated, together with a statement of the amount of said property which is situated in each township, village, city, or ward therein. The value of all movable property shall be added to the stationary and fixed property and real estate, and apportioned to such wards, cities, villages or townships, pro rata, in proportion to the value of the real estate and fixed property in said ward, city, village or township, and all property so listed shall be subject to and pay the same taxes as other property listed in such ward, city, village, or township. It shall be the duty of the accounting officer aforesaid to make return to the auditor of state during the month of May of each year of the aggregate amount of all property by him returned to the several auditors of the respective counties in which the same may be located. It shall be the duty of the auditor of each county, on or before the first Monday of May, annually, to furnish the aforesaid president, secretary, principal accounting officer, or agent, the necessary blanks for the purpose of making aforesaid returns; but no neglect or failure on the part of the county auditor to furnish such blanks shall excuse any such president, secretary, principal accountant, or agent, from making the returns within the time specified herein. If the county auditor to whom returns are made is of the opinion that false or incorrect valuations have been made, or that the property of the corporation or association has not been listed at its full value, or that it has not been listed in the location where it properly belongs, or in cases



where no return has been made to the county auditor, he is hereby required to proceed to have the same valued and assessed: provided, that nothing in this section shall be so construed as to tax any stock or interest in any joint stock company held by the state. [73 v. 139, § 16 (S. & C. 1446).]

And a special method of taxing foreign insurance companies is provided by section 2745 of the Revised Statutes of Ohio, as follows:

"(Returns by foreign insurance companies.) Every agency of an insurance company incorporated by the authority of any other state or government, shall return to the auditor of each county in which such company does business, or from which it collects premiums, on or before the first day of May, annually, the amount of the gross premium receipts of such agency for the previous calendar year in such counties: provided, however, that in the case of regular companies, wherein policy holders participate in the surplus and earnings of the company, dividends or surplus from previous payments allowed and used in the payment of current premiums, cancellation or surrender values, and commissions paid to the citizens of this state, during the same period for which receipts are reported, shall be deducted from such gross receipts, and the net amount after such deductions shall be the basis of taxation for such companies in the counties; which shall be entered upon the tax list of the proper county, and be subject to the same rate of taxation, for all purposes, that other personal property is subject to at the place where located; and the whole of said tax shall be due and payable on the twentieth day of November next ensuing. And it shall be the duty of the superintendent of insurance, in the month of December, annually, to charge and collect from all such companies such a sum as, added to the sum paid to the county treasuries, will produce an amount equal to two and one-half per cent. on the gross premium receipts of such companies, as shown by their annual statements, under oath, to the insurance department: provided, however, that if by the laws of any other state, territory or nation, a larger tax than two and one-half per cent. on such gross premium receipts is charged companies organized under the laws of Ohio, then the superintendent of insurance shall charge a like tax upon companies from such state, territory or nation doing business in this state. If any such company refuse to pay said tax, after demand therefor has been made, or if he shall make any false statement of its gross premium receipts, the superintendent of insurance shall revoke the license of such company to do business in this state. If, at any time, said superintendent has reason to suspect the correctness of the return made of the gross premium receipts of any such company, he may, at the expense of the state, make an examination of the books of such company, or of its agents, for the purpose of verifying the same. All taxes collected under the provisions of this section by the superintendent of insurance shall be paid by him, upon the warrant of the auditor, into the general revenue fund of the state. [91 v. 91; 90 v. 201; 86 v. 274; 85 v. 183; Rev. St. 1880; 73 v. 139, § 16.]"

The complainant claims: First. That the bonds in question are neither personal property within the state nor do they represent credits or investments of a person residing in the state, within the meaning of section 2731. Second. That foreign insurance companies are excepted from the operation of section 2744, and that the only method for taxing such companies is that provided by section 2745. Third. That complainant has in all respects complied with the requirements of section 2745, and has paid all taxes levied against it thereunder for the years mentioned. The defendants deny the first two propositions, and contend that the tax provided by section 2745 is not a tax on property, but a franchise tax, to be levied in addition to the property tax, which should be levied under section 2731 et seq.

1. These bonds represent investments of the insurance company, and it is a physical fact that they are within the state. They evidence

debts payable to the bearer or holder, and, being negotiable by delivery, they serve some of the purposes of money in effecting the exchange of values. The right of the bona fide holder to enforce payment of the debt is evidenced by the bond, but is not lost by the destruction of the bond. The debtor, however, cannot be required to pay the debt until the bond be produced for cancellation, or its destruction be shown. And although the debt, as a credit of the holder, has a property value independent of the bond which represents it, yet the bond, because of its negotiable character, has a property value in itself, which may give it a taxing situs distinct from that of the holder or owner. State Tax on Foreign-Held Bonds Case, 15 Wall. 300, 21 L. Ed. 179; State ex rel. Traders' Ins. Co. v. Board of Assessors, 47 La. Ann. 1545, 1546, 18 South. 519; Walker v. Jack, 31 C. C. A. 462, 88 Fed. 578. But it is said that the negotiable feature of these bonds has been suspended and rendered inoperative by the law under which they are deposited, and that they cannot operate in the market, or serve the purposes which would otherwise give them special value, but must remain idle in the hands of the state, having no value other than as evidence of the right of the insurance company to demand and receive the debt which they represent; a right which is property, but not property within the state, because it necessarily follows the person of the owner, who resides in another country. These moneys are deposited in compliance with the requirements of section 3660 of the Revised Statutes of Ohio, which provides as follows:

"Sec. 3660. A company incorporated by or organized under the laws of a foreign government shall deposit with the superintendent of insurance, for the benefit and security of the policy-holders residing in this state, a sum not less than one hundred thousand dollars in stock or bonds of the United States, or the state of Ohio or any municipality or county thereof, which shall not be received by the superintendent at a rate above their par value; the stock and securities so deposited may be exchanged from time to time for other like securities; so long as the company so depositing continues solvent and complies with the laws of this state, it shall be permitted by the superintendent to collect the interest or dividends on such deposits; and for the purpose of this chapter the capital of any foreign company doing fire insurance business in this state shall be deemed to be the aggregate value of its deposits with the insurance or other departments of this state and of the other states of the United States, for the benefit of the policy-holders in this state or in the United States, and its assets and investments in the United States certified according to the provisions of this chapter; but such assets and investments must be held within the United States, and invested in and held by trustees, who must be citizens of the United States, appointed by the board of directors of the company and approved by the insurance commissioner of the state where invested, for the benefit of the policy-holders and creditors in the United States; and the trustees so chosen may take, hold and convey real and personal property for the purpose of the trust, subject to the same restrictions as companies of this state."

These bonds are part of the capital stock of the insurance company. The laws of Ohio require that fire insurance companies, whether domestic or foreign, shall have a capital stock of not less than \$100,000, which shall be invested in bonds, etc., and held for the protection and security of policy holders. They are not permitted to do business until they provide this fund to meet losses. And, although foreign insurance companies are required to deposit their

bonds, etc., with the superintendent of insurance, yet so long as the company continues solvent, and complies with the laws of the state, it may collect the interest and dividends thereon, and may exchange the bonds from time to time for other securities. By the deposit of these bonds the insurance company pledges them for the payment of losses incurred by policy holders, and their negotiable character enables them to be readily disposed of for that purpose. Their negotiability, therefore, is not suspended or destroyed, but is always available for the purposes of their deposit. As is said by the supreme court of California in *People v. Home Ins. Co.*, 29 Cal. 540:

"If the bonds themselves are property, they are, of course, 'within the state'; but, if only evidence of the existence of property in some other form, they represent the thing, whatever it is. They are the outward symbols by which its actual presence is manifested, and by means of which it is manipulated and actually controlled, and through which the state can actually subject it to its jurisdiction. For this very purpose, the state required these bonds to be deposited within its reach, as a condition precedent to the transaction of any business in the state by the owner."

Every element of value in the bonds is employed not only to enable the company to comply with the law permitting it to do business, but to meet the exigencies of that business. The property rights of the insurance company in these bonds to the fullest extent are transferred to and vested in the superintendent of insurance of Ohio, in trust for its policy holders, and may be used by him for the purposes of the trust. *Falkenbach v. Patterson*, 43 Ohio St. 359, 1 N. E. 757; *State v. Matthews*, Wkly. Law Bul. No. 16 (April 22, 1901) 60 N. E. 605. There can be no doubt, therefore, that they are property within the state, and that it is within the power of the general assembly of Ohio to tax them in the same manner as the capital stock of domestic insurance companies is taxed. *People v. Commissioners of Taxes*, 23 N. Y. 224; *British Commercial Life Ins. Co. v. Commissioners of Taxes*, 18 Abb. Prac. 118; *International Life Assur. Soc. of London v. Commissioner of Taxes*, 28 Barb. 318; *Mutual Life Ins. Co. of Buffalo v. Board of Sup'rs of Erie Co.*, 4 N. Y. 442.

2. But has the state passed laws authorizing or requiring the taxation of these bonds? Are they taxable under section 2731 of the Revised Statutes of Ohio? Section 2 of article 12 of the constitution of Ohio provides that "laws shall be passed, taxing by a uniform rule all moneys, credits, investments in bonds, stocks, joint stock companies, or otherwise; and also all real and personal property, according to its true value in money." Section 2731 provides that "all property, whether real or personal, in this state, and whether belonging to individuals or corporations, and all moneys, credits, investments in bonds, stocks, or otherwise of persons residing in this state, shall be subject to taxation"; and section 2734, which designates the persons by whom property shall be listed for taxation, provides, among other things, that the property of every person held in trust shall be listed by the trustee, and, if any person required to list property for taxation fails to do so, it may be listed by the county auditor, pursuant to the authority vested in him by sections 2781 and 2782; so that laws have been passed which provide for the taxation

of all property in the state, which, with great particularity, point out how and by whom it shall be listed and valued, and how the taxes shall be levied and collected. Prior to 1867 the only property which foreign insurance companies had in the state subject to taxation were premium receipts, and these were taxed, and are still taxed, by the special method provided by section 2745. In 1867 the legislature passed a law requiring foreign insurance companies to deposit with the superintendent of insurance, for the benefit and security of policy holders, not less than \$100,000 in bonds, etc.; and when the complainant, in compliance with this law, deposited the bonds in question, they brought property into the state which is subject to taxation under the provisions of the laws just quoted. Upon their deposit it became the duty of the superintendent of insurance, as the trustee holding them for the benefit of the insurance company and its policy holders, to list them for taxation; and upon his failure to do so the duty devolved upon the auditor of the county. It is doubtless true that the taxation of these bonds may work a result not contemplated by the legislature or by the taxing officers of the state, and in this case may, in a measure, impose double taxation upon the complainant, but the mandatory provisions of the constitution and of section 2731 may not be disregarded, although these considerations suggest a doubt as to whether the construction given these provisions be the true one. Double taxation, however, may be avoided under the provisions of section 3660, by depositing nontaxable bonds, and the most serious objection to the ruling of the court will be thereby removed. The demurrer will be sustained, and the bill dismissed, at the complainant's costs.

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BLINN et al. v. CONTINENTAL SECURITY REDEMPTION CO. et al.

In re CONTINENTAL SECURITY REDEMPTION CO.

(Circuit Court, N. D. Alabama, S. D. August 24, 1901.)

No. 126.

APPEAL—SUPERSEDEAS—STATEMENT OF RECEIVER'S ACCOUNT.

After appointment of a receiver, the court rendered a decree dismissing the bill, and on the same day a separate decree, reciting the filing of a report by the receiver and the lodging of exceptions against it, and ordering that the exceptions be referred to a master, and that he proceed to hear and determine them. Appeal was then taken from the former decree, and supersedeas had. *Held* that, even if the decrees be construed as one, the supersedeas did not prevent the making of the statement of the receiver's accounts.

In Equity.

William H. Denson, for petitioner.

William Vaughan, for receiver.

Charles Powell, for defendants.

SHELBY, Circuit Judge. Under the prayer to the original bill in this cause, a receiver was appointed. The record shows that the

receiver came into the possession of valuable assets. At a subsequent term the circuit court came to the conclusion that it did not have jurisdiction of the parties, and that the amount involved was not sufficient to confer jurisdiction, and dismissed the bill by decree entered May 27, 1901. The complainants took an appeal to the supreme court, and the circuit court certified the question of jurisdiction to the supreme court. The complainants, pursuant to the order of the court, gave a supersedeas bond, and the court ordered that all further proceedings be suspended and stayed. On the same day that the circuit court dismissed the bill and discharged the receiver, it also rendered a separate decree, which recited that the receiver had filed his report as directed, "and that exceptions and objections had been lodged against the report" by certain defendants, and it was therefore ordered by the circuit court that these exceptions and objections be referred to a master in chancery. By this decree it was further ordered that the said master in chancery "do proceed to hear and to determine the exceptions to said report of said receiver, and to take evidence on the objections made thereto, and to report his conclusions seasonably to this court." The master in chancery gave notice that he would proceed to hear and determine the exceptions on August 27, 1901. The defendant, the Continental Security Redemption Company, thereupon filed the petition now under consideration, praying that the master in chancery be ordered and directed to proceed no further in the statement of the account of the receiver.

The contention of the petitioner is that, the case having been certified to the supreme court, and the supersedeas having been granted, the master in chancery should be restrained from stating the account until the cause has been determined by the supreme court. An examination of the record shows that the decree appealed from and certified to the supreme court is the one dismissing the bill for want of jurisdiction. The decree directing the statement of the account is not superseded. It was in the discretion of the circuit court, in dismissing the bill, to make such orders as were necessary to preserve the assets in the hands of the receiver. For that purpose it was proper to require a statement of the receiver's accounts. No matter how the supreme court may decide the question of the jurisdiction of the circuit court, the accounts of the receiver will have to be settled. The learned counsel for the petitioner contends that the several decrees rendered May 27, 1901, should all be construed as one decree. The decrees were in fact rendered and signed separately. If, however, they be construed as one decree, I do not think it would alter the case. In a case like this it is the duty of the court, even after the supersedeas of the decree dismissing the bill for want of jurisdiction, to make the necessary orders to preserve the fund in the hands of the receiver. The statement which is directed to be made of the receiver's accounts is necessary to ascertain the amount in his hands. A statement of the account will not place the assets beyond the control of any decree the appellate court may render. On the contrary, it is a proceeding tending to protect the assets, and it is the circuit court's duty to preserve them, notwith-

standing the appeal. *Goddard v. Ordway*, 94 U. S. 672, 24 L. Ed. 237; *Ex parte Hood*, 107 Ala. 520, 18 South. 176; *Hovey v. McDonald*, 109 U. S. 150, 3 Sup. Ct. 136, 27 L. Ed. 888; *Ferguson v. Dent* (C. C.) 29 Fed. 1.

An order will be entered denying the petition of the Continental Security Redemption Company for an order restraining the master in chancery from proceeding to state the account. Motion denied.

# ALEXANDER et al. v. SOUTHERN HOME BUILDING & LOAN ASS'N.

(Circuit Court, N. D. Georgia. November 3, 1900.)

## 1. BUILDING AND LOAN ASSOCIATIONS—RECEIVERS—STOCKHOLDERS—PREFERENCE.

Where the affairs of a building and loan association are placed in the hands of a receiver for settlement and winding up, the effect is to transform all the stockholders into creditors; and the holders of paid-up or full-paid stock, or those who gave notice of withdrawal before the receiver was appointed, should have no preference over the holders of installment stock.

## 2. SAME—LIABILITIES—SHARES OF STOCK—COMPUTATION.

In computing the liabilities of an insolvent building and loan association, full-paid and paid-up stock on which dividends have been regularly paid should be computed at its par value; and all installment stock, whether or not there has been notice of withdrawals or loans made thereon, should be computed at its withdrawal value, as determined by the by-laws.

## 3. SAME—BORROWING MEMBERS—DIVIDENDS.

In winding up the affairs of an insolvent building and loan association, the amount of the probable dividend which will be payable to borrowing stockholders may be computed and allowed to them as a credit on their loans, not as a matter of right or even strict equity, but rather as a compromise to aid in the speedy collection of the assets.

In Equity.

J. L. Hopkins & Sons and Rosser & Carter, for complainants.  
Ellis & Ellis, for defendant.

PARDEE, Circuit Judge. Upon an order of court made upon the petition of receivers reading as follows: "Upon reading and considering the foregoing petition of the receivers herein, it is ordered and decreed that said petition be, and it is hereby, referred to the master in this cause, Robert C. Alston, Esq., with direction and authority, after due notice to the solicitors of record in this cause, to take testimony, hear the petition upon all the issues of law and fact involved, and report fully to the court as to the subject-matter of said petition, and especially to ascertain and report what would be the proper basis for the adjustment, settlement, and collection, at this stage of the cause, of the obligations of the borrowing members of the defendant, Southern Home Building & Loan Association; and, in order that the collection of debts due the association may proceed without delay, the master is directed to make his investigations and report with all convenient speed,"—the special master has submitted an elaborate report, finding substantially that the holders of full-paid stock and the holders of stock in the different classes who have duly

given notice of withdrawal stand upon the same footing of priority as other stockholders, and that in settling with borrowing stockholders a credit should be allowed in the nature of an anticipatory dividend amounting to 32 per cent. of the amounts paid by said stockholders into the loan fund of the association. To this report certain holders of full-paid stock and certain holders of stock upon which notice of withdrawal had been given prior to the appointment of the receiver filed exceptions; the former claiming that they are not stockholders at all, but creditors, and entitled to be paid by preference over any and all stockholders; and the latter claiming that, as they had given notice of withdrawal prior to the appointment of the receiver, they are creditors with a lien upon the funds of the association, and entitled to be paid by preference over all stockholders. After an elaborate examination and full consideration, I am satisfied that the master's finding in regard to these two classes of stockholders is correct, and the authorities cited by him fully sustain his position. As the association is in the hands of a receiver, to be wound up and liquidated because of the impossibility to carry out the original scheme and purpose, it would be rank injustice to allow one class of investors to be paid in full at the expense of other investors equally innocent of all fault in the matter.

As to the credit in the nature of an anticipatory dividend to be allowed borrowing stockholders in the settlement and collection of the amounts due the association on loans, no exception has been filed; but, as the proper settlement of that matter is of prime importance, I have given it much consideration. When the bill in this case was filed the association was not insolvent, in the proper sense of the term. There were no debts to outside creditors of any importance. The mass of the obligations of the association were due and to become due to its members, who occupied the position of stockholders, with the right to become eventual creditors. The association is in the hands of the court for settlement and winding up because, for the many reasons stated in the bill, it is impossible to carry out the objects and purposes of the association. The practical effect of the appointment of the receiver for the purpose of winding it up is to turn or transform all the stockholders into creditors, and thus make the association insolvent; and the course to pursue under the bill is to collect the assets and distribute them as justice and equity require. As the obligations of the association are mainly due to stockholders, so the available assets consist of loans to stockholders based on shares of stock in the association, and these loans must be collected in order to make any distribution. In each contract of loan the value of the shares based on installments paid was a material element, and now has to be dealt with, whether the borrower complied strictly with his contract, and paid all installments as the same became due, or after some payments became in default. According to the by-laws, every share of class A stock upon which all monthly payments have been made may be withdrawn after one year, and every share of stock in classes B, C, and D upon which all monthly payments have been made may be withdrawn after two years from date of issue. The by-laws give fixed and certain rules for ascertaining the with-

drawal value of any and all shares of stock. In settling with the borrowing stockholders and collecting the amount of loan, it would be very desirable to be able to allow as a credit on the loan the full withdrawal value of the stock upon which the loan was based; but this, which would be just and equitable if the association were to continue a going concern, becomes unjust and inequitable when it is considered that the object and purpose of the association cannot be carried out, and the association must be wound up and its affairs settled substantially as an insolvent corporation, in the strict sense of the term; and this because the effect would be to throw all the expense of winding up and all the losses upon the nonborrowing stockholders, of whom it may be said that, while they are no more innocent stockholders than the borrowing stockholders, yet they are the only individuals paying money into this association who have received no benefit therefrom. As the assets of the association are collected, it will be necessary in the progress of the case to decree an equitable distribution, and a consideration of the basis of distribution will throw some light upon the matter. By the report of the master, neither the full-paid stock, nor the stock upon which notice of withdrawal had been given, is entitled to any priority over holders of installment stock; and whether all are treated as stockholders or as unsecured creditors makes little difference, provided all are treated alike, and just and equal rules are applied in determining the amount of stock in the one case, or the amount of debt in the other. The holders of full-paid stock paid in the par value thereof, and, according to the terms of the contract, have ever since received 6 per cent. dividend thereon, and this up to the time the receiver was appointed. In listing them for distribution either as stockholders or as creditors, there seems to be no other fair way than to list them on the par value of the stock; and this, it is to be noticed, does no violence to the contract. The holders of stock who had given notice of withdrawal prior to the appointment of a receiver cannot well be listed on any other basis than the withdrawal value of said stock, as determined by the rules and by-laws of the association. If these propositions with regard to the holders of full-paid stock and of certain withdrawn stock are correct, it follows that, in order to do equity in the decree of distribution, all the installment stock should be listed for distribution on the basis of its withdrawal value at the time the receiver was appointed, as determined by the by-laws of the association. As the withdrawal value of the installment stock must then be the basis of distribution to holders thereof, it would seem that the credit or anticipatory dividend to be allowed borrowing stockholders in the amicable settlement and adjustment of their loans should be based upon the withdrawal value of the stock, and not upon the amounts paid by them into the so-called loan fund. In addition to this, it is to be noticed that the loan fund which was provided for by the original by-laws, and under which, perhaps, a large amount of class A stock was subscribed, was in 1897 abolished, and since that date there has been no loan fund per se set apart on the books of the association; and this furnishes an additional reason why the amounts paid into the loan fund should not be taken as the basis for an anticipatory



dividend. For these and other reasons hereinbefore given, I am reasonably clear that the anticipatory dividend to be allowed borrowing stockholders should be based upon the withdrawal value of the stock.

The special master, in his very exhaustive report, after fully considering the assets of the association, and making apparently very liberal deductions for bad loans and insufficiently secured loans, gives the following tabulated statement of the assets of the association:

Loans on real estate.....	\$300,000 00
Loans on stock.....	68,000 00
Bills receivable.....	20,000 00
Real estate.....	40,000 00
Insurance advanced.....	1,250 00
Office furniture and fixtures.....	500 00
Arrears of dues to April 1, 1900.....	16,050 90
Interest and premiums due on loans to April 1, 1900.....	34,421 68
Cash on hand and in bank.....	24,637 35
	<hr/>
	\$504,859 93

Giving the same consideration to liabilities of the concern, he gives the following table:

Amount paid in on installment stock, class A.....	\$372,380 67
“ “ “ “ “ “ “ B.....	2,866 40
“ “ “ “ “ “ “ C.....	661 50
“ “ “ “ “ “ “ D.....	2,096 50
“ “ “ “ paid-up stock.....	3,505 00
“ “ “ “ full-paid stock.....	134,100 00
“ “ “ “ sundry accounts.....	1,278 05
To this must be added the amount of dues in arrears, because this item has been given a value in the assets.....	52,177 35
	<hr/>
	\$569,065 47

As to expenses of administration, based upon the evidence and his own experience, the special master estimates said expenses as not exceeding \$135,000. He submits the following statement:

"In considering the assets and liabilities of this association, and the probable anticipatory dividend, it is well to strike from the column of assets the value placed therein upon the items of loans on stock, and to strike from the column of liabilities the amount which was paid in on the stock pledged to secure this loan; making allowance for the fact that some of this stock is not pledged for as much as was actually paid in on the stock so pledged, and that that stock will be entitled to a dividend after paying the loan. In making allowance for this, it is probably proper to strike from the list of liabilities \$100,000, instead of \$114,215.40, which is the amount paid in on the stock so pledged. This would make the estimated value of the assets of the association for this purpose \$436,859.93, and the liabilities \$469,065.47. From the assets there should be deducted the amount of estimated expense of winding up the affairs of the association. These expenses will necessarily be heavy, because of the nature of the assets of the company, the places where located, the expense of foreclosure, and the time to be consumed, and the various and many expenses attendant, which are now unforeseen and which may never arise; but provision must nevertheless be made for their possibility, and which I have heretofore placed at not exceeding the sum of \$135,000. This leaves \$301,859.93 to be distributed to the \$469,065.47 of liabilities, which is about sixty-five per cent. Owing to the possibility of error in these calculations, both as to allowing too much for assets and too little for expenses and liabilities, I find that the anticipatory dividend to be allowed in accordance with this report should be thirty-

two per cent. of the amount paid into the loan fund by the borrowing members."

It is to be noticed that as a result the special master, after liberal deductions for bad loans and insufficiently secured loans, and after making a very liberal estimate for expenses of administration, finds that there will be realized for distribution the sum of \$301,859.93. It may be that this conclusion is an overestimate, but it is to be hoped, in the interest of the beneficiaries, that it is the reverse. For the matter in hand, however, I assume it to be substantially correct.

From the evidence in the case, and such other facts as have reached me on investigation, a substantially fair estimate of the obligations of the association which will be entitled to share pro rata in the decree of distribution is as follows:

Par value of paid-up stock.....	\$ 3,505
Par value of full-paid stock.....	134,100
Withdrawal value class A stock.....	450,000
Withdrawal value class B stock.....	3,124
Withdrawal value class C stock.....	721
Withdrawal value class D stock.....	2,285

Making a total of..... \$593,735

It results that on the basis of the master's estimate of the fund which will be collected for distribution, and the above estimate of obligations to participate pro rata in the distribution, a dividend of 50 per cent. can be made when the assets are all collected. The strictly correct rule to follow in winding up this association would undoubtedly be to first collect all the assets, and then distribute; but in view of the fact that the eventual distributees are nearly all debtors, and from the peculiar contracts between the association and its members there is an inchoate equity in each case, and considering further that, until that equity is taken into account, few, if any, collections can be made without litigation involving great delay and much expense, I am of opinion that it is to the interest of all stockholders, borrowing and not borrowing, to fix an anticipatory credit or dividend which the receiver may allow in all cases where collections are made without litigation and without unnecessary delay, and that that credit or anticipatory dividend should be fixed at 50 per cent. of the withdrawal value of the stock involved on the 3d day of April, 1900. It is not to be understood that the allowance of this anticipatory dividend is a matter of right or even strict equity, but rather as a compromise to aid in the speedy collection of the assets. If it is accepted by the borrowing stockholders, I am satisfied it will result in advantage to all concerned, and will give a larger dividend in the final decree than will follow if the receiver is compelled to resort to litigation. If the allowance is not accepted, the fund will be in no worse condition, because the receiver has been authorized to deal fairly—perhaps more than fairly—with the borrowing stockholders. A decree will be entered in accordance with the views herein expressed.

**COLTRANE v. BALTIMORE BUILDING & LOAN ASS'N OF BALTIMORE CITY.****In re CAULK et al.****(Circuit Court, D. Maryland. June 17, 1901.)****1. BUILDING AND LOAN ASSOCIATIONS—DISTRIBUTION OF ASSETS IN INSOLVENCY—PREFERENCES AS BETWEEN MEMBERS.**

A matured notice of withdrawal given by a member of a building association holding paid-up stock, as permitted by the terms of his contract, does not operate to terminate his membership and convert him into a creditor entitled to preference of payment over the other members in the distribution of the assets of the association in insolvency, contrary to the express provisions of the by-laws.

**2. SAME—NOTICE OF WITHDRAWAL.**

Where certificates of paid-up stock issued by a building association gave the holder the right to withdraw and have his stock redeemed, subject to the provisions of the by-laws of the association, which required 30 days' notice of intention to withdraw to be given, the status of a holder of such a certificate as a member of the association is not affected by a notice of withdrawal given less than 30 days before the commencement of proceedings in insolvency against the association.

**3. SAME—EFFECT OF GIVING NOTICE OF WITHDRAWAL.**

Even where the by-laws of a building association give a holder of paid-up stock the right to withdraw and receive the amount of his stock on giving a stated notice, a member who has given such notice as to stock which has matured, but not been paid, is entitled to no preference in payment over other members when the assets of the association are taken in charge by a court of equity for distribution in insolvency proceedings. The provisions of the by-laws prescribing the order in which payments shall be made to the different classes of members in the regular course of business apply only so long as the association is a going concern, and do not govern the distribution of its assets in insolvency, and a member who has given notice of withdrawal is not by that fact given any superior equity which entitles him to a preference over others who have not.

**In Equity.** In the matter of the intervening petitions of Florence A. Caulk and Helen M. Norris. On exceptions to report of John C. Rose, special master.

The petitioners allege that they were the holders of full-paid stock in the defendant association, and had given notice prior to the filing of the bill in this case that they desired to withdraw their stock. The petitioners alleged that by giving such notice they became creditors of the association, and were entitled to be paid in full out of its assets in preference to such stockholders as had not given such notice. On the 17th day of September, 1900, the special master filed his report, making 38 findings of fact, and reaching 7 conclusions of law. So much of these findings of fact as are material to the questions raised by the exceptions may be briefly stated as follows: The Baltimore Building & Loan Association was a Maryland corporation. Among the various classes of stock issued by it was a full-paid stock, for which the subscriber at the time of subscription paid its full par value in cash. In the early years of the existence of the association, upon this character of stock it contracted to pay interest or dividends at the rate of 8 per cent. per annum, payable semiannually. Subsequently it changed its by-laws so that upon all full-paid stock issued thereafter it undertook to pay but 6 per cent. per annum, payable semiannually. The change of by-laws did not purport to affect the rate of interest or dividend payable on the full-paid stock issued before the change was made. The petitioners were the holders of full-paid stock, some of it being the 8 per cent. stock, and some the 6 per cent. They had paid par value for that

stock, and they had received the interest or dividends which the association had agreed to pay. Mrs. Norris had given notice to the association on the 28th of February, 1900, that she desired to withdraw the full-paid shares held by her, and Mrs. Caulk gave a similar notice on the 16th day of March, 1900. The association acknowledged the receipt of these notices upon the days upon which they were respectively given. At no time subsequent to January 1, 1900, were the total assets of the association sufficient to have repaid to its stockholders the amount they had paid into it. On the 21st day of March, 1900, a receiver for the association was appointed by this court. The debts due by the association to persons other than its stockholders were trifling in amount. The by-laws of the association were amended from time to time. The provisions of such of them as are relevant to any of the questions in this controversy appear from the master's discussion of his conclusions of law. To the findings of fact no objection has been made. The intervening petitioners have excepted to the master's conclusions of law, which, with the reasons in support of them, were substantially as follows:

"First Conclusion of Law. If the amendments made in 1899 to the by-laws of the defendant corporation are binding upon the petitioners, the petitioners are not entitled, by reason of their having given notice of withdrawal, to any preference in payment over the stockholders who have not given such notice.

"Reasons for the First Conclusion of Law. The cases which give preference in the distribution of the assets of an insolvent building association to a member whose withdrawal notice has matured before the association stopped business do so upon the ground that the by-laws of such association clearly provide for such preference, and that under such by-laws the effect of a matured withdrawal notice is to terminate the membership of the member who gives it, and to convert him into a quasi creditor as against the other members who have not given such notice. *Walton v. Edge*, 10 App. Cas. 33. The language of the first paragraph of section 1 of article 7 of the by-laws of the defendant association, as amended in May, 1899, expressly declares that a withdrawal notice does not 'constitute a withdrawal or terminate the membership, or give to the person filing such notice the status of a creditor, or create any rights of action, legal or equitable, against the association, or in any manner alter or disturb his rights and duties as a member.' This by-law was evidently drawn by some one entirely familiar with the cases in which the right of a withdrawing member to preferential payment has been discussed by the courts. Its language is aptly phrased to negative every assumption upon which such preference has been based when such preference has been upheld at all.

"Second Conclusion of Law. That if the amendments made to the by-laws of the defendant corporation in May, 1899, are not binding upon the petitioners, their withdrawal notices had not matured at the time of the appointment of a receiver in this cause.

"Reasons for the Second Conclusion of Law. By the express terms of the certificates of paid-up stock held by the petitioners, they were redeemable,—that is, withdrawable,—subject to the provisions of the by-laws of the association, 'thirty days' notice of intention to redeem being necessary.' The requirement that a stockholder desiring to withdraw his or her stock shall give thirty days' notice of his or her intention so to do is found in section 2 of article 6 of the by-laws of 1891. It appears that only five days elapsed between the filing of the notice of withdrawal of one of the petitioners and the appointment of the receiver in this cause, and only twenty-one days between the filing of the notice of the other petitioner and the appointment of such receiver. It is obvious that, if the by-laws of 1899 are not binding upon the petitioners, their rights as against the association are governed by the by-laws in force when they became members, and by the terms of their certificates of stock, and that thirty days' notice was required from them of their intention to withdraw before their withdrawal notices matured.

"Third Conclusion of Law. That the court of last resort of the state of Maryland has never decided whether or not a stockholder of an insolvent building association, who has given notice of withdrawal of his stock

before the declaration of insolvency, is entitled, when the association is being wound up by a court of equity, to a preference in the distribution of the corporate assets over those stockholders who have not given such notice.

"Reasons for the Third Conclusion of Law. The counsel for the petitioners in the argument before the special master strenuously argued that the court of appeals of Maryland had decided that under the circumstances mentioned in the third conclusion of law, and existing in this cause, stockholders who had given such notice of withdrawal before the declaration of insolvency were entitled to priority of payment over those stockholders who had not given such notice. They relied upon the following cases: *Gaehle's Piano Mfg. Co. v. Berg*, 45 Md. 113; *Hennighausen v. Tischer*, 50 Md. 583; *Association v. Price*, 88 Md. 155, 41 Atl. 53, 42 L. R. A. 206; *Baltimore & O. Relief Ass'n Cases*, 77 Md. 563, 26 Atl. 1045; *Failey v. Fee*, 83 Md. 83, 34 Atl. 839, 32 L. R. A. 311. A careful examination of each of these cases shows that the precise question was not necessarily involved in any of them, and was not decided. In the case of *Gaehle's Piano Mfg. Co. v. Berg*, 45 Md. 113, the association was still a going concern. It was sued at law by a stockholder who had exercised the right given him by its charter and by-laws to withdraw his stock. The court of appeals held that the by-laws said that a withdrawing member had the right to withdraw, and to receive what he had paid for his stock, without any abatement for the losses incurred by the corporation. It further held that this by-law was valid and binding upon the corporation, and that therefore the stockholder was entitled to be repaid what he had paid in on his stock; and this, too, although the corporation, before he had given notice of withdrawal, had suffered losses. The other stockholders were still carrying on the business of the corporation. All that the decision of the court of appeals in this case amounted to was that if the stockholders chose to guaranty by their by-laws to any of their number the right to withdraw and take out all he had paid in, whether the corporation had suffered losses or not, they were bound, so long as they continued to operate the corporation, to carry out the agreement they had made. In the case of *Hennighausen v. Tischer*, 50 Md. 583, the corporation was a building association, strictly, as the *Gaehle Manufacturing Company* was not. It was being wound up by a court of equity. The appellee in the case was a member of the association who had borrowed money from it, and who had given a mortgage to it. He had also bought the unredeemed shares of certain members who had given notices of withdrawal. He claimed the right to credit against his mortgage indebtedness the amount which should have been paid on these unredeemed shares, according to the by-laws, at the time the notices of their withdrawal matured. The receivers denied his right to such credit, and said he ought to file his claim as a holder of these unredeemed or free shares with the other stockholders or creditors. The court said: 'The withdrawing members had given written notice of their withdrawal, and the secretary had entered on their books the sums they were entitled to withdraw. As shareholder, a member is liable for his proportion of losses, but as creditor he is entitled to recover the amount due him, independent of all losses. The balances assigned him by withdrawing members must be presumed to have been ascertained after allowing all deductions to which the withdrawing members, the assignors, were then subject or liable.' All that is necessarily decided by the court in this case was that the withdrawing member could not be charged with losses incurred after he had ceased to be a member, and that the amount due him after deducting all losses to which he was liable had been definitely ascertained, and that, having been so ascertained, such ascertainment was binding on the other members. If the amount he was entitled to receive had been so ascertained, and such ascertainment was conclusive upon the other members, it obviously would have been unnecessary and contrary to the established principles of courts of equity to have driven him to a new proceeding, or to have compelled him to wait to a subsequent stage of the pending proceeding to get this already definitely fixed and ascertained credit upon the claims of the association against him. The court therefore held that he was entitled to a credit as against his mortgage for the amount of the sums entered on the books by the secretary as the withdrawal value of the shares so assigned to him,

The question whether the determination by the secretary would have been binding upon the corporation and the other stockholders, had it been a mistaken one when made, was not presented in the case, and was not passed upon by the court, which, indeed, had no data upon the subject before it. The court said: 'There is no sufficient evidence of insolvency of the corporation in this case. The proceedings under which the receivers were appointed are not made a part of the record. Non constat that the assets of the West Saratoga Building Association are not sufficient to pay its debts.'

'The case principally relied upon by the petitioner was that of *Association v. Price*, 88 Md. 155, 41 Atl. 53, 42 L. R. A. 206. This was a suit at law. The Southern Building & Loan Association was a Tennessee corporation. The plaintiff, appellee above, was a holder of stock therein. The by-laws of the corporation provided that 'withdrawn stock will be paid for in the order in which notice is given, but the association shall not be required to use in the payment thereof in any one month, without the consent of the board of directors, more than one-half of the net receipts of the loan fund for that month.' The plaintiff on the 21st day of December, 1896, while the corporation was a going concern, gave such notice of withdrawal. On the 16th day of April receivers were appointed for the corporation by the courts of Tennessee. A few days thereafter the plaintiff sued out an attachment against the defendant corporation for the amount he had sought to withdraw from it. The defendant corporation appeared in the attachment proceedings and pleaded the above provisions of its by-laws, and averred facts showing that, under said by-laws, plaintiff was not entitled to present payment. The plaintiff in his replication confessed the truth of the facts alleged in the plea, but said that 'when the notice was given, received, and accepted, the plaintiff became a creditor of the association to the amount owing on the said withdrawn stock, under the charter and by-laws of the defendant, and subject to the charter and by-laws,' and that the provisions of the by-laws by which the plaintiff was limited to payment in order and out of one-half of the net receipts were made upon the condition that the defendant would continue its business according to its charter. The replication further alleged that the corporation had contracted with the plaintiff so to continue its business, but that on the 16th of April, 1897, being a Tennessee corporation, it was by a decree of the chancery court of that state placed in the hands of receivers, who took possession of its assets in Tennessee, and that the defendant ceased to do business in the manner provided by its charter and by its contract with the plaintiff, and ceased to have any receipts whatever applicable to the payment of withdrawn stock. The defendant demurred to this replication. The case went to the court of appeals on the demurrer, and the question involved was one of pleading, purely. The plaintiff by its replication had alleged that the defendant had contracted with him to continue to do business, and that the limitations on his right to demand present payment for his withdrawn stock were conditioned upon the performance of this contract by the defendant. The demurrer confessed the truth of these allegations. The court of appeals held the replication good, as on its face it clearly was. It is familiar law that, if a party to a contract itself renders impossible the performance of conditions intended for its protection, it cannot, as against the other party, rely upon the nonperformance of those conditions. The case was one between the withdrawing stockholders and the corporation. The other stockholders were not parties. Moreover, from the statement of the court it would appear that the practical result reached was substantially the same it would have been had the corporation been wound up in equity, and its assets distributed among the stockholders without preference or priority. The court said that, in determining the amount of the verdict to which the plaintiff was entitled, the losses suffered by the corporation had been taken into account. If in point of fact these losses were so taken into account, the principle for which the defendant corporation and its receivers are contending in this case was applied. There is no question, of course, that the withdrawing stockholders will, when the assets of the corporation are ready for distribution, be entitled to receive what they have paid into it, less their share of its losses. The case of *Association*

v. Price is therefore not in any sense an authority for the contention that the withdrawing stockholders are entitled to payment in full, without regard to what losses the association has suffered. In the subsequent case of *Cook v. Association*, 90 Md. 284, 44 Atl. 1022, the court of appeals expressly declared that the case of *Association v. Price*, as presented to it, was one of the exercise of the right of withdrawal, unaffected by the question of insolvency with which the Maryland court had nothing to do, the Tennessee decree having no extraterritorial effect. In the opinion in the *Cook* Case, *supra*, the court of appeals refers, and apparently with approval, to a number of the cases in other states which upheld the rule for which the defendant building association and its receivers in this matter are contending. It is not necessary, however, to draw any inference from such citations. It is true, as the counsel for the petitioner says, that the question of the relative rights of the withdrawing and nonwithdrawing stockholders was not before the court, and was not passed on by it. It is equally true that no such question was before the court in the earlier case of *Association v. Price*. The declaration of the court of appeals in the *Emmet Building Ass'n Case* shows that that tribunal understood the effect of the *Price Case* as that case has been above explained. The case of *Failey v. Fee*, 83 Md. 83, 34 Atl. 839, 32 L. A. 311, concerned the winding up of the insolvent Order of the Iron Hall. The Order of the Iron Hall agreed with the persons who became its members that, if they would pay certain assessments for a period of seven years, the order would at the end of that period pay to them the sum of \$1,000. The court of appeals held that those persons who had before the appointment of the receivers actually completed their seven years of payment became entitled to receive the sum of \$1,000 each, and were entitled to be paid that sum before any dividend out of the assets could be paid to those members who had not yet completed their payments. The case was decided very largely upon the authority of *Baltimore & O. R. Co. v. Employés' Relief Ass'n*, 77 Md. 566, 26 Atl. 1045, to be presently discussed. The agreement among the members of the Iron Hall was substantially that those who had begun their payments first should first be paid in full, and that those who began their payments later should take their chances. If the scheme was valid at all, there was no reason why the rule of first pay first paid, laid down by the members themselves, should not be followed by the courts. In the case of *Baltimore & O. R. Co. v. Employés' Relief Ass'n*, 77 Md. 566, 26 Atl. 1045, a mutual life and accident insurance association was being wound up in a court of equity. It was there determined that claims for indemnity for death and accident which had matured by the happening of the death or the accident before the winding up of the association began were entitled to a preference over the claims which had not then matured. It seems to have been conceded in this case that the claims for indemnity for deaths which happened before the winding up were preferred. The dispute was as to the right of the members whose claims were for weekly payments for an indefinite period as an indemnity for injuries suffered by them before the winding up began to stand in the same category with the holders of matured death claims. The court held that they so stood. The case, however, is a recognition in the state of Maryland of the doctrine laid down in *Mayer v. Attorney General*, 32 N. J. Eq. 815, and which has since been generally followed in this country, viz. that, in a mutual life insurance association or order, claims for indemnity which had matured before the winding up are entitled to be paid in full before any payments can be made to those members whose claims have not matured at that time. The rule is different in the case of insurance companies not mutual. The distinction is based upon the fact that in a mutual company all the insured are partners, but that by the terms of the association, and of the contracts between it and its members, that partnership terminates upon the maturity of the certificate or policy. When such membership terminates, the person whose membership has so terminated ceases to be a partner in the concern, and becomes, as against those who continue in the business, although not necessarily against outside creditors, a creditor, and as such entitled to payment in preference to any distribution

among those who still remain partners. There can be no question that substantially the same reason was given by Earl Selborne and Lord Blackburn for holding that members of insolvent building associations whose notices of withdrawal had matured before the association had stopped business were entitled to preferential payment out of the assets. *Walton v. Edge*, 10 App. Cas. 33. It is important to observe, however, that there is one great practical difference between a building association whose members give notices of withdrawal, and an insurance association furnishing indemnity against death, injury, or other casualty. The event upon which the maturity of the indemnity certificate or policy of the insurance association depends is one which happens independent of the action or volition of the beneficiary. The withdrawal notice given by a member of a building association is his voluntary act. In the former case there can be nothing akin to a race of diligence among the policy holders. In the latter case there can be, and usually is. In the particular cases of the petitioners now under consideration, it is admitted that they did not know that the association was insolvent, and that they did not believe it was, when they gave their withdrawal notices. It is obvious, however, that, as a general rule, when a building association is moving towards insolvency its withdrawal notices will increase in number, and that while it will usually be impossible to show that those giving them had any definite knowledge that the association was insolvent, or even to show that they believed it was, it will still remain likely that, as a rule, those notices will be given by those people who have, or whose friends have, the best means of obtaining accurate knowledge as to what the situation of the association is. A rule of preference which favors persons so situated at the expense of the others is not one which will commend itself to a court of equity. It must be admitted, however, that the rule laid down in *Baltimore & O. R. Co. v. Employés' Relief Ass'n* is based upon a doctrine which is susceptible of a logical extension to the case of building associations, however great the practical difference in the consequences which follow from the application of that doctrine may be. The court of appeals of Maryland, however, in the two subsequent cases of *Association v. Price* and *Association v. Cook*, has not itself recognized the case of *Baltimore & O. R. Co. v. Employés' Relief Ass'n* as an authority controlling the action of the courts of Maryland in the distribution of the assets of insolvent building associations. The courts of the United States are not, for the sake of following the Maryland court, bound to do what the latter court has not seen fit to do.

"Fourth Conclusion of Law. That the petitioners are not entitled, because of their having given the notices of withdrawal which they did give, to any preference or priority in payment over the other full-paid stockholders of the defendant corporation who had not, before the appointment of the receiver in this case, given any notice of withdrawal.

"Reasons for the Fourth Conclusion of Law. There is a direct and irreconcilable conflict among the authorities as to the right of a member whose notice of withdrawal had matured at the time an insolvent association stopped business to be preferred over the other stockholders. It is believed, however, to be well settled that those members whose notices have not matured at the time of such stoppage of business stand on no different footing from those members who have not given any notice at all. It is the English cases which upheld the doctrine of the preference of the member whose notice had matured. Those cases are, however, quite as clear to the effect that one whose notice has not matured is entitled to no preference whatever. Thus in one case the by-laws required six months' notice of withdrawal. The notice was given on October 8, 1886. The association stopped business February 14, 1887, something over four months later. The member who gave it was entitled to no preference. In *re Sunderland*, 36th Universal Bldg. Soc. (1890) 24 Q. B. Div. 394; In *re Ambition Investment Bldg. Soc.* [1896] 1 Ch. 89. It has already been shown that the withdrawal notices of the petitioners in this case had not matured at the time the receiver was appointed.

"Fifth Conclusion of Law. That the petitioners, even if it were held that their notices of withdrawal had, under the by-laws, matured before the ap-



pointment of a receiver in this cause, are not, because of their having given such notices, and of the maturity of such notices, entitled to be paid in preference to the other stockholders who had given no notice of withdrawal.

"Reasons for the Fifth Conclusion of Law. It has already been shown that the question has not been decided in Maryland. I have been referred to no case in which it has been passed upon by a federal court, and my own research has not discovered any such case. It is useless to attempt to reconcile the cases elsewhere. It cannot be done. The conflict among them is direct. The court is therefore at liberty to adopt that rule which seems to it to be most nearly in accord with the principles of equity and the proper construction of the contracts between the parties. In England the authoritative case is that of *Walton v. Edge*, 10 App. Cas. 33, where the question was fully considered by the house of lords. Earl Selborne and Lord Blackburn, who delivered opinions, held that the whole question was one of the construction of the rules or by-laws. If by the by-laws the member upon expiration of his notice of withdrawal is entitled, if the association was a going concern, to be paid as soon as the funds permit, his right at the expiration of his notice becomes fixed, and is a right to be paid so soon as the funds suffice, after paying all claims upon them prior to his. Nothing that can subsequently occur, whether it be insolvency of the association or what not, can change his rights, or put any one ahead of him or upon an equality with him who was not ahead of him or who was not upon an equality with him when his notice matured. It follows that the English rule holds that members who have given notices of withdrawal have among themselves the right of preference in the order in which their notices of withdrawal mature. According to the English rule, assuming, for the sake of argument, that the notices given by these petitioners had matured at the time of the appointment of the receiver, they would still be postponed to the payment of all the other stockholders whose notices of withdrawal had matured prior to theirs. In *re Middlesborough, Redear, Saltburn-by-the-Sea*, and *Cleveland District Permanent Benefit Bldg. Soc.*, No. 2, 53 Law T. (N. S.) 203. Such is the English rule, and such, very briefly, is the reasoning upon which it rests. If it shall be adopted as the law by this court, the members who have given notices of withdrawal, and whose notices of withdrawal had matured at the time of the appointment of the receiver, would be entitled, after the payment of all the claims of outside creditors, to be paid in the order in which their notices matured, being preferred in that order to each other and to other stockholders otherwise in like case with them, but who had either given no notices of withdrawal, or whose notices of withdrawal, if given, had not matured at the time of the appointment of the receiver. The great weight of American authority holds the contrary doctrine, viz. that a member of a building society who has not been paid the withdrawal value of his stock loses all right to a preference in payment when assets of an insolvent association are taken in charge by a court of equity for distribution among those having claims on them, and this in spite of the fact that his notice of withdrawal had matured before the winding up of the association had begun, and in spite of the fact that at the time he gave his notice of withdrawal and at the time it matured he had no knowledge or belief that the association was insolvent. The leading case on the subject is that which is usually known as *Christian's Appeal*, 102 Pa. 184. In this case, under by-laws which it would be difficult to distinguish in any important respect from those in force when the petitioners became stockholders of the defendant corporation, certain stockholders had given notices of withdrawal. Those notices had matured, and they had received orders on the treasurer for the payment of the withdrawal value of their stock. These orders had been given more than six months before the association made its assignment. The court held that the provisions in the by-laws of such associations providing for withdrawals implied that at the time such members received the withdrawal value of their stock there is left a reasonable proportion of the assets of the association for the other members, and when this is not so, as it is not when the association has become insolvent, they have lost all their right to a preference. And accordingly it was held that the stockholders who had given their withdrawal

notices, and whose withdrawal notices had matured, and who had received orders from the treasurer for the payment of the withdrawal value of their stock, were not preferred to other stockholders. It was said that had the association suffered losses, resulting from bad investments made after they withdrew from the association as active members, they would not be required to stand any share of such losses, but in that case, as in that of the petitioners in this case, the evidence did not show that any such losses after withdrawal had in fact occurred. The same conclusion was reached by the court of appeals of Kentucky in *Reddick v. Association*, 49 S. W. 1075. There the court said that, looking beyond the mere language of the by-laws and statutes, it is manifest that these withdrawal contracts are provided for with respect to going concerns only. *Forwood v. Eubank* (Ky.) 50 S. W. 255. The supreme court of Missouri, in the case of *Hohenshell v. Association*, 140 Mo. 566, 41 S. W. 948, followed and approved the decision in *Christian's Appeal*, and held distinctly that, if the association was insolvent at the time the notice of withdrawal was given and accepted, the stockholder giving such notice had, on the subsequent winding up of the association by a court of equity, no preference over those stockholders who had not given any such notice. To the same effect is the decision of the supreme court of Illinois in the case of *Gibson v. Association*, 48 N. E. 580, which approves the earlier case in the appellate court of Illinois of *Chapman v. Young*, 65 Ill. App. 131. The same doctrine has been upheld by the supreme court of Iowa in the case of *Rabbitt v. Wilcoxon*, 103 Iowa, 35, 72 N. W. 306, 38 L. R. A. 183. Substantially the same doctrine was applied in the case of *Post v. Association*, 97 Tenn. 418, 37 S. W. 216, 34 L. R. A. 201. There the stock of one of the members had been declared matured. He was entitled to receive its par value. He did not actually draw it, and the association afterwards went into the hands of receivers, and it appeared that at the time his stock was declared matured, in point of fact, had he been charged with his proper share of losses, it would not have been matured. It was held that he was entitled to no preference. *End. Bldg. Ass'ns* (2d Ed.) § 514, says: 'The truth is that there is implied in the very essence of the building association scheme an agreement between the members of every association, in the light of which all other agreements and rules and by-laws must be read, and to which they must be conformed, and that is the agreement that all burdens shall be equally borne, as all profits equally shared; that the whole enterprise shall be concluded, and the rights and obligations of the participants in it shall be adjusted upon a basis of strict mutuality, equality, and fairness. \* \* \* There is nothing in the mere fact that one has given a certain number of days' notice that he wants his money whereby he is, ipso facto, invested with an equity to receive it prior to that of one who has not given such notice. There is therefore nothing to counterbalance, much less to outweigh, the inequitableness of permitting him to take the fund belonging to his fellows in order to pay himself. \* \* \* In short, the order prescribed by the by-laws of a building association for the payment of money out of its treasury to the different classes of holders of ordinary stock in the regular course of its business does not apply to the distribution of its assets when insolvent.' The other recent text-books—that is to say, *Thomp. Bldg. Ass'ns* (2d Ed.) § 148, and *Thornt. & Bl. Bldg. & Loan Ass'ns* (2d Ed.) § 329—do little more than state the different decisions without apparently recognizing their hopeless conflict. No American cases have been cited to me in which the precise question involved in this appeal was expressly decided in conformity with the English rule. In the case of *Moore v. Association*, 50 S. C. 89, 27 S. E. 543, the supreme court of South Carolina held that a member who had given notice of withdrawal could maintain an attachment against the assets of an insolvent building association. The case was very similar to that of *Association v. Price*, 88 Md. 155, 41 Atl. 53, 42 L. R. A. 206, and, as in that case, was very possibly decided rightly upon the pleadings as they stood. The defense made by the association in the South Carolina case was the purely technical one that a member of the association could not sue the association at law, being a partner in it. To this technical defense the technical answer that the withdrawal terminated

the membership and converted him from a debtor to a creditor was held a sufficient reply. A very similar ruling was made in the case of *Association v. Silverman*, 85 Pa. 394. But *Silverman's Case*, if construed to support the English doctrine in the case of an insolvent building association, was expressly overruled in the subsequent case of *Christian's Appeal*, 102 Pa. 184, already cited.

"After all the reasoning of the English and American courts is boiled down, it comes very much to this: The American courts say that it is clear that the provisions of the by-laws were not intended to apply to insolvent associations. The provisions of the by-laws governing withdrawals, like many of the provisions of the by-laws with reference to borrowing members, are obviously intended and are equitably applicable only so long as the association is a going concern, from which all the members may ultimately hope and expect to receive approximately equal benefits. The English courts say that the by-laws do not provide that members whose notices of withdrawal have matured before the association has ceased doing business shall upon its subsequent ceasing to do business be deprived of the right to be paid in full. If the members had wanted to provide for such a contingency, they could have done so. If they had not done so, the courts will enforce their agreements as they find them. One argument is, perhaps, as strong as the other. The real question to be considered, therefore, by this court, is which rule would practically be the most equitable, and the least liable to abuse. Members who have given notice of withdrawal are distinguished from the other members of the association merely by that fact. They are entitled to no extra privileges, because they are exposed to no extra burdens over those of all their fellow stockholders. They have given their notice of withdrawal. If they actually get their money before the association goes into the hands of the courts, they are, in the absence of fraud, entitled to maintain the advantage they have thus gained. It is admitted that when the association goes into the hands of a receiver the right to give further notices of withdrawal ceases. Why should not the right cease as well to be paid on notices of withdrawal already given? Equality is equity. There is no reason in the nature of things why one stockholder who has not gotten his money out of the association should get any larger share of his money from the association than any other stockholder, unless there was some specific contract or some special equity in his case that gives him the preference. Nor will a court of equity be ready to construe doubtful provisions of the by-laws into a specific contract giving one shareholder such an inequitable preference over his fellows. Nor can courts of equity ignore the practical consideration that if the rule be laid down that members whose notices of withdrawal have matured before the winding up of the association begins shall be preferred over other stockholders, in the long run, and in nine associations out of ten, the practical effect will be that those persons who have the best means of knowing what the condition of the association is (that is to say, the officers and employees of the association, and their friends) will, in the distribution of its assets, be preferred to the great body of the stockholders, and especially to those who are poor and ignorant, and who will not have given notices of withdrawal. Nor can the courts, if they apply the English doctrine, escape from the practical consequence of it by laying down the rule that such notice shall not create preference if the person who gave it, at the time he gave it, had reason to believe that the association was insolvent. An inquiry as to whether a member giving such notice knew of the insolvency would always be troublesome, would from the nature of the issue to be determined give rise to a state of feeling calculated to impede the cheap and speedy winding up of the association, and would usually be unproductive of any clear and certain result. The safe and equitable rule, as it seems to me, is that which has in the last few years received rapid and almost general recognition from the American courts, and that is that if a member gives a notice of withdrawal which matures when the association is actually insolvent, although its insolvency may not be known or suspected by the person giving such notice, and before the member giving the notice is paid the withdrawal value of his stock, the association ceases to do business

and is wound up in equity as an insolvent corporation, such member has no priority over other stockholders."

Joseph B. Seth, for intervening petitioners.

Russell & Winslow, Richard S. Culbreth, Morton Schaeffer, Fielder C. Slingluff, and Randolph Barton, for defendant association and its receivers.

MORRIS, District Judge. I concur in the reasoning and conclusions of the special master as set forth in his very learned and carefully prepared report. I overrule the exceptions and confirm the report, and will sign an order denying the claim of the intervening petitioners to be paid in preference to other stockholders who had given no withdrawal notice.

**GOLTRANE v. BALTIMORE BUILDING & LOAN ASS'N OF BALTIMORE CITY.**

**In re TWINING et al.**

(Circuit Court, D. Maryland. June 17, 1901.)

**1. BUILDING AND LOAN ASSOCIATIONS—DISTRIBUTION OF ASSETS IN INSOLVENCY—STATUS OF HOLDERS OF FULL-PAID STOCK.**

A building and loan association, having the power to do so, issued what was called "full-paid stock," the subscribers for which paid in the full par value in cash, and were entitled to receive and were paid interest or dividends thereon semiannually at a fixed rate. Installment stock was also issued, on which no interest or dividends were ever credited or paid. The holders of both classes of stock were entitled to withdraw on giving a stated notice, and on such withdrawal holders of full-paid stock received back what they had paid in, and holders of installment stock the amount paid in, with interest. Both classes of stock carried the right to vote and to participate in the management of the association, without distinction between them. *Held*, that the holders of full-paid stock were stockholders, and not creditors, and, on the winding up of the association in insolvency, were entitled to no preference in payment over the holders of the installment stock.

**2. SAME.**

Holders of full-paid stock issued by a building association as authorized by its by-laws, who have received interest on the same at a fixed rate as provided by its terms, cannot question the legal authority of the association to issue such stock after its insolvency, in order to establish their status as creditors instead of stockholders, and entitle them to a preference over other stockholders in the distribution of the assets.

**3. SAME—RECOVERY OF DIVIDENDS PAID.**

After a building association has become insolvent, and its affairs are being wound up and its assets distributed by a court of equity, holders of full-paid stock who have received fixed dividends or interest thereon in accordance with their contract cannot be required to refund the same, or be charged with the amount so received in such distribution, although the other stockholders have received no dividends; but, for the purpose of fixing the amount of the claims of each class of stockholders, interest should be computed on the full-paid stock from the date of the last payment to the time the proceedings were instituted, and upon the amount paid in by each holder of ordinary or installment stock for the average time it was held by the association, at the rate fixed by the by-laws in case of withdrawal.

**In Equity.** In the matter of the intervening petitions of S. Fannie Twining and Eunice A. Pearce. On exceptions to report of John C. Rose, special master.

The hearing before the special master was at the instance of the petitioners, Mrs. Twining and Mrs. Pearce, who are holders of the so-called full-paid stock of the Baltimore Building & Loan Association of Baltimore City. The matter came on to be heard before the special master upon the issues raised by the petitions of Mrs. Twining and Mrs. Pearce. These petitions alleged that the petitioners, as holders of the full-paid stock, were entitled to be paid out of the assets of the association the full par value of their stock before the holders of any other classes of stock could be paid anything on account of such other stock. On the 21st day of March, 1901, the special master filed his report, in which he set forth his conclusions in 84 findings of fact and in 9 conclusions of law. The substance of such of the findings of fact as are at all material to the questions raised by the exceptions filed by the petitioners to the special master's report may be stated as follows: The Baltimore Building & Loan Association is a Maryland corporation, incorporated under the general incorporation laws of that state. It has always, from its first incorporation, issued, among other classes of stock, a full-paid stock. Persons subscribing for such stock paid for it its full par value in cash at the time of their subscription. Upon such stock issued in the earlier years of the association's operations the association undertook to pay and did pay 8 per cent. per annum interest or dividend, payable semiannually. On full-paid stock issued in the later years of the association's existence it contracted to pay, and did pay, 6 per cent. per annum, payable semiannually. The petitioners are the holders of full-paid 8 per cent. stock, for which they paid full par value, and upon which they received 8 per cent. interest or dividends. The original by-laws adopted by the association provided for the issue of such stock, which provision, with the difference above mentioned as to the rate of interest or dividend, has, in substance, been retained in all subsequent revisions of the by-laws. No profits were ever apportioned among any of the shares of the installment stock, or credited to the account of any installment stockholder. Installment stockholders who withdrew their stock during the existence of the association received back from the association what they had paid in to it on account of such stock, together with 6 per cent. interest for the average time their money had been in the possession of the association. The holders of full-paid stock participated equally with the holders of the installment stock in all stockholders' meetings, and the holders of full-paid stock were eligible to be elected, and in one case at least were elected, directors of the association. One of the intervening petitioners had been herself represented by proxy at several of the stockholders' meetings of the corporation. The total number of shares of stock issued by the defendant corporation never equaled the number of shares it was authorized by its charter to issue. The association had been in fact insolvent since January 1, 1900, and a receiver for it was appointed by this court on the 21st of March, 1900. The special master's principal conclusions of law, with his reasons in support of them, were in substance as follows:

"First Conclusion of Law. That, if the defendant corporation had the legal power to make the contracts it assumed to make with the intervening petitioners, the latter became, and still are, stockholders in the defendant corporation.

"Reasons in Support of the First Conclusion of Law. The intervening petitioners, over their signatures, applied for membership in the Baltimore Building & Loan Association of Baltimore City, and subscribed for a definite number of shares of its full-paid stock. The defendant corporation received their applications, subscriptions, and money. It issued to them certificates that they were entitled to the number of full-paid shares of its stock for which they had paid, and that such shares were transferable on the books of the company in person or by attorney. These certificates bore on their face the statements that they were full-paid and nonassessable, and that the shares were \$100 each. All this is the familiar language of the stock certificates of most stock companies. Each of those issued by the defendant corporation further declared: 'This certificate redeemable six [or twelve] months after date, subject to the provisions of the by-laws of the association. Thirty days' notice of intention to redeem being nec-

essary.' Such a provision is usually, in substance, with more or less variation of phrase and detail, to be found on the stock certificates of building associations. 'The mere naming of a thing does not make it that which it is named, if in fact it is something else.' *Heller v. Bank*, 89 Md. 611, 43 Atl. 800. But, when you are trying to find out what the parties did, it may often help you to find out what they thought they were doing. In *re Guardian Permanent Ben. Bldg. Soc.*, 23 Ch. Div. 462. The so-called certificates of stock contained another statement which is said to show that, whatever the parties called them, they were not in fact certificates of stock at all, and the persons who held them were not stockholders. The statement in question was: 'This certificate bears eight per cent. interest, payable semiannually July and January.' Stock does not bear interest. When reference, however, is had to the by-laws under which the certificates were issued, it appears that the semiannual payments to be made on the full-paid stock are in the by-laws always called 'dividends,' and never 'interest.' The use of the latter word in the certificate seems to have been merely a blunder of the officials charged with their preparation. Even if the word 'interest' was intentionally used, the argument of the intervening petitioners that the papers thereby show on their face that they are not certificates of stock, but are evidences of indebtedness, is not convincing. If stock does not bear interest, it is equally true that no binding contract can be made in Maryland to pay eight per cent. interest. Nor is there anything in any of the by-laws of the defendant corporation which as much as suggests that the holders of the full-paid stock are anything other than stockholders. They were allowed to vote at stockholders' meetings, and many of them, including one of the intervening petitioners, did vote, at least by proxy. They were eligible to be elected to office, and they were so elected. It is true that they received a definite dividend on their stock, and would not have been entitled to any more, no matter how great the profits of the defendant corporation might have turned out to be. But such a contract between corporations and the holders of certain classes of their stock is not uncommon. 1 *Cook, Corp.* § 269; *Hamlin v. Railroad Co.*, 24 C. C. A. 271, 73 Fed. 670, 36 L. R. A. 826; *Mercantile Trust Co. v. Baltimore & O. R. Co.* (C. C.) 82 Fed. 365; *Birch v. Cropper*, In *re Bridgewater Nav. Co.*, 14 App. Cas. 525. It has never been held that this limited right of participation in profits was inconsistent with the status of stockholders. In this case the holders of such of the full-paid stock as was issued early in the history of the association bargained for eight per cent. per year, to be paid them semiannually, before the installment stockholders received anything. If the association had been uniformly successful, it is true that the holders of installment stock would have obtained about ten per cent. per annum. Such associations are not always successful. In the light of the experience of this and other associations of a like kind, it is impossible to argue that the share of profits which the holders of the paid-up stock were to receive was so small that it could not be reasonably supposed that they would have been willing to have assumed the liabilities of stockholders. Not a cent of interest or dividends has ever been paid on any share of installment stock now outstanding, while the intervening petitioner Mrs. Pearce has received one thousand one hundred and seven dollars and eleven cents (\$1,107.11) as dividends, equivalent to a little more than fifty-five per cent. on her original investment. There is no question that if the holders of the full-paid stock were stockholders, and nothing more, the defendant corporation would have had no power to pay them their eight or their six per cent. dividends out of anything but its profits. The intervening petitioners say that in the by-laws and certificates of stock there is no limitation or qualification of the undertaking to pay these dividends. If this were true, the sufficient answer would be that the law forms a part of all contracts. No one can take stock without being charged with notice of the fact that the corporation's promise to pay a dividend upon it is subject to the condition imposed by law that the dividend shall have been first earned. The contention of the intervening petitioners on this point does not, however, appear to the undersigned to be well founded in fact. The by-laws of the defendant corporation show that the dividends on the full-paid stock were

to be paid out of the earnings or profits, and their payment out of anything else was in effect forbidden. In discussing the soundness of this conclusion of law it is not necessary to consider whether by the contract between the association and the holders of full-paid stock such holders were, in the event of the insolvency of the association, entitled to receive back the par value of their stock before anything was payable to the holders of installment stock. That question will be considered in connection with the eighth conclusion of law. The holders of full-paid stock might have such a preferential right, and still be stockholders and not creditors. *Hamlin v. Railroad Co.*, 24 C. C. A. 271, 78 Fed. 670, 36 L. R. A. 826.

"Second Conclusion of Law. That the defendant corporation had lawful power at the respective times at which it issued stock to the intervening petitioners to issue the number of shares of stock which it did in fact issue.

"Reasons in Support of the Second Conclusion of Law. By the amended certificate of incorporation the defendant corporation was authorized to issue not exceeding two hundred and fifty thousand (250,000) shares of its capital stock. The aggregate number of shares issued by it from first to last did not exceed one hundred and fifty thousand (150,000).

"Third Conclusion of Law. That the laws of Maryland do not prohibit a building association from accepting from its members the payment in advance of some or all of the installments to become due upon their stock.

"Reasons in Support of the Third Conclusion of Law. By section 95 of article 23 of the Maryland Code of Public General Laws, a building association is authorized to 'regulate the installments to be paid on each share provided the same shall not exceed the sum of \$1 per share per week, and the times at which the same shall be payable.' There is in this matter no other restriction upon the power of the association. It very possibly could not compel the payment of dues in advance if the effect was to make a member pay more than \$1 in any one week on any one share of its stock. There is absolutely nothing, however, to prevent the member from offering and the association from accepting payments in advance if both parties desire so to do. It has been a common practice of building associations in this state to accept dues in advance when the members wished to pay them in that way. There seems no difference in principle between accepting some dues in advance and accepting at one time the payment in advance of all the dues.

"Fourth Conclusion of Law. That, when the stock of a building association is or becomes full paid, the holder thereof does not necessarily, under the Maryland law, cease to be a stockholder in the association.

"Reasons in Support of the Fourth Conclusion of Law. Some of the authorities in other states have held that when the stock of a building association becomes fully paid up or matured the holder of such stock ceases to be a member of the association, and becomes a creditor. *Eversman v. Schmitt*, 53 Ohio St. 184, 41 N. E. 139. It is not necessary to discuss these authorities. It is sufficient to say that in Maryland it has been expressly decided that the holders of full-paid stock are still stockholders in the association, and that their stock is still outstanding as stock. *Tax Cases*, 50 Md. 320.

"Fifth Conclusion of Law. That the intervening petitioners cannot now question the legality of the issue of stock to them by the defendant corporation on the ground that the said defendant corporation had no legal authority to promise to pay to them semiannual dividends at the rate of eight and six per cent. on the par value of their stock.

"Reasons in Support of the Fifth Conclusion of Law. The corporation did not, as has been seen, by the issue of the stock subscribed for by the intervening petitioners, exceed the number of shares it was authorized to issue. It is not necessary in this case to decide whether it would have been in the power of any stockholder of the defendant corporation to have prevented, by apt legal proceedings seasonably taken, the issue of full-paid stock. No such attempt was made. In the original by-laws of the association provision was made for the issue of this stock. In the organization of the corporation holders of full-paid and of installment stock participated. There is nothing in the law of Maryland which expressly prohibits the is-

sue of stock with the rights and attributes of the full-paid stock issued by the defendant corporation. It is true that section 294 of article 23 of the Maryland Code of Public General Laws provides how the preferred stock issued as prescribed in that section of the Code can be made a lien on the property and franchises of the corporation. But no attempt was in this case made to issue any such stock, or to give it any such rights and privileges. Stock issued with the formalities of record and otherwise provided for in that section has a lien upon the property and franchises of the corporation superior to that of its creditors. No such stock could be given such properties without compliance with all the requirements of that section. It does not follow, however, that because the legislature provides for that peculiar kind of preferred stock, and says how that kind of preferred stock shall be issued, it is to be understood as prohibiting the issue of all other kinds of preferred stock. It certainly does not follow that formalities prescribed largely, if not altogether, for the purpose of protecting creditors, must necessarily be followed before there can be validly issued a stock by the issue of which the rights of creditors could not possibly be affected. In Maryland, therefore, there is no statute either expressly authorizing or prohibiting the issue of such stock as was issued by the defendant corporation to the intervening petitioners. Under such circumstances, when the stock was, as in this case, issued contemporaneously with the original inception of the enterprise, the overwhelming weight of authority holds that the issue is within the corporate powers. 1 Cook, Corp. 268; *People v. Preston*, 140 N. Y. 549, 35 N. E. 979; *In re South Durham Brewery Co.*, 31 Ch. Div. 261; *Lockhart v. Van Alstyne*, 31 Mich. 76, 85, 18 Am. Rep. 156. Nor is there any reason why this general rule of law should not be held applicable to building societies. Sir George Jessel, with that vigor and clearness of thought and statement which so eminently characterized him, said on this very subject: 'I do not think it the province of the judicature to find out things to be inconsistent with the ordinary requirements of mankind which the people themselves have not found out. It is all very easy for people to say it is against the policy or against the meaning of these societies; but when you see that people who have established the society do not think so, and have acted on a contrary view, it is very improbable that it is contrary to the nature of the society, and contrary to the objects the members have in view. But, besides that, I cannot see any reason why it should be so.' *In re Guardian Permanent Ben. Bldg. Soc.*, 23 Ch. Div. 464. If in the face of all this high authority it should be assumed that the association was not authorized to classify its stockholders, who can complain? Obviously only those persons who were or who might have been injured by such classification. Creditors of the corporation could not have objected. They were not concerned, directly or indirectly, in the manner in which the stockholders of the defendant corporation divided its profits among themselves. The question as to in what manner and in what proportions the defendant corporation should divide its profits among its stockholders is one in which nobody but those stockholders themselves are interested. It appears that from the beginning of the association paid-up stock was issued under the same terms as those under which the stock held by the intervening petitioners was issued. No objection to such issue was ever made by anybody prior to the appointment of receivers in this cause, which was nearly nine years after the original formation of the association. It is true that on one occasion a redeemed installment stockholder, who had, however, been previously a holder of full-paid stock, did in certain legal proceedings contend that the issue of paid-up stock with a fixed rate of dividend took from the corporation its purely mutual character, and therefore subjected the contracts between it and its borrowers to the same rules of law as those to which ordinary contracts of borrowing and lending between strangers are subject. It will be noticed, however, that even in this case no question was raised as to the legality of the issue of the stock, or of the agreement to pay the dividends in question. Indeed, it was assumed that such stock was legally issued, and that the contract to pay the dividends was a legal contract. From that assumption it was sought to deduce certain legal consequences. It is now too late for the intervening petitioners to



question the binding force upon them of the contract actually made. There is a well-recognized distinction between those contracts which a corporation has no power to make, and the doing in an irregular way of those things which the corporation has the power to do. In the latter class of cases the contract is binding upon the corporation and its stockholders who have acquiesced with knowledge in the irregular proceedings, and have acted upon and taken benefits under them. *Scoville v. Thayer*, 105 U. S. 154, 26 L. Ed. 968; *Kent v. Mining Co.*, 78 N. Y. 159; *Branch v. Jesup*, 106 U. S. 468-481, 1 Sup. Ct. 495, 27 L. Ed. 279.

"Sixth Conclusion of Law. That the payments made as dividends to the intervening petitioners, or any of them, by the defendant corporation, cannot now be recovered back from the intervening petitioners.

"Reasons in Support of the Sixth Conclusion of Law. The court of appeals of Maryland has declared that a building association 'is bound to treat its members equally,' and any 'by-law or contract made by it in contravention of such mutuality would be ultra vires and void.' *Baltimore Building & Loan Ass'n v. Powhatan Imp. Co.*, 87 Md. 64, 39 Atl. 274. It has been suggested by counsel representing some of the installment stockholders that when the defendant corporation paid dividends to the holders of full-paid stock, and paid none to the holders of installment stock, it did not treat all its members equally, and that consequently the by-laws and contracts providing for such payments were, in the language of the court of appeals, 'ultra vires and void.' It is significant, however, that in the very case quoted the court of appeals had the by-laws of this particular association before it, and while it certainly had no occasion directly to pass upon the validity of the issue of this full-paid stock, and of the promise to pay fixed dividends upon it, it is quite obvious that it did not strike the court of appeals that such provisions were in any wise invalid or improper. However this may be, this is a case where, for the same reasons as those set forth under the previous conclusion of law, it is now too late for the installment stockholders to attack the payments of dividends which have been made to the holders of full-paid stock. When the by-laws were adopted the holders of the installment stock supposed that their returns from their investment would be considerably greater than those which would go to the holders of the full-paid stock. It has turned out that they will not be. But the holders of the full-paid stock, in agreeing to accept and in accepting the dividends they did in lieu of all other share of the profit, gave full consideration for the payments which were made to them. They were to get all their dividends semiannually. The holders of the installment stock, if for any reason their stock was paid off before its maturity, were to get six per cent. interest for the average time the association had their money. If their stock was not paid off until it matured, they were to get their full share of all the profits of the association, no matter how great the latter might have been. The holders of the full-paid stock had the right to collect semiannually some part of their claim against the association. They have collected it. They cannot now be required to account for it, although, of course, its payment necessarily reduces the amount of their claim against the association. Had it not been collected they would now have a right to ask the association for the amount of their stock, with interest or dividend upon it for all the time the corporation held it. The interest or dividend upon it has been paid to the 1st of January, 1900, and consequently their claim against the association is only for the par value of their stock, with interest on such par value from the 1st of January, 1900, to the 21st of March, 1900, when the association passed into the hands of the receivers. The person who succeeds in securing the payment of some part of his claim before the corporation becomes insolvent has simply reduced his claim by the amount of such payment. In the absence of fraud or of such an unlawful preference as might be cognizable in a court of bankruptcy, he cannot be required to account for that which he was entitled to get if he could, and which, when he did get it, became his.

"Seventh Conclusion of Law. That there is nothing in the by-laws of the defendant corporation, or in the certificates of stock issued by it to the intervening petitioners, which promises to the latter payment of either the

par or the withdrawal value of their stock out of the assets of the defendant corporation in preference to the payment to the holders of installment stock of the withdrawal value of such installment stock.

"Reasons in Support of the Seventh Conclusion of Law. The intervening petitioners claim that the by-laws of the defendant corporation and the certificates of stock it issued to them give them the right to be paid in full out of its assets before the holders of the installment stock are entitled to be paid anything. They rely upon the following provisions of the by-laws, viz.: 'Holders of paid-up stock can never be assessed or called upon for any payments other than the \$100 per share for which such stock is sold, and in withdrawing it will receive the full \$100 on each share, with interest up to the date of withdrawal.' So much of the above-quoted by-law as declares that the holders of paid-up stock can never be assessed or called upon for any payments other than the \$100 per share for which such stock is sold has no bearing upon the matter in hand. It is merely one way of saying that the stock is full-paid and nonassessable, as of course it was. The defendant corporation had received its full par value in cash, and by the law of Maryland there was no further liability upon its holders. The other portion of the by-law quoted, viz. that which says that holders of the paid-up stock 'in withdrawing it will receive the full \$100 on each share, with interest up to the date of withdrawal,' is an agreement binding upon the defendant corporation. The defendant corporation, however, has made other agreements also binding upon it. It has undertaken to pay to the holders of installment stock issued prior to July 1, 1896, upon withdrawal, 'the amount paid on such shares, together with a dividend thereon at the rate of six per cent. per annum for the average time.' The question to be determined, therefore, is not whether the association has bound itself to pay to the intervening petitioners what the latter claim, for, assuming the contract to be valid, there is no doubt that it has, but whether there is anything in the contracts it made with the installment stockholders to distinguish those contracts from the contracts it made with the holders of paid-up stock. If there be no such distinction, the case presented is simply the common one of an insolvent corporation having bound itself to pay more than can be realized from its assets. If that is the whole situation, of course the familiar doctrine that equality is equity must control. The holders of the full-paid stock assert, however, that there is a distinction between the contracts held by them and the contracts held by the installment stockholders. They say that by a proper construction of the by-laws all losses are to be charged to the installment shares. The provision of the by-laws referred to reads as follows: 'If the undivided profits on hand at any time are not sufficient to pay any loss that may occur, the balance shall be charged up to the shares in good standing pro rata in proportion to the value thereof; and, if any share is withdrawn, the amount so charged will be deducted from the amount due on such share.' It will be perceived that the application of this by-law is not by its terms limited to the installment stock, but is broad enough to cover all classes of stock. The intervening petitioners contend, however, that this by-law has always formed part of the article devoted to withdrawals; that many of the provisions of the article on withdrawals are applicable, and only applicable, to installment stock; and that therefore no part of such article has any application whatever to any stock but installment stock, and, as a consequence, that the by-laws intend that all losses shall be charged to the installment stock. I have not been able to see that their contention is well founded.

"Eighth Conclusion of Law. That the intervening petitioners are not entitled in the distribution of the assets of the defendant corporation to any preference or priority over the holders of installment stock.

"Reasons in Support of the Eighth Conclusion of Law. If the preceding conclusions of law are correct, the defendant corporation did not promise to the holders of full-paid stock that they would have any preference over the other stockholders in the event that the distribution of the assets of the corporation among its stockholders should, by reason of insolvency or otherwise, become necessary. Under such circumstances the unquestioned rule

of law is that the holders of preferred stock are not entitled, in the event of a dissolution of the corporation, to any preference in the return of their capital over the holders of common stock. 1 Cook, Corp. § 278; 2 Beach, Corp. § 507; *Birch v. Cropper*, *In re Bridgewater Nav. Co.*, 14 App. Cas. 525; *In re London India-Rubber Co.*, L. R. 5 Eq. 519; *McGregor v. Insurance Co.*, 33 N. J. Eq. 181. How unbending this rule is appears from the decision in the matter of the London India-Rubber Company, above cited. In that case the promoters of the company had received considerable stock in return for certain patent rights. They had contributed no money, and, as it turned out, nothing else of any real value, to the corporation. All the capital had been furnished by the holders of preferred stock. Yet the articles did not provide for any preference in the distribution of capital of preferred over common stockholders, and the court with great reluctance held that, in spite of the actual inequity of the application of the rule to the facts of the particular case, it must be so applied. The intervening petitioners in this case have not the equities with them. They and the other holders of paid-up stock have alone among the present shareholders of the corporation received from it anything. Some of them who have held stock for a number of years, it may be, have already received back nearly, if not quite, as large a proportion of the money paid in by them as it will now be possible to return to the installment stockholders, even provided that the paid-up stockholders are held not to be entitled to any preference. If the full-paid stockholders are given the preference for which they ask, it is possible that the holders of installment stock will receive nothing at all. The net result in that event would be that the very classes for whom building associations exist would lose all they had out of their monthly savings contributed to it, while the better to do, who had taken paid-up stock, would get all they put in, with interest. Building associations, of late years, especially, have very commonly issued full-paid stock. In one reported case, if not more, there was an express contract that in the event of the dissolution of the corporation the paid-up or preferred stockholders should be preferred in the distribution of capital. In that case, of course, there was nothing to be done but to give them the right for which they had bargained. It may be worth while to quote the language of the rules of the association referred to, for the purpose of showing how easy it is to make the right to such a preference perfectly plain, and by comparison to show how far short of declaring any such preference the by-laws of the Baltimore Building & Loan Association stopped. By the rule of the English society a holder of the paid-up share had a right to withdraw the whole or part of his deposit in preference to all other shares. It was further provided that if a loss should arise the board should direct a levy of such sum on every share as would cover all deficiency, provided that no levy of any sum should be made on or in respect of any paid-up share. *In re Guardian Permanent Ben. Bldg. Soc.*, 23 Ch. Div. 440. In one building association case in this country the court said that paid-up stock issued under similar terms to that of the defendant corporation was not stock at all, but that the so-called stock certificates were really evidences of debt. This was the case of *Cook v. Association*, 104 Ga. 823, 30 S. E. 911. In that case, however, the status of the full-paid stock was only incidentally before the court. A borrowing member who had paid a premium in addition to the legal rate of interest on his loan had alleged that such payment was usurious. In Georgia it had been previously decided that premiums might be lawfully charged by building associations which were purely mutual. The borrowing shareholder in this case sought to escape the effect of those decisions by setting up the claim that this association, having shareholders who were to get a fixed rate of interest in any event, was not a purely mutual association, but was really, in part at least, a mortgage loan company. It was under these circumstances that the court held that the so-called paid-up shareholders were not shareholders of the corporation, but were its creditors. The United States circuit court for the Northern district of Georgia, when the same question as that which is now before this court was presented to it in the recent case, decided on the 8th of November last, of *Alexander v. Association*, 110 Fed. 267, held that the full-paid stock

was not entitled to any preference or priority, but that in the distribution of the assets of the corporation it should participate in proportion to its par value, and the installment stock in proportion to the withdrawal value of the latter. As to the installment stock, the undersigned has already, in the matter of the intervening petition of Charles G. Blake, made a like report. The federal court sitting in the same state, and winding up a Georgia corporation, did not conceive itself bound by what the state court said in the case of *Cook v. Association*. Wherever else the question has directly come before the courts in this country the decisions have been of like effect. *Hohenshall v. Association*, 140 Mo. 566, 41 S. W. 948; *Gibson v. Association*, 170 Ill. 46, 48 N. E. 580; *Leahy v. Association*, 100 Wis. 535, 76 N. W. 625. The same rule has been laid down by the federal circuit courts of three circuits, viz.: Circuit court for the Northern district of Illinois, in *Towle v. Association*, 75 Fed. 938; circuit court for the Western district of Missouri, in *Latimer v. Investment Co.*, 81 Fed. 776; and, as before stated, the circuit court for the Northern district of Georgia in *Alexander v. Association*, decided on November 8, 1900. I can find in this country no decisions to the contrary; nor is the English rule different, except that in England the power of an association to give a preference in distribution of its capital to its full-paid stock is recognized and enforced, when such preference is clearly and unequivocally given. The American decisions suggest at least that they would hold that the corporation had no power to give such preference, even if it had clearly attempted so to do. If the construction which in this report has been placed upon the certificates of stock and by-laws of the defendant corporation is correct, it is not necessary in this case to inquire whether such a preference would have been valid had the association sought to give it. In *End. Bldg. Ass'ns*, § 514, it is said, 'Nor, again, is there any room for question \* \* \* that holders of priority or preference stock are to be preferred' to ordinary members. It appears, however, from the authority cited by the learned author, namely, *Murray v. Scott*, 9 App. Cas. 519, that by 'priority or preference' shares he means shares which have been issued under an express contract that they shall be preferred in the distribution of assets in the event of winding up. None of the American cases in which the question now before us has been considered had been decided when the last edition of *Endlich* went to press. *Thomp. Bldg. Ass'ns* (2d Ed.) § 128, also says that upon the winding up of the affairs of the association in the hands of a receiver the holder of paid-up stock is entitled to recover the amount advanced by him ahead of the other members. The American authorities which the learned author cites in support of this proposition in fact decide precisely the opposite, while in the English case upon which he relies (*Murray v. Scott*, 9 App. Cas. 519) the preference was expressly bargained for.

'Ninth Conclusion of Law. That a decree should be passed by which it should be ordered, adjudged, and decreed that the amount of the claims of the said intervening petitioners, respectively, against the defendant corporation, was on the 21st day of March, 1900, the par value of the stock held by them, with interest thereon from January 1, 1900, to March 21, 1900, and that neither of the said intervening petitioners is entitled to be paid the amount of their said respective claims, or any part thereof, in preference to the payment to the installment stockholders of the amount paid in by said installment stockholders, respectively, as dues upon their said stock, with interest thereon for average time to the 21st day of March, 1900, but that the said intervening petitioners and the said installment stockholders shall, in proportion to their said respective claims, share equally in the distribution of the assets of the said defendant corporation, and that it should be further ordered, adjudged, and decreed that the costs of these intervening petitioners shall be paid by the receivers of the said defendant corporation out of its assets.'

'Reasons in Support of the Ninth Conclusion of Law. On the 21st of March, 1900, had the defendant corporation been then a going concern, and had the intervening petitioners on that day withdrawn their stock, it would have been bound to pay to them the par value of their stock, with eighty days' interest thereon; that is, interest from the 1st day of January, 1900, up to

which time they had received their dividends, to the 21st day of March, 1900. Now, they did not withdraw their stock on the 21st of March, 1900, but on that day the defendant corporation went into the hands of receivers, to be wound up. In legal effect, what happened on the 21st day of March, 1900, was equivalent to the compulsory withdrawal of all the members. Opinion of the Earl of Selborne in *Brownlie v. Russell*, 8 App. Cas. 235. It follows that on the 21st of March, 1900, the defendant corporation would have been bound to pay to the holders of the installment stock the amount paid in on such stock, with interest thereon for the average time the association had had the money. In adjusting the equities between the different classes of stock, and between the holders of the same class of stock who became holders at different times, there seems no fairer way than to follow the rules laid down by the association itself, and acquiesced in by all its members. By these rules the claim of the installment stockholders when they withdrew was not only for the amount they had paid in, but for interest thereon for the average time the association had had their money. This rule has a peculiar equity in this case, where the holders of the paid-up stock have already received an equivalent, and in some cases more than the equivalent, of this interest in full. Its allowance to the installment stockholders now will allow to them only the dividend they will receive upon it. The rule here followed is that adopted by the United States circuit court for the Northern district of Georgia in the recently decided case of *Alexander v. Association*. It is eminently fair, for it simply says that every stockholder shall be entitled to prove his claim against the association for that amount which the association promised to pay him. The association cannot keep its promise to him in full, but it must come as near doing it in the case of one of its stockholders as in the case of any of the others. A question could be raised as to what was the withdrawal value of the installment stock issued subsequent to July 1, 1896. By the terms of the by-laws such stock, 'if withdrawn before thirty-six months' installments had been paid upon it, would be entitled to receive back but five-sixths of what had been paid in upon it, without interest. When the holder of stock upon which not less than thirty-six nor more than forty-eight installments had been paid withdrew it, he was entitled to get back all that he had paid in, without interest. Upon the withdrawal of stock upon which forty-eight or more payments had been made, the holder was entitled to receive the full amount paid in, with interest for the average time. The insolvency of the defendant corporation has, without the consent of the holders of any of the installment stock, caused all of it to be practically withdrawn as of date of March 21, 1900. Under such circumstances, it seems most equitable to treat all the installment stock alike, and to hold that the withdrawal value of all of it is the amount paid in on it, with interest for the average time."

The intervening petitioners excepted to the first, fourth, fifth, seventh, eighth, and ninth conclusions of law.

Henry A. Whitaker, James Hewes, and Henry C. Kennard, for intervening petitioners.

Fielder C. Slingluff, for Baltimort Building & Loan Association.

Richard S. Culbreth, for complainant.

Thomas Foley Hisky and Morrill N. Packard, for certain holders of installment stock.

MORRIS, District Judge. The conclusions of the special master may be summarized as follows: (1) Holders of the paid-up stock are stockholders of the defendant corporation, and are not its creditors. The defendant corporation had power to issue paid-up stock, and the holders of that stock cannot now question that it had such power. (2) Neither the corporation nor the holders of other classes of stock can now recover back from the holders of the paid-up stock the interest or dividend which has been heretofore paid the holders

of such paid-up stock. (3) Neither the by-laws nor the certificates of paid-up stock provide that the holders thereof shall be paid in full in preference to installment stockholders in the distribution of the assets of the corporation. Holders of paid-up stock are not entitled to any preference over the holders of installment stock. Distribution is to be made pro rata between both classes alike. Interest to be calculated on the paid-up stock from the date of the last payment of interest or dividend upon it, and on the installment stock for the average time the association has held the money paid in on such installment stock.

Counsel on behalf of the paid-up stockholders have, with great earnestness and industry, urged upon the court that the report of the special master denies to them rights to which they are entitled by the contracts made between them and the association. It is admitted that, in most of the cases in this country in which holders of paid-up stock in insolvent building associations have asserted a claim to preferential payment out of the assets, their right so to do has been denied by the courts. It has been here argued, however, that the contracts in such cases could be distinguished from those at bar. In argument much reliance was placed by the counsel for the paid-up stockholders upon the decision of the supreme court of Georgia in the case of *Cook v. Association*, 104 Ga. 815, 30 S. E. 911. The special master has pointed out in his report that the United States circuit court for the Northern district of Georgia has, in the recently decided case of *Alexander v. Association*, 110 Fed. 267, declined to regard the decision in *Cook's Case* as conclusive of the point now in controversy. It so happens that, three days before the exceptions to the master's report were argued before me, Judge Lumpkin, of the superior court of Georgia, who had presided at the trial of the case of *Cook v. Association*, was called upon, in the case of *Robinson et al. against the Southern Mutual Building & Loan Association*, to pass upon the question now before me. The auditor had held that the holders of paid-up stock were creditors, having reached that conclusion because he felt himself controlled by the decision in the case of *Cook v. Association*. Judge Lumpkin points out that the rights and status of the paid-up stockholders were only collaterally involved in the decision of *Cook v. Association*; that case having been, as the special master shows in his report, a controversy between a borrowing stockholder and the association as to the proper method of accounting between them. Judge Lumpkin further calls attention to the fact that in *Cook's Case* not only had the holder of paid-up stock the right to withdraw it, but the association reserved the right to call it in or redeem it. This right was not reserved by the defendant association in the present case. Judge Lumpkin says:

"I should hesitate long before holding that a number of people can join a building and loan association, take shares in it (regardless of whether they pay in advance or by installments), call themselves 'shareholders,' have the privilege of voting as such, be subject to the by-laws, and in fact be part and parcel of a concern which has no right to exist and do business and make loans on the usual plan of building and loan associations, without coming in conflict with the usury laws of the state, except on the basis of mutuality and equality, and yet, when the enterprise fails, discover that

they are creditors, with the right of priority of payment of the full amount of their share."

He adds:

"While the substance rather than the form is to be regarded in determining whether a certificate represents a debt or shares of stock, yet what the contracting parties call the paper, and what they intended and meant it to be, and the duties and rights conferred by them upon the holder of it, furnish indicia as to its nature."

I concur in these views. Nearly all building associations draw up their by-laws and make their agreements upon the assumption that they will succeed. They promise to each class of persons with whom they seek to do business those things which are likely to prove most attractive to people so situated. When disaster overtakes the association each class of its stockholders insists that the association shall be required to carry out its contract with them, no matter what happens to its agreements with the other classes of stockholders. In any such case, to enable any class of stockholders successfully to assert a right to be paid in full in preference to other stockholders, they must rest their claim upon a positive, unambiguous contract, specifically giving them that priority. A court of equity, when winding up an insolvent association and distributing its assets, is compelled to look at all the engagements into which the association has entered. If the association has undertaken to do more than its assets will enable it to do, the court must apportion its assets among those having claims upon it in conformity with the principles of equity. The court of appeals of Maryland, speaking of this defendant association, said:

"As a mutual association based on the mutual plan, it is bound to treat its members equally, and any by-law or contract made by it in contravention of such mutuality would be ultra vires and void. While we are of opinion that an examination of all the by-laws must be made to ascertain their meaning and effect, we must not allow too much weight to attach to any one alone, so that it shall unduly preponderate against the other." *Baltimore Building & Loan Ass'n v. Powhatan Imp. Co.*, 87 Md. 59-64, 39 Atl. 274.

It does not seem to me that the contract of the paid-up stockholders in this case gives them the right to be paid in full in preference to the installment stockholders, and that to allow them to be so paid would be inequitable.

For these reasons, I will sign a decree overruling the exceptions and confirming the special master's report, and dismissing the petitions of the full-paid stockholders; the costs to be paid, in accordance with the recommendation of the special master, and for the reasons by him stated, out of the general assets of the association.

**COLTRANE v. BALTIMORE BUILDING & LOAN ASS'N OF BALTIMORE CITY.**

In re BLAKE.

(Circuit Court, D. Maryland. June 17, 1901.)

**1. BUILDING AND LOAN ASSOCIATIONS—DISTRIBUTION OF ASSETS IN INSOLVENCY—LAW GOVERNING.**

Building and loan associations are the creatures of state statutes, by which their powers and the validity and effect of their contracts are measured; and the mutual rights and obligations of the shareholders of such an association, when it becomes necessary to wind up its affairs and distribute its assets through a court of equity, must be determined by the law of the state of its domicile, where such law has been authoritatively declared by its courts.

**2. SAME—ACCOUNTING WITH BORROWING MEMBERS—STOCK PAYMENTS.**

Under the law of Maryland, settled by decision since 1878, a borrowing shareholder in a building association incorporated in that state cannot be required to contribute to the losses of the association, where his contract has been terminated and his loan matured by the winding up of the association before the maturity of his stock, but in such case he is entitled to credit on his loan for the full amount paid on his stock; and a case is not taken out of the rule because the by-laws of the association provide that losses in excess of undivided profits shall be charged pro rata against the shares in good standing, such provision being for the purpose of determining the withdrawal value of the shares in case of foreclosure or voluntary settlement by the borrower, or the number of payments required to mature his stock, and having no reference or application to the enforced maturing of his stock and loan through the insolvency of the association.

**3. SAME—PREMIUM PAID.**

Where a building association becomes insolvent and is wound up, and the loan of a borrowing shareholder is thereby matured, contrary to its terms, equity requires that each party to the contract be restored as nearly as possible to the position occupied when it was made. The stockholder should be charged with the money received and interest thereon, and credited with all payments made as premium or interest, but he is not entitled to credit for admission fees or fines paid.

**4. SAME—USURIOUS PREMIUMS—MARYLAND RULE.**

The Maryland statute of 1894 providing that it shall be lawful for building associations to collect premiums in installments (Acts 1894, c. 321) does not affect the question whether a premium contracted to be paid is usurious, and under the decisions of the court of appeals of the state a premium arbitrarily fixed without competition, although payable in installments, is in fact only a form of usurious interest and illegal, and the borrowing shareholder is entitled to have the installments paid credited as partial payments on his loan.

In Equity. In the matter of the intervening petition of Charles G. Blake. On exceptions to report of John C. Rose, special master.

The hearing before the special master was at the instance of the petitioner, Blake, who is one of the advanced or borrowing stockholders of the Baltimore Building & Loan Association of Baltimore City; and the matter came on to be heard before the special master upon the issues raised by Blake's petition, and by the answer of the association and its receivers, and upon their cross petition, and was for the purpose of declaring the proper rule for ascertaining the amount now justly due by Blake and by the other advanced shareholders to this insolvent association, the assets of which are now in the hands of receivers appointed by this court, and which is being wound up under its orders. It being obvious that the declaration of the rule of settlement with the petitioner, Blake, would practically affect the



rights of all the stockholders, the special master, in pursuance of the general order of reference to him, gave notice to all stockholders who had filed intervening petitions that he would sit to hear argument on all the questions of law involved in Blake's petition in which they were severally interested. The special master did, in accordance with this notice and subsequent notices, sit from time to time from June, 1900, to October, 1900, giving opportunity to all the intervening petitioners, by their respective counsel, and to the counsel of the complainant and of the receivers, to present their respective contentions both orally and by printed briefs. On the 30th of January, 1901, the special master filed his report, in which, with great care and particularity, he has clearly and learnedly set forth his conclusions, in 71 findings of fact and in 14 conclusions of law, with the reasons therefor. The substance of such of the findings of fact as are at all material to the questions raised by the exceptions filed by Blake and others to the special master's report may be stated as follows: That the Baltimore Building & Loan Association was incorporated under the general laws of Maryland, by a certificate of incorporation recorded April 1, 1891, which was subsequently amended April 20, 1893. That by-laws were adopted which were from time to time amended as in said findings set forth. That Blake, by application in writing, subscribed November 16, 1892, for 10 shares of installment stock of said association, and on November 22, 1892, made application for a loan of \$1,000, which was granted to him upon the security of a deed of trust of certain real estate situate in Tucker county, W. Va. That Blake had paid to the association on said 10 shares 87 monthly payments of \$6 each, as stock dues from December, 1892, to February, 1900, amounting to \$522, and also, as premium and interest, \$10 per month, which were receipted for without distinguishing how much was premium and how much was interest, and amounting February, 1900, to \$863.32; and he also paid an admission fee of \$10. That subsequently, May 17, 1895, Blake procured another loan of \$300 on the three shares of stock upon the same security, and made similar proportionate payments on said three shares. That, under the by-laws in force when these loans were made, a fixed charge of 50 cents a month per share, as premium, was made to all borrowing shareholders, irrespective of whether the applications for loans were in excess of funds on hand or not; the premium not being influenced or affected by competition for loans among shareholders. That no profits were ever apportioned among any of the shares, or credited to the account of any shareholder. That by the bonds executed by Blake, and by the deeds of trust, he agreed to pay upon each share advanced to him 60 cents as dues, 50 cents as interest, and 50 cents as premium per month per share until each share should be fully paid in, and of the par value of \$100. That, if the association had proved to be a continuously successful concern, its stock would have matured in about 105 months, and the advanced shareholders would have paid about 13 per cent. per annum for the use of the money advanced to them, and the investment installment stockholders would, under the same circumstances, have received as a return on their money the equivalent of 10 per cent. per annum, compounded monthly.

The master finds, as a conclusion of law, that when, on March 21, 1900, on account of the insolvency of the association, the court appointed receivers of its assets for the purpose of winding up its affairs and equitably distributing its assets, the contracts between the association and its borrowing stockholders became impossible of performance, and that the borrowing shareholders by the now undisputed rule of law were entitled to treat their contracts as matured, and to be presently released upon adjusting upon principles of equity and fair dealing the amounts due by them. The special master held that with regard to the question whether the monthly payments of premiums were legally exacted or not this court was bound to follow the decisions of the court of appeals of Maryland, in so far as it had passed upon that question, because this was a Maryland contract, made with a Maryland corporation, whose charter depended upon the statutes of Maryland, and that the decisions of the state court construing those statutes were controlling in the federal court. The court of appeals of Maryland having decided in the case of *Geiger v. Association* (1882) 58 Md. 569, that an agreement to pay a

weekly premium in addition to 6 per cent. interest was not authorized by the law of Maryland, and was by the law of Maryland usurious, and having held in *White v. Williams* (decided March 21, 1900) 90 Md. 719, 45 Atl. 1001, with regard to this defendant association, that at the date when Blake's first mortgage was executed there was no law in Maryland authorizing the payment of a weekly premium in addition to legal interest, the special master held that the weekly payments exacted from Blake were usurious, and must by the law of Maryland be credited as payments on the advance to him. The special master in his report dealing with the second loan made to Blake, and which was made subsequently, holds, as a conclusion of law, that even upon shares advanced and mortgages made since the passage of the act of 1894, c. 321, the payments of weekly premiums are usurious, and are to be credited as payments upon principal. The act of 1894 (chapter 321) provides that building associations, instead of receiving the whole amount of such premium as might be agreed upon in advance, or deducting the whole amount of such premiums from the amount advanced, might agree with the borrower that he should pay the premium in such installments as might be agreed upon. The special master, in a very able presentation of the law in support of his sixth conclusion of law, points out that the line of decisions in the Maryland court of appeals, extending through more than 40 years, has held that, although a premium in the nature of a competitive bonus between members of a building and loan association who are bidding for a loan may be lawful, a fixed premium exacted, which is in no way to be distinguished from usurious interest, has never been sanctioned; and the court of appeals of Maryland has constantly declared that the rate of interest agreed to be paid on the sum advanced cannot lawfully exceed 6 per cent. The special master points out the facts from which the conclusion is to be deduced that the exaction of weekly payments of premium, fixed and uniform, from all borrowers alike, and having no relation to the demand for money among the shareholders, and without competition, is usurious in states where the law does not expressly legalize it, and in which statutes forbid taking above a fixed and less rate of interest. The special master, under his seventh conclusion of law, holds that when an insolvent building and loan association is being wound up in an equity court, and the contract under which the advance was made has become impossible of fulfillment, and the effort is equitably to adjust the relations of the parties so as to put them, as near as they reasonably can be, in the position in which they were when the contract was made, the great weight of authority supports the rule of settlement by which the advanced member is credited with the money paid the association under the special contract in accordance with which the money was advanced to him, and that therefore both interest and premium, having been paid in his capacity of borrower, are to be credited to him in full, without rebate for any portion of the premium. By his eighth conclusion of law the special master held that the court of appeals of Maryland, in the cases before it in which it ruled that in a settlement with an insolvent or winding-up building and loan association the borrowing shareholder must be credited with stock dues paid by him, had never had a case in which it was made to appear that the by-law contained an express provision that all shares should be charged pro rata with losses, and that therefore there is no Maryland decision which has held, in a case similar to the present case, that the borrowing stockholder must be given credit for the payments made as dues upon stock. And by his ninth conclusion of law, and the reasons in support of it, the special master held the weight of authority in the United States to be in favor of the doctrine that the shares of stock pledged for the advance are like other shares, in this: that they must bear their pro rata share of all losses, and that the borrower can only obtain credit for their value after an ascertainment of the distributive share of the assets to which all shares are entitled. In the special master's report he has stated his principal conclusions of law and his reasons as follows:

"First Conclusion of Law. That on the 21st day of March in the year 1900 the said receivers of the said defendant corporation became entitled to demand from the said Charles G. Blake the immediate payment of such sum as would in equity discharge the said intervening petitioner from all liability

to the said defendant corporation or its receivers for or on account of the two advances made him, and Charles G. Blake became entitled upon payment of the said sum to the said receivers of the said defendant corporation to demand and receive from them a full release.

"Reasons in Support of the First Conclusion of Law. The intervening petitioner bound himself by the bonds and deeds of trust he gave to the defendant corporation to pay to it monthly the sum of \$1.00 upon each share of its stock upon which he had received an advance, until said share became fully paid in, and of the par value of \$100. Before any one of the said shares had become of the par value of \$100 the said defendant corporation became insolvent. This court, through its receivers, took possession of the corporate assets for the purpose of winding up the affairs of the corporation and of equitably distributing the assets. On the 21st day of March, 1900, it therefore became evident that no one of the shares of stock upon which the intervening petitioner had received an advance would ever become of the par value of \$100. Only three ways of dealing with such a situation are logically possible: (1) The bonds and deeds of trust do not in terms provide that the insolvency of the corporation shall terminate the payments which the intervening petitioner bound himself to make. If he be held to the literal performance of his undertaking, he will be required to pay forever the monthly installments of dues, premiums, and interest. (2) The purpose of the contracts made by the intervening petitioner has become impossible of fulfillment by something which the law can regard as the default of the defendant corporation. He may therefore be treated as discharged from the obligation of his bonds and deeds of trust, without being called on to account for the money which on the faith of those bonds and deeds of trust the corporation paid to him. (3) The contracts between the parties have become impossible of performance, and therefore neither party can call upon the other to do anything under them. But each party on the faith of these contracts has already done something, and has acquired rights against the other not arising out of the contract, but resulting from the things actually done. These rights it is the duty of the court to protect and adjust upon principles of equity and fair dealing. When such adjustment is made the net sum due by the one to the other is presently payable, and upon its payment all securities given for the performance of the contracts are necessarily to be surrendered up to be canceled. The first of the above enumerated solutions of the problems created by the insolvency of the defendant corporation would be grossly unfair to the intervening petitioner; the second, to the defendant corporation. The third involves in theory no injustice to any one, whatever doubt and difficulty there may be as to its practical application. It has accordingly been universally adopted, and is now the settled and undisputed rule of law. *Weir v. Association*, 38 Atl. 643, 56 N. J. Eq. 234; *Kemp v. Wright*, L. R. [1894] 2 Ch. 462; *Association v. Zucker*, 48 Md. 448; *End. Bldg. Ass'n* (2d Ed.) p. 518.

"Second Conclusion of Law. That, in stating the account between the intervening petitioner and the defendant corporation arising out of each of the loans or advances made to him, he should be charged with the amount of said loan or advance, with interest at the rate of six per centum per annum thereon from the date at which loan or advance was made.

"Reasons in Support of the Second Conclusion of Law. The money which the intervening petitioner received as a loan or advance was not his. The contract under which he received it having been abrogated, it never became his. He must, in equity and good conscience, return it. He has had the use of it since it was paid him. It is just that he should pay as compensation for the use of that money what the law holds to be the reasonable worth of such use; that is to say, legal interest thereon. All the cases agree as to the soundness of this conclusion of law, however widely they may differ on other questions. *Association v. Zucker*, 48 Md. 448; *Strohen v. Association*, 8 Atl. 843, 115 Pa. St. 273; *Towle v. Society* (C. C.) 61 Fed. 446.

"Third Conclusion of Law. That, if the premium of fifty cents per share per month exacted of the intervening petitioner by the defendant corporation was illegally exacted, the intervening petitioner is entitled to have the amounts paid by him as such premium credited on his loan as of the date when made, according to the rule governing the application of partial pay-

ments, whatever rule for the settlement of the accounts between the defendant corporation and the intervening petitioner shall be adopted, and whether the defendant is insolvent, as it is, or were solvent and actively engaged in the prosecution of its business, as it is not.

"Reasons in Support of the Third Conclusion of Law. As will be seen hereafter in the discussion of the reasons for the seventh conclusion of law, the great weight of authority holds that when a building association becomes insolvent its advanced members are entitled to credit for all the premiums paid by them, whether such premiums were or were not legally exacted. The leading case of the few which take a different view is *Towle v. Society* (O. C.) 61 Fed. 446. By that decision, and by those which follow it, the premiums paid by advanced members are apportioned upon the theory that some part of them had been equitably earned by the association prior to its becoming insolvent. For those portions which had been so earned the advanced members are held not entitled to any credit, while they are given credit for such portions as had not been earned by the association up to the time of its ceasing to do business. As was pointed out by the circuit court of appeals for the Sixth circuit, no question of apportionment can arise unless the premium was lawfully exacted, and when the premium was not lawfully taken it followed, in the language of the court, that all of it must be 'credited against the loan.' *Douglass v. Kavanaugh*, 33 C. C. A. 107, 90 Fed. 374. In an able and ingenious brief which Mr. Culbreth, of counsel for the receivers, has filed with the special master, it is argued that, even if it be held that the defendant corporation had no legal power to demand the premium it did demand from the intervening petitioner, still the intervening petitioner is not now entitled to have such premium in effect repaid to him by crediting its amount upon his loan. It is said that the relations between building associations and their members are such that any contracts made between them cannot be usurious, in the strict sense of that term. It is admitted that a building association cannot enforce any contracts into which the legislature has not given it power to enter. But it is said that, if the other party nevertheless makes payment under such unenforceable contract, he cannot recover back that which he has paid under a mistake of the law. Usury may be recovered back, because its collection was in defiance of the settled policy of the state. It is urged that premiums which the association had not been given power to demand cannot be recovered, because their collection, if illegal at all, was illegal only in the sense that the law had failed to confer upon the association any power to enforce their payment. If without such power the association actually succeeded in collecting them, Mr. Culbreth asserts that there is no legal warrant for compelling their return to the members who paid them. If this were a question of first impression, it might be sufficient to say that the reasons which have led legislatures to put limits upon the legal powers of building associations to accept premiums, when such limits have been in fact imposed, are precisely the same reasons, good or bad, which have inspired all statutes against usury, and that therefore they should be given precisely the same effect as would be given to the prohibitions against usury. The matter is not, however, one of first impression. It has been decided over and over again, and always in the same way. A long line of building association cases in Maryland has determined that premiums illegally exacted from the advanced members by the association are usurious. Being usurious under the law of Maryland, and the entire transaction of which their payment was an incident not having been finally closed, they must be credited on the principal. *Association v. Hayes*, 61 Md. 597; *Same v. Hilleary*, 68 Md. 52, 11 Atl. 505. In this respect the Maryland law is not peculiar. Everywhere throughout the country the courts have refused to recognize the distinction sought to be made by Mr. Culbreth. Wherever the association took more interest than it was authorized to take, no matter by what name it called the excessive exaction, or whether such exaction was illegal because in terms forbidden, or was illegal merely because the statute had not given the association power to take it, such interest has uniformly been treated as usury, and has been dealt with in whatever way the local statutes and decisions required that usury should be dealt with. *Falls v. Building Co.*, 13 South. 25, 97 Ala. 417, 24 L. R. A. 174; *Association*

*v. Wilcox*, 24 Conn. 147; *Wilcoxon v. Smith*, 78 N. W. 217, 107 Iowa, 555; *Association v. Kidder*, 58 Pac. 798, 9 Kan. App. 385; *Association v. Johnson*, 10 S. W. 787, 88 Ky. 191, 3 L. R. A. 289; *Sullivan v. Association*, 12 South. 590, 70 Miss. 94; *Moore v. Association*, 74 Mo. App. 468; *Melville v. Association*, 33 Barb. 103; *Association v. Keeney*, 77 N. W. 442, 57 Neb. 94; *Mills v. Association*, 75 N. C. 292; *Bates v. Association*, 42 Ohio St. 655; *Kupfert v. Association*, 80 Pa. 465; *Association v. Bollinger*, 12 Rich. Eq. 124, 78 Am. Dec. 463; *Graham v. Association* (Tenn. Ch. App.) 52 S. W. 1011; *Jackson v. Cassidy*, 4 S. W. 541, 68 Tex. 282; *Crabtree v. Association*, 29 S. E. 741, 95 Va. 670; *Pfeister v. Association*, 19 W. Va. 676; *Rhodes v. Loan Co.* (Ill. Sup.) 50 N. E. 998, 42 L. R. A. 93.

'Fourth Conclusion of Law. That in determining whether the premiums exacted from the intervening petitioner by the defendant corporation, and paid by him to it, were legally exacted, this court will follow the decisions of the courts of Maryland.

'Reasons in Support of the Fourth Conclusion of Law. The defendant is a Maryland corporation. It derives its existence from the laws of Maryland, and has no powers other than those conferred upon it by those laws. The construction which the court of appeals of Maryland places upon the statutes of Maryland is binding on this court. It is clearly settled that the decision of state tribunals as to what contracts are under the state laws usurious are binding upon the federal courts. Whenever the latter have been called on to determine whether a premium charged by a building association has been legally exacted or not they have uniformly recognized that the state decisions are binding upon them. *Brower v. Insurance Co.* (U. S. circuit court for the Western District of North Carolina, *Simonton, J.*) 86 Fed. 748; *Douglass v. Kavanaugh*, 33 C. C. A. 107, 90 Fed. 373 (C. C. A., Sixth Circuit). The rule was affirmed and applied by the circuit court of appeals for the Eighth circuit, which said, 'If we were at liberty to consider this case upon principle, and apart from the laws of Alabama, we might find it difficult to answer counsel's contention. But the validity and legal effect of this contract must be tested by the laws of Alabama, and the decisions of the supreme court of that state construing those laws, and not by the laws and decisions of other states. Applying that test, we find that under the laws of Alabama, as construed by the supreme court of that state, the contract in suit is not usurious.' *Association v. Rector*, 38 C. C. A. 686, 98 Fed. 171.

'Fifth Conclusion of Law. That the premium of fifty cents per share per month exacted from the intervening petitioner by the defendant corporation, and paid by him to it, upon the advance of \$1,000 made to him on the 21st day of December, 1892, was illegally exacted from him, and the demand and payment thereof were in the nature of the demand and payment of usurious interest; and the loan then made not having been finally settled, and the transaction closed between the parties, the intervening petitioner, independent of the insolvency of the defendant corporation, or of what rule shall be adopted for the settlement of accounts between the advanced members and the insolvent corporation, is entitled to a credit on said loan for such premium when and as paid, in accordance with the rule governing the application of partial payments.

'Reasons in Support of the Fifth Conclusion of Law. Prior to the enactment of the act of 1894 (chapter 321) the authority of a building association to exact a premium was derived from the provisions of sections 6 and 7 of chapter 148 of the Acts of 1852, codified as sections 98 and 99 of the Code of Public General Laws (1888). These sections authorized the association to make an advance to a member for such premium as might be agreed upon. They did not authorize it to take security for the payment of any other than the unpaid installments on the shares redeemed, and interest at 6 per cent. on the money advanced. The court of appeals so held eight years before the charter of the defendant corporation was granted. *Geiger v. Association*, 58 Md. 569. *Geiger's Case* was followed in *White v. Williams*, 90 Md. 719, 45 Atl. 1001, argued before, but decided a few days after, the filing of the complainant's bill in this case. The mortgage before the court of appeals in the last-mentioned case had been made to the defendant corporation. It was there held that the act of 1894 had no effect upon contracts made prior

to its passage. Premiums taken subsequently to its enactment for advances previously made were equally illegal with those which had been collected before it became a law. Such premiums were therefore directed to be credited as partial payments on the original advance. Forty-six years ago the supreme court of Connecticut placed the same construction on statutory provisions substantially identical. *Association v. Wilcox*, 24 Conn. 147.

"Sixth Conclusion of Law. That the premium of fifty cents per share per month exacted from the intervening petitioner by the defendant corporation, and paid by him to it, upon the advance of \$300 made to him on the 21st day of June, 1895, was illegally exacted from him, and the demand and payment thereof were in the nature of the demand and payment of usurious interest; and the loan then made not having been finally settled, and the transaction closed between the parties, the intervening petitioner, independently of the insolvency of the association, and of whatever rule shall be adopted for the settlement of the accounts between the advanced members and the defendant corporation, is entitled to a credit on his loan for such premium when and as paid, in accordance with the rule governing the application of partial payments.

"Reasons in Support of the Sixth Conclusion of Law. The first Maryland statute authorizing the formation of building associations was the act of 1852 (chapter 148), and that act, except in so far as it was amended by the act of 1894 (chapter 321), is still, in substance, in force. The statute has always provided that the corporation may 'advance to any member thereof for such premium as may be agreed upon the sum which he would be entitled to receive upon the dissolution of the corporation \* \* \* or to purchase from any member thereof the shares or any number of shares of stock held by him at such price or sum as according to the articles of association such member may agree to receive.' Since 1894 it has been lawful to collect the premium in installments. All the enactments on the subject (that of 1894 as well as its predecessors) have expressly declared that the interest to be paid by the advanced member shall be at the rate of six per cent. per annum on the sum advanced. More than sixteen years before the charter of the defendant corporation the court of appeals of Maryland had decided that interest could be collected only on the sum actually advanced; that is to say, upon the sum the borrowing member received after the premium had been deducted. Thus, where, upon a nominal advance of \$3,600, \$900 was retained as premium, the court held that interest could be legally exacted on \$2,700 only, and that, it having been actually taken on \$3,600, the transaction had become usurious. *Society v. Taylor* (decided Feb. 11, 1875) 41 Md. 409. This case has never been qualified, or its authority questioned or shaken. The courts have always refused to permit any evasion of this law. In March, 1879, twelve years before the defendant corporation was chartered, the court of appeals held that where the unredeemed shares were required to pay but twenty-five cents per share a week, and the redeemed or advanced shares fifty cents a week, the extra twenty-five cents per share must have been charged for interest, and, if that were so, it was 'clear there has been usury taken.' *Association v. Jaacksch*, 51 Md. 198. In July, 1882, or nearly nine years before the defendant corporation received its charter, there was before the same court a building association contract legally indistinguishable from that made by the defendant corporation with the intervening petitioner. In that case the advanced member bound himself to pay fifty cents per share as weekly dues and thirty cents per share as weekly premium until the maturity of his stock. The premium of thirty cents per share was provided for by the association's constitution, and exceeded six per cent. on \$200, the amount actually advanced on each share, by nearly seven cents per week. The court said: 'In this case the word "premium," and the charge for it, can only be regarded as meaning interest, and, to the extent that the charge exceeds the rate of six per cent., it cannot be allowed.' *Geiger v. Association*, 58 Md. 569. Among other cases in which the court of appeals of Maryland has declared illegal schemes for securing more than six per cent. interest on the money actually advanced, are the following: *Association v. McCarthy*, 57 Md. 555, decided February 9, 1882; *Association v. Thursby*, 58 Md. 284, decided April 13, 1882; *Association v. Hayes*, 61 Md.

597, decided March 26, 1884; *Same v. Hilleary*, 68 Md. 52, 11 Atl. 505, decided December 9, 1887. The opinions in all of these cases, as the dates above given show, were announced years before the defendant corporation was organized. The same principle has been applied in the recent case of *Association v. McKenzie* (decided Feb. 18, 1897) 85 Md. 132, 36 Atl. 754. The contract passed on in the last-mentioned case was entered into subsequent to the passage of the act of 1894 (chapter 321). The court of appeals referred to that act, but did not suggest that its passage had in any wise restricted the scope and effect which had been given by prior decisions to the prohibition against taking more than six per cent. interest on the money advanced.

'It is, of course, clear that the practical effect of the contract between the intervening petitioner and the defendant association would have been precisely the same as it was under the contracts actually made had the advances been made to him on condition that he should continue to pay his regular dues on his stock, and twelve per cent. interest on the money advanced him. He would have paid precisely the same money at precisely the same time, and the money he paid would have been applied by the defendant corporation in precisely the same way. But, if the parties in their contract had called the premium 'interest,' its collection would have been clearly illegal. Did styling it 'premium' make it legal? For forty-eight years the general assembly of Maryland has been careful, in every revision of the building association law, to insert the provision that the interest to be paid shall be at the rate of six per cent. per annum. Was all this trouble taken to insure that the word 'premium' should be used in building association contracts instead of the word 'interest'? Even if this were a case of first impression, the respect which this court must have for the legislature of one of the states of the Union would prevent it from assuming that anything so useless and absurd had been done. The legislative purpose is plain. It is to protect the advanced member from any requirement to make a disproportionate contribution to the profits of the unadvanced members. This is not a case of first impression, however. In the long chain of decisions already cited, the highest judicial tribunal of the state of Maryland has said over and over again, in effect, that the legislature of its state intended by the proviso in question to limit to a sum equivalent to six per cent. on the sum advanced the collection from the advanced stockholder of anything the payment of which has the same practical effect as between the parties as the payment of interest would have. What the money so collected is called is immaterial. What it is, is the only question to be considered. A premium may be collected. Since the act of 1894 it may be paid in a lump sum or in installments. More than six per cent. interest cannot be taken. These provisions must be so construed as to give effect to each of them. How can this be done? In other words, what is the real distinction between a legal premium and illegal interest? The act of 1894, by legalizing the installment premium, and retaining the provision against excessive interest, demonstrates that such distinction is not to be found in the time and manner in which the premium may be paid. The evidence offered by the defendant corporation and its receivers is conclusive to the same effect.

'What follows? It is quite obvious that it does not follow, as contended by the receivers, that the premium exacted from the intervening petitioner was legal. To so hold would be to strike out of the statute the limitation upon the rate of interest which may be lawfully taken. That cannot be done. There is no escape, therefore, from the conclusion that a gross deducted premium otherwise indistinguishable from the premium paid by the intervening petitioner would be a premium which could not be lawfully taken or retained. It could not be, because to take it amounts to receiving interest at the rate of thirteen per cent. on the sum advanced, when the statute allows only six per cent. to be charged. On the other hand, it is, of course, true that the mere fact that the premium, when added to the interest, makes the advance in effect cost the borrowing member more than six per cent. per annum, is not conclusive of its illegality. To so hold would be to ignore those provisions of the statute which expressly authorize the taking of the premium. It is clear, therefore, that the rate of the premium does not determine its validity, any more than does the manner of its payment. Wheth-

er its taking is forbidden or permitted must, then, depend upon what it is given for. If it is paid merely for the use of money, it is forbidden. If its effect is to make the member obtaining the advance pay for that advance at a higher rate than six per cent. per annum. If it is compensation for a preference given the advanced member over some or all of his fellow members, it is permitted. The counsel for the receivers say that the premium paid by the intervening petitioner was paid not for the use of the money advanced to him, but for the preference given him in redeeming his shares before their maturity. It is admitted that there was no other preference than that necessarily involved in the redemption of the shares. It was expressly stipulated that at the time the intervening petitioner received his advance no other member was seeking one. The statutory limitation upon the rate of interest is by its terms applicable to advances made for the redemption of shares. To hold that such redemption is in itself sufficient to take the transaction out of the restrictions of the act, is in effect to construe the statute with the limitations in precisely the same way as it would be construed if those limitations were not in. This cannot be done. The borrowing member is not necessarily preferred when an advance is made to him. When he is preferred, it is not over those members who do not want to redeem their shares, but only over those who do, and are postponed to him. There can be no preference, except among competitors. The member who takes an advance confers a benefit on the member who does not want one. It is to the interest of the latter that all the money of the association shall be constantly out at interest. If it be idle, he and all the other members are losing the value of its use. The association is in theory of law a mutual one. It exists for the benefit of all its members, and, so far as may be, for their equal benefit. The counsel for the receivers contend that, while all this is true, yet the free shareholders can say to their fellow members: 'You want an advance, and we want you to have it. If you do not take it, no one else will, and we will all lose. Yet, as you want it and must have it, we will charge you in addition to that interest, which is the reasonable worth of its use, and which would be all that the law would suffer us to take from any one not a member of our association, an extra sum which we can legally exact from you because you and ourselves are fellow members of a purely mutual association.' If he replied that he could not see where the mutuality came in, they would explain to him that all the interest and all the premium he paid would go into the common fund, to be divided as profits, the practical result of which division would be that, while an outsider would borrow at six per cent., he would have to pay in the first instance perhaps fourteen per cent. and would then, because the association was mutual, get back enough of what he had paid to reduce the actual cost to him to about thirteen per cent.

"Such, in its last analysis, is the contention of the learned counsel for the receivers on this point. Because a building association is or ought to be a purely mutual society is no reason why it should be allowed to charge an arbitrary premium. It is in fact the most persuasive of all circumstances to show that no such premium should be permitted. Building associations may have other uses than those resulting from their mutual character. The method of repayment of their advances which their schemes permit may be of great benefit to certain classes of the community. In some localities it may be that it would not be economically possible to carry on such associations, and to make loans repayable in installments extending over a long period of time, unless they were permitted to charge more than the legal rate of interest. Where such conditions prevail the remedy must be sought from legislation. In a number of states statutes have been passed, of which that of Indiana is a fair type. It provides 'that it shall be competent and lawful for the borrower from such association to agree in writing upon a given rate of premium in addition to the interest to be paid upon each loan without bidding. All contracts heretofore made between any borrower and any such association for the payment of any premium with or without any bidding are hereby legalized. No premiums heretofore contracted for without bidding or to be contracted for under this section shall be deemed usurious.' Burns' Supp.



Ind. 1897, § 44631. Where such statutes exist, the only question remaining open is whether the legislature enacting them had power under the constitution of its state to do so. That question has been variously decided in different states, but is of no relevancy here, as the general assembly of Maryland has never attempted to pass any such law. In a number of cases in which building association contracts have been attacked as usurious, their validity has been upheld upon the ground that the nature of the transaction and the relationship between the parties was such that usury, in its old and strict sense, could not arise out of it between them. The result arrived at in most of these cases was, on the facts, right. It was true that the character of the contracts in the particular cases examined showed that they were not usurious. An excellent type of such a case is *Robertson v. Association*, 10 Md. 397, 69 Am. Dec. 145. It is probably not true that these courts ever intended to decide that no bargain made between the association and an advanced member could be usurious. If they did, they are to that extent no longer law, as the citation of authorities in the discussion of the reasons in support of the third conclusion of law demonstrates. In a few jurisdictions, of which Maryland is not one, the language of these early cases has been construed to mean that such an association can lawfully take any character of premium it sees fit to ask, and the borrowing member agrees to give. It is believed, however, that in every one of the states in which such doctrine exists there is either an entire absence of legislation upon the subject, or else, as is in such states more frequently the case, a statute like that of Indiana already cited, expressly declaring that no such contract shall be held usurious. Where such statutes exist and are constitutional, it makes no difference how the premium is fixed or how large it is, just because in those states it makes no difference whether the charge for interest is above the legal rate or not. It is not believed, however, that any well-reasoned case has ever held that where, as in Maryland, a statutory restriction has been placed upon the rate of interest which may be lawfully charged, an arbitrary premium in addition to the maximum legal rate of interest can be exacted. The special master has not been able to find a single such case under such a statute in which the point has been raised and decided adversely to the conclusions herein reached. It is very probable that even in Maryland some of the premiums which have been upheld were fixed arbitrarily, and not as a result of a competition in which one would-be borrower was preferred to another. But, if so, no objection was taken as to the absence of competition, and no decision on the subject was made. On the other hand, it has been held under statutes which are in substance similar to those of Maryland that all noncompetitive premiums are illegal and forbidden. *Bates v. Association*, 42 Ohio St. 655; *State v. Greenville Bldg. & Sav. Ass'n*, 23 Ohio St. 92; *State v. Oberlin Bldg. Soc.*, 35 Ohio St. 258. In a well-considered Tennessee case the court pointed out that it was not, under the constitution of Tennessee, in the power of the legislature to authorize a noncompetitive premium, because such a premium was nothing but usurious interest under another name. The same case holds that a competitive premium was in its nature a different thing from interest, and that the legislature could and had permitted its collection. *Patterson v. Association*, 14 Lea, 677. The same question is considered in *Wilcoxon v. Smith*, 78 N. W. 217, 107 Iowa, 555. Of course, there is no question that, where the statute directs that the premium shall be determined by competitive bidding, any other way of fixing it is illegal. *Myers v. Association*, 75 N. W. 944, 117 Mich. 389; *Moore v. Association*, 74 Mo. App. 468; *Stiles' Appeal*, 95 Pa. 122.

"The reason why a noncompetitive premium is not lawful, and that a competitive one is permissible, lies in the very nature and purpose of the original building association. Such associations were at first made up of persons who lived in the same neighborhood. They all knew each other, or had the means of easily learning all about each other, and about the property which was offered as security for advances. All or the large majority of them became members with the object of speedily obtaining through the association a home for themselves. Under such circumstan-

ces it was inevitable that in the earlier years of any such association there would always be more members seeking advances than there would be idle money in the treasury to loan to them. The association being mutual, every member who wanted an advance had as much right to it as any of the others; and yet, when more wanted an advance than could get, some rule of selection among them had to be adopted. There were only three ways of choosing among applicants: By order of application, by lot, or by giving the preference to that member to whom the advance would be of the greatest use. In theory, the last method was the one most in harmony with the purely beneficial and fraternal character of the association. Some of the members were so situated that they could wisely and prudently afford to pay more for an advance than others, just because they could use the money so advanced to greater advantage than could the others. If all the members acted with wisdom and discretion, each was the best judge of what he could afford to pay to get an advance at any particular time. He who needed the assistance most received it, and, in return for the preference his fellows accorded him, he, in the true spirit of mutuality and fraternity, contributed to the common stock the value he himself placed upon what he had received. The discussion of this subject in the best of the text-books leaves little to be added. End. Bldg. Ass'ns (2d Ed.) § 409. The interest of all the members of such associations, investing as well as borrowing, requires that the rule against arbitrary noncompetitive premiums shall be maintained. If the savings of the investing members are to be at once profitably and securely employed, there must be a constant and natural demand for loans. The fixing of an arbitrary premium, which is required of all under all circumstances, restricts the demand, and tends to result in the accumulation by the association of large sums of idle money. Such a condition of things must be costly, and may become disastrous. The managers are forced to go out and seek people who are willing to become members, take advances, and pay for them the rate which the association requires, thus reversing the natural order of things, under which the borrower should seek the lender. Now, it is only in special circumstances, and to persons peculiarly situated, that such a loan as the defendant corporation was willing to make can be of any advantage, costing, as it did, something more than twice the legal rate for money. When the agents of the associations are seeking borrowers, they often induce persons to enter into association contracts who ought not to do so. Such people soon become dissatisfied. They complain that they did not understand their bargain. They say, and doubtless not infrequently truthfully say, that its real meaning and effect were misrepresented to them. They claim that they did not become in any real sense members of the association, but were mere borrowers from it. They refuse to perform their contract, and the association becomes involved in litigation, expensive and harassing, and in the end dangerous. Moreover, when the association is seeking borrowers, instead of borrowers seeking the association, the latter does not and cannot scrutinize the security offered as it would do if the usual course of things had been maintained. Loans are made on insufficient security. Moreover, when the association is hunting the borrowers the expenses of management will be much greater proportionately than where the reverse is the case. To these three causes are due the insolvency of most of the building associations which have come to grief, and which have not suffered from the absolute fraud of their officials. It is quite evident that in the case before us all these three causes operated. They would have been far less effective had the association offered its money among its members at the legal rate of interest when there were not more applicants among the members than there was money to lend, or at such premium in addition to interest as the applicants might have fairly bid among themselves when there happened to be more applicants than there was money. The modern so-called national association, of which the defendant corporation was a type, is a very different thing from the original association with which the earlier cases dealt. The defendant corporation was to a considerable extent in fact, whatever it was in legal theory, a mortgage loan company. Capitalists

invested hundreds of thousands of dollars with it. For years some of them received eight per cent. per annum clear of all taxes, and others six per cent., on sums which varied from time to time, but averaged at all times upwards of half a million of dollars. Most of the free or investing stockholders did not join the association with any idea of ever becoming borrowers, and they never did. To them, if the association could be carried to an ordinarily successful conclusion, would have been paid ten per cent. compound interest. To carry on a business so extensively distributed over a great expanse of territory requires an extensive staff of permanent officials. Some of these, if the adventure is to have any chance of success, must be men of exceptional ability, whose services can be secured, if at all, only by the payment of large salaries. Many special attorneys, agents, appraisers, and so on, must be from time to time employed, and large traveling and other expenses incurred. All these profits, exceeding as they do the legal, and sometimes very greatly exceeding the market, rate for money, and all these expenses, must come out of the borrowing members. It therefore becomes necessary to so arrange the scheme of the association that the borrowing member shall be required to pay in any event for the use of the money of the paid-up and the free installment stockholders more than twice the legal rate of interest. If bad fortune comes, he must pay much more, but in any probable event he will have to pay at least that much. So far as concerns the relation of the paid-up stockholders to the borrowing members, the association as actually conducted was in no sense mutual. Under the system of arbitrary premiums at the rate charged by the defendant corporation, the relations between its borrowing and its investing installment stockholders were mutual only in one sense. It is to the advantage of each of them that the association shall succeed, because if it does succeed the free shareholders will get ten per cent. or more compound interest, and the advance shareholders will not have to pay more than thirteen per cent. If the maturity of the stock is protracted beyond the normal period, the rate of interest to be received by the free shareholders will be less, and the rate of interest to be paid by the borrowing shareholders will be greater. Upon principle and authority alike the premiums collected by the defendant corporation from the intervening petitioner were illegally exacted, and should be credited on his loan. The decision in the case of *Robertson v. Association*, 10 Md. 397, 69 Am. Dec. 145, has in this case been repeatedly cited as laying down principles which justified the exaction of arbitrary premiums, excessive interest, or any other demand which the association might make upon a member seeking an advance. In that case all that was decided was that the association might lawfully continue to charge six per cent. interest upon the full amount advanced until the maturity of the stock. In effect, that case decided nothing more than that the borrowing member had no right to claim credit on his loan for the payments of stock dues made by him when and as he made them. He could not claim to do this because he was a partner or a quasi partner with the free shareholders. Each of them had contracted to pay in their stock dues until the shares mature. The free shareholders were not entitled to draw interest on their stock payments, and consequently the borrowing shareholders had no right to receive interest on their payments upon the same account. It is clear that, if the borrowing members were allowed a reduction of interest on their loans on account of the payments made by them on their shares, they would in effect receive interest on those stock payments. To that they were clearly not entitled, and could not be so long as the association was a mutual institution. Whatever might have been said or argued from *Robertson's Case* in former years, it has not been possible since 1882, when the case of *Association v. McCarthy*, 57 Md. 555, was decided, to construe it otherwise than it has been above construed, and the year 1882 was nine years before the defendant corporation was chartered.

"Seventh Conclusion of Law. That, the defendant corporation being insolvent and in process of being wound up in equity, the intervening petitioner is entitled to have credited on his advances from the defendant corporation all the sums he has paid to the said defendant corporation as pre-

mum or interest for or upon said advances, or either of them, even although all of said premium and said interest had been legally exacted and collected.

"Reasons in Support of the Seventh Conclusion of Law. The contract of loan or advance has become impossible of fulfillment. It is rescinded, and all that it is possible to do is to restore the parties to the contract to the position in which they respectively were when they made it. As the only thing which passed from one to the other was money, this process of return can in theory be readily carried out. The corporation or its receivers can get back the money it lent to the advanced member, and he can get back the money he paid the association under the contract by which he borrowed it. If each pays or allows the other interest for the time during which it or he had any of the other's money in his possession, the parties will, in theory of law, be restored precisely to the position in which they were when they made the contract. It is true that in fact it may be the position of neither party will be precisely the same after the rescission is made and the repayments accomplished as it would have been had the contract never been entered into at all. The corporation, on the one hand, has supposed that the premiums paid to it had become in all events and for all purposes its property, and in making up statements of its profits it has assumed that these premiums had become irrevocably its own. Many members had, between the time when the intervening petitioner obtained his advance and the time when the receivers were appointed in this case, withdrawn from the association. The settlement made by the corporation with these withdrawing members would doubtless have been different had the corporation supposed that its title to the premiums which had been paid in by the petitioner and other advanced members was still uncertain, and subject upon a contingency to be defeated. On the other hand, the intervening petitioner and the other advanced members would doubtless have ordered their own affairs differently had they supposed that they might suddenly be called upon to repay at once, in a lump sum, that which they had not expected to be called upon to return, except in installments extending over a considerable period of time. Such circumstances are not susceptible of being made the basis of legal adjustment. The law has long ago determined that, in its eye, interest is full compensation for the use of money, and, if he who is entitled to receive money does not get it when he has a right to ask for it, his injury is made good if he finally receives it with interest for the time during which he should have had possession of it, but did not. Conversely, if one man has had the possession of money belonging to another, he has made that other whole when he gives him back his money with interest upon it. The overwhelming weight of authority supports the conclusion of law above stated. It is the well-recognized law in the following states: (1) Connecticut. *Curtis v. Association*, 36 Atl. 1023, 69 Conn. 6. (2) Indiana. *Marion Trust Co. v. Edwards Lodge Trustees*, 54 N. E. 444, 153 Ind. 96. (3) Georgia. *Association v. Goodrich*, 48 Ga. 450. (4) Iowa. *Wilcoxon v. Smith*, 78 N. W. 217, 107 Iowa, 555. (5) Kentucky. *Rogers v. Rains*, 38 S. W. 483, 100 Ky. 295. (6) Maryland. *Association v. Zucker*, 48 Md. 448. (7) Michigan. *Russell v. Pierce*, 80 N. W. 118. (8) Minnesota. *Knutson v. Association*, 69 N. W. 889, 67 Minn. 201. (9) Missouri. *Brown v. Archer*, 62 Mo. App. 277. (10) New Hampshire. *Bank Com'rs v. Granite State Provident Ass'n*, 68 N. H. 554, 44 Atl. 605. (11) New Jersey. *Weir v. Association*, 38 Atl. 643, 56 N. J. Eq. 234. (12) North Carolina. *Strauss v. Association*, 23 S. E. 450, 117 N. C. 308, 30 L. R. A. 693. (13) North Dakota. *Hale v. Cairns*, 77 N. W. 1010, 8 N. D. 145. (14) Pennsylvania. *Strohen v. Association*, 8 Atl. 843, 115 Pa. 273. (15) South Carolina. *Buist v. Bryan*, 21 S. E. 537, 44 S. C. 121, 29 L. R. A. 127. (16) Tennessee. *Rogers v. Hargo*, 20 S. W. 430, 92 Tenn. 35. (17) Texas. *Blakeley v. Association* (Civ. App.) 26 S. W. 292. (18) Utah. *Hale v. Thomas*, 59 Pac. 241, 20 Utah, 426. (19) Wisconsin. *Leahy v. Association*, 76 N. W. 625, 100 Wis. 555. And by the following federal circuit courts: Western district of North Carolina. *McIlwaine v. Iseley*, 96 Fed. 62; *Lauer v. Association*, 96 Fed. 775. Southern district of Alabama. *Manorita v. Trust Co.*, 101 Fed. 8. It is the rule approved in *End. Bldg. Ass'ns* (2d Ed.) p. 530, § 531. The authorities affirming and applying this

rule are now much more numerous and weighty than they were when the last edition of Mr. Endlich's book went to press.

"The only dissent from the above conclusion of law is to be found in *Towle v. Society (C. C.)* 61 Fed. 446, and in the few cases which follow that decision. In his opinion in that case, Judge Grosscup, sitting in the United States circuit court for the Northern district of Illinois, held that where an insolvent association was being wound up in equity, and a gross deducted premium had been paid, there should be an apportionment of the premium; the advanced member being credited with only that portion of it which had not been earned at the time the association went into the hands of receivers. It so happened that the Illinois statute assumed that eight years was the normal duration of a building association, and gave a statutory right to an advanced member who desired to pay off his advance before the maturity of his stock to demand on doing so the return of such portion of the premium as the period yet to elapse before the loan was eight years old bore to eight years. Judge Grosscup followed the analogy of this statute, and held that he would allow credit to the borrowing member only for that portion of the premium which, had the association been a going concern, the borrower would have had the right to demand should be returned to him had he withdrawn at the date the association became insolvent. Judge Baker, sitting in the United States circuit court for the district of Indiana, subsequently, in a case arising out of the winding up of the same building association as that in the course of which Judge Grosscup had made his decision, followed Judge Grosscup's ruling, as, indeed, every reason of courtesy, judicial comity, and expediency required he should. *Sullivan v. Stucky (C. C.)* 86 Fed. 491. It has never been applied by any other of the federal courts. It has not as yet been adopted by the courts of last resort of any of the states, although it has been followed by the intermediate appellate courts of Illinois in the cases of *Choisser v. Young*, 69 Ill. App. 252; *Sullivan v. Spaniol*, 78 Ill. App. 125; *Dooling v. Davis*, 84 Ill. App. 393. In all the above cases, as in *Towle's Case*, the premiums were competitive. The supreme court of New York has followed Judge Grosscup in the case of *Harrison v. Cobb*, 63 N. Y. Supp. 738. I have not been able to discover that it has been elsewhere applied. The decision in *Towle's Case* was rendered in March, 1894. Since that time the highest courts of Connecticut, Indiana, Iowa, Kentucky, Michigan, Minnesota, Missouri, New Hampshire, New Jersey, North Dakota, Utah, and Wisconsin, or twelve states in all, have been called on for the first time to lay down the rule which they would follow in the winding up of an insolvent building association. In all or nearly all of these cases it appears that the decision in *Towle's Case* was called to the attention of the court. In none of them was it followed. There was nothing in the previous decisions in any of those states to have prevented the adoption of its doctrines.

"The advanced member is entitled to credit premiums legally as well as those illegally paid by him. The decisions in the above-cited cases in many instances were made with reference to premiums which had been legally exacted. There is probably no state which has gone further in upholding such premiums than has Indiana. The statute (Act March 11, 1875) in that state declares that 'premiums, fines and interest on premiums shall not be deemed usurious.' In the case of *McLaughlin v. Association*, 62 Ind. 264, the court said that the provisions of this section of the statute did not change the law as it previously existed, for, if the nature of the transaction was in fact usurious under the then constitutional provisions of the state, the legislature had no power to make it innocent. *McLaughlin's Case* has been followed by a number of cases, and is the established law of Indiana to-day. *Association v. Elbert*, 54 N. E. 753, 153 Ind. 198. And yet in the case of *Huter v. Trust Co.*, 54 N. E. 755, 153 Ind. 204, the Indiana court said: 'The insolvency of the association would have abrogated the stock and loan contract.' 'The association would be treated by the court as though the contracts had never existed. Equity would administer not according to the contract relations of the parties, but according to their actual relations, resulting from what they had done, and according to the nature and source of the fund, and the claims upon it. An allowance of the plea of *ultra vires*

cannot wipe out the contracts more thoroughly. In either case the claimant would stand before the court on a footing of equality.' And in the case of *Marion Trust Co. v. Edwards Lodge Trustees*, 54 N. E. 444, 153 Ind. 96, the court, in an able opinion, in which all the authorities were collated and considered, definitely adhered to the rule of law announced in the conclusion at the head of this discussion, and definitely declined to follow the decision in *Towle's Case*, and the decision of the federal court in *Indiana v. Sullivan v. Stucky*. In *New Hampshire*, also, it has been decided that the building association contracts are not necessarily usurious. *Shannon v. Dunn*, 43 N. H. 194. In the case of *Bank Com'rs v. Granite State Provident Ass'n*, 68 N. H. 554, 44 Atl. 605, decided subsequently to Judge Grosscup's decision, the conclusion of law above stated was accepted by the court. In *New Jersey* it has been a number of times decided that the premiums in building associations, whether they were competitive or noncompetitive, are, under the statute of that state, not usurious. *Investment Co. v. Bachelor* (Ch.) 35 Atl. 745, 54 N. J. Eq. 600. Upon full consideration and definitely, although with some hesitation, the court of chancery of that state declined to follow the doctrine in *Towle's Case*, and adopted the rule stated in the above conclusion of law. *Weir v. Association* (Ch.) 38 Atl. 643, 56 N. J. Eq. 234. In the well-considered case of *Leahy v. Association*, decided by the supreme court of Wisconsin in October, 1898, and reported in 76 N. W. 625, 100 Wis. 555, it is assumed the premiums there charged were legally exacted, but it is held that the settlements should be made in accordance with the principles of the conclusion of law above stated. There are a great many other states in which the contracts of building associations made strictly in compliance with the law under which they are incorporated are by the terms of the statutes exempted from the prohibitions against usury. In many of these states when the association has become insolvent it has been decided that the borrower is entitled to credit for all such premiums. See the cases already cited from Iowa, Michigan, Minnesota, Missouri, North Dakota, Pennsylvania, Tennessee, Texas, and Maryland.

"Judge Grosscup holds that the borrowers, being members of the association, and being as much responsible for its management as the investing members, are not entitled to treat their contracts of loan in the same way as they unquestionably would be entitled to treat them if the loans had been made to them by strangers. The supreme court of Indiana, however, well said: 'It is the ownership of stock, and nothing else, that makes borrowers and nonborrowers alike members of the association. It is upon their stock, and nothing else, and therefore in the capacity of stockholders, and not otherwise, that borrowers and nonborrowers alike were expected and entitled to receive or be credited with the division of profits. It is upon their stock, and nothing else, and therefore in their capacity of stockholders, and not otherwise, that borrowers and nonborrowers alike must be charged with losses and expenses. The nonborrowers pay only stock dues. The borrowers pay stock dues, interest, and premium. Manifestly stock dues are the only payments made by members in their capacity of stockholders. Manifestly payments of interest and premium are made by members in their capacity of borrowers. Whether the premium be considered as a bonus or as additional interest, or whether it be paid in a lump sum retained out of the loan as a result of competitive bidding at stockholders' meetings, or be paid in installments on the basis of an arbitrary percentage, whether it be paid for precedence in securing the loan or as a uniform charge upon all borrowers, in any event it is paid by the members in their capacity of borrowers. As to refuse credit for payment of premiums, receivers might as well refuse credit for payments of interest made under the contract. The contract has been abrogated by the association's insolvency. The interest that is charged the borrowers on settlement with the receiver is not the interest agreed upon in the contract. It is the interest that the law, and equity following the law, exacts for the use of money had and received; and borrowers are credited with the interest payments, not as interest, but as partial payments upon the money had and received. If premiums were not to be credited as partial payments upon the money had and received, and if they were to remain in the account subject to losses and expenses, a non-

borrowing member who had paid in \$500 on twenty-five shares of stock, and who was entitled only to the same dividends of profits as the borrowing member with twenty-five shares, would stand to lose only \$500, while the borrower who had paid \$500 on stock and \$500 on premium would stand to lose \$1,000. \* \* \* Equality requires that losses shall be borne by those who have shared the profits, and in the same proportions.' *Marion Trust Co. v. Edwards Lodge Trustees*, 54 N. E. 444, 153 Ind. 96. Moreover, as Mr. Endlich points out, no part of the premium 'is earned until the whole scheme has been carried out.' 'A proviso requiring a return of a certain fraction of the premium for every unexpired year of a certain number of years is a rebate in favor of voluntary repayment, not an apportionment of the premium as earned or unearned.' 'Hence, if at any stage the society, breaking down, fails to perform its part of the bargain, the promise to pay it the premium loses the consideration upon which it was based, and ought to be regarded as wholly abrogated. To attempt to apportion the premium is simply to treat it as additional interest. To regard it as something which the borrower has borrowed, as something which the society has earned, and as assets in its hands, before it has done that which entitled it to retain the premium, is to misconceive its true character and office.' *End. Bldg. Ass'ns* (2d Ed.) § 531, p. 530.

"Eighth Conclusion of Law. That the court of appeals of Maryland has never decided that, under such contracts as those made between the defendant corporation and the intervening petitioner, the advanced member is entitled, in the event of the insolvency of the association before the maturity of his shares, to have credited on his loan the payments made by him on his stock, when and as made, according to the rule for the application of partial payments.

"Reasons in Support of the Eighth Conclusion of Law. There are five cases in Maryland in which is discussed the proper method of settlement between an advanced member and a building association or its representatives when the association has discontinued business, has been dissolved, or is insolvent. All of these cases were decided before the defendant corporation, the Baltimore Building & Loan Association, was chartered. They are: (1) *Windsor v. Bandel*, 40 Md. 172, decided in May, 1874; (2) *Association v. Zucker*, 48 Md. 448, decided in March, 1878; (3) *Association v. Jaacksch*, 51 Md. 198, decided in March, 1879; (4) *Association v. King*, 53 Md. 279, decided in April, 1882; (5) *Association v. Buck*, 64 Md. 340, 1 Atl. 561, decided in November, 1885. In the first, fourth, and fifth of the above cases the associations were not, strictly speaking, insolvent. Their free shareholders had decided to discontinue business. This decision was not, so far as appears from the record, taken because the associations had become insolvent, but because, for one reason or another, the free shareholders had become tired of the enterprises, and deemed it more expedient for their interests to wind them up than to carry them on to the end. The difficult problem in the winding up of dissolved or insolvent associations is to so adjust the equities between the borrowing and the investing stockholders as to do justice to each. Where insolvency comes upon all alike, it would seem, for the reasons to be stated under the ninth conclusion of law, inequitable to the investing shareholders to require them to bear all the losses. From an equitable standpoint the situation is by no means precisely the same where the investing shareholders, for their own purposes, or in accordance with their own judgment, decide that they will wind up the association without being compelled to do so. In such case there is every equity in saying, as the court of appeals of Maryland said, in effect: 'Very well. You all agreed that the association should continue until the shares became worth their par value. Upon the faith of this agreement the borrowing members took their advances. When they took their advances they were promised a release when their shares matured, provided until that period arrived they paid their weekly or monthly installment. They did not assume to make any other payments, or to pay the principal of their debt, or any part of that principal, except in the manner just stated. Now, you have said, "We will not mature our shares, and we will so act that you cannot mature yours." Very well. If that be your will, so let it be; but by so

doing you have abrogated the contract of membership, as well as the contract of loan. All the relation between the advanced member and the association which then remains is the implied contract growing out of the fact that each party has received money of the other for which he and it must in equity and good conscience account as for money had and received.' The case in Massachusetts usually cited as concurring with the Maryland courts was a case where the facts were similar to those in the three Maryland cases referred to. *Cook v. Kent*, 105 Mass. 246. It is true that the distinction between the voluntary dissolution of an association at the instance of its free shareholders and its insolvency has not been usually taken. The courts and the text writers have ordinarily, if not always, assumed that cases of voluntary dissolution or stoppage of business were legally indistinguishable from cases of insolvency, in their effect upon the rights of the different classes of shareholders among themselves. Yet there is a difference. Where the dissolution or the ceasing to do business is the result of the deliberate action of the free shareholders, or indeed of any shareholder except the one who is in the particular case resisting the attempt to enforce against himself obligations which had been in whole or in part repudiated by the controlling membership of the association, there is no just reason for holding him responsible for a share of the losses and expenses resulting from such winding up. The reason why in cases of ordinary insolvency the advanced member should be held responsible, as stated by Judge Grosscup in the case of *Towle v. Society* (C. C.) 61 Fed. 446, is that as all the members, advanced or unadvanced, have their voice in the control of the association, they are all alike responsible for its insolvency, and should all alike bear their fair share of its losses. That reason does not apply where the advanced member had no part or lot in bringing about the dissolution. The two other Maryland cases above cited, viz. *Association v. Zucker* and *Association v. Jaecksch*, were cases of insolvent building associations. In those cases it did not appear that the advanced members had, either by their contracts or by the by-laws of the association, assumed any direct responsibility or liability for its losses. The by-laws of the defendant association expressly declare that the losses shall, if they exceed the undivided profits, be charged pro rata against the various shares. See By-Laws 1891, art. 6, § 4; *Id.* 1899, art. 7, § 6. There have been losses which have not only absorbed all the undivided profits, but have greatly impaired the capital of the defendant corporation. The by-law was reasonable. It was just. If the association had not become insolvent this by-law would have been binding on all the members. There does not seem to be any reason in the nature of things why it should become ineffective so far as the advanced members were concerned merely because the losses were so large as to make the association insolvent.

"There is one argument which may be made against the equity of the conclusion of law above stated. The records of the above cases greatly limit the effect of the decisions of the court of appeals of Maryland. It cannot be questioned, however, that text writers and courts of other states have, in all their discussions as to what is the proper rule of settlement of the accounts between an advanced member and an insolvent association, said or assumed that in Maryland in such case the advanced member was entitled to credit on his loan all the payments he had made to the association, whether as stock dues, premium, or interest. At the time the defendant corporation was chartered and the intervening petitioner entered into his contracts, such statements could be found in the books. *End. Bldg. Ass'ns* (1st Ed.) p. 507. It is therefore possible that, had any of the members of the defendant corporation before taking an advance from it consulted counsel as to what their rights would be in case the association became insolvent before the maturity of their loans, they might have been told that in such event everything they paid in to the association would be credited on their debt. Yet, if the advice he sought had been of the best, he would doubtless have had his attention called to the fact that in none of the Maryland cases did it appear that the association had such a by-law as that which was binding on the members of the association from which he was seeking an advance. It seems, therefore, both legally sound and actually just to hold that nothing which the Maryland courts have decided compels this court in this case to



give credit to the intervening petitioner for the payments he has made as dues on his stock. As has already been mentioned, if the conclusion of law above stated is correct there is no conflict between the doctrine of the case of *Robertson v. Association*, 10 Md. 397, 69 Am. Dec. 145, and that of the subsequent cases in which excessive payments for interest or premium are treated as usurious. The doctrine of that case, as explained in the case of *Association v. McCarthy*, 57 Md. 555, does not permit the crediting on the loan of the payments made as dues as and when such payments are made. Of course, the payments on the dues are ultimately and indirectly to be applied to the liquidation of the debt, but such application is to be made only when the shares mature. That is to say, such payments, when made, and until the ultimate maturity of the stock, are a part of the common fund of the association, entitled to share in its profits, and bound to bear its losses.

"Ninth Conclusion of Law. That the intervening petitioner is not entitled to credit on the account between himself and the defendant association and its receivers for the amount paid in by him as dues upon the shares of stock pledged as collateral security for the loans or advances made to him by the defendant corporation.

"Reasons in Support of the Ninth Conclusion of Law. The intervening petitioner first became a free or unadvanced stockholder. There is no direct evidence in this case that at the time he did so he expected to apply for a loan. It is true, however, that his applications for his loans were in each case made so shortly after the time he subscribed for his stock as to make it highly probable that his purpose in subscribing for the stock was to obtain such advances. No inquiry has been made as to what the intervening petitioner's intentions at the time of his becoming a stockholder were, because it is believed that no possible result of such inquiry could be material to any issue properly in this case. Whatever his motives for becoming a stockholder were, the fact remains that he did take stock. There was nothing oppressive in the corporation's action in accepting him as such stockholder. No matter what his purpose in becoming a stockholder was, he could have changed that purpose if he had seen fit before he applied for an advance, and the corporation could not have complained. The fact that his controlling motive in becoming a shareholder may have been to qualify himself to obtain an advance has no material bearing upon his rights. The authorities are practically unanimous in this conclusion. It is only necessary to cite a couple as fair examples of the rest: *Reynolds v. Association*, 29 S. E. 187, 102 Ga. 126; *Freeman v. Association*, 114 Ill. 182, 28 N. E. 611. In becoming a shareholder the intervening petitioner agreed that all the money he paid in as shareholder should be at the common risk of the enterprise. When the intervening petitioner became a stockholder the by-laws of the association provided that against the value of his shares should be charged his portion of any loss which the association might suffer while he remained a member thereof. By-Laws 1891, § 4, art. 6. There seems to be no reason in the nature of things why this agreement should cease to be binding upon him simply because subsequently to becoming a member of the corporation and a stockholder therein he borrowed money on his shares. It is clear that if he be given credit on his loan for all his payments of dues upon stock as and when they are made, and because they were dues, this provision of the by-laws as to him would become absolutely non-effective, and he would be relieved from his obligation to bear his share of such losses as the corporation might incur. We are not dealing with the obligations resulting from his contracts of loan. Nor are we considering whether they were in any respect illegal, usurious, or oppressive, or whether, although not illegal, usurious, or oppressive, the circumstances have been so changed by the insolvency of the association as to relieve him from the whole or from any part of his obligation thereunder. Those problems have been considered in this report in other connections. As shareholder, and in respect to those sums which he paid at precisely the same time, in precisely the same amounts, as the unadvanced stockholders, he would not seem to be, on any principle of law or of equity, entitled to stand in any other position than do the unadvanced shareholders.

"The conclusion of law above stated is supported by the great weight of

American authority. It is the law in the following states, viz.: (1) Connecticut. *Curtis v. Association*, 36 Atl. 1023, 69 Conn. 6. (2) Georgia. *Association v. Goodrich*, 48 Ga. 450. (3) Illinois. *Choisser v. Young*, 69 Ill. App. 252. (4) Indiana. *Marion Trust Co. v. Edwards Lodge Trustees*, 54 N. E. 444, 153 Ind. 96. (5) Iowa. *Wilcoxon v. Smith*, 78 N. W. 217, 107 Iowa, 555. (6) Kentucky. *Rogers v. Rains*, 38 S. W. 483, 100 Ky. 295. (7) Michigan. *Russell v. Pierce*, 80 N. W. 118. (8) Minnesota. *Knutson v. Association*, 69 N. W. 889, 67 Minn. 201. (9) Missouri. *Brown v. Archer*, 62 Mo. App. 277. (10) New Jersey. *Weir v. Association*, 38 Atl. 643, 56 N. J. Eq. 234. (11) New York. *People v. Lowe*, 22 N. E. 1016, 117 N. Y. 175. (12) North Carolina. *Meares v. Duncan*, 123 N. C. 203, 31 S. E. 476. (13) North Dakota. *Hale v. Cairns*, 77 N. W. 1010, 8 N. D. 145. (14) Ohio. *Eversmann v. Schmitt*, 41 N. E. 139, 29 L. R. A. 184. (15) Pennsylvania. *Strohen v. Association*, 8 Atl. 843, 115 Pa. 273. (16) Tennessee. *Rogers v. Hargo*, 20 S. W. 430, 92 Tenn. 35. (17) Texas. *Blakeley v. Association* (Tex. Civ. App.) 26 S. W. 292. (18) Wisconsin. *Leahy v. Association*, 76 N. W. 625, 100 Wis. 555. And of federal courts in the Northern district of Illinois (*Towle v. Society* [C. C.] 61 Fed. 448); district of Indiana (*Sullivan v. Stucky*, 86 Fed. 491); circuit court of appeals for the Sixth circuit (*Douglass v. Kavanaugh*, 33 C. C. A. 107, 90 Fed. 373); Western district of North Carolina (*McIlwaine v. Iseley* [C. C.] 96 Fed. 62); Southern district of Alabama (*Manorita v. Trust Co.* [C. C.] 101 Fed. 8). In a few cases the opposite doctrine has been laid down. In *Association v. Shea*, 55 Pac. 1022, an Idaho court held that 'although the relation between the corporation and its stockholders is distinct from that between it and its debtors, whether stockholders or not, the entire contract is one of loan, and the relation of corporation and stockholder exists not in fact, but purely in fiction.' In this case the corporation was still a going concern, and it does not appear that there had been any losses. The Maryland cases have been considered in the discussion under the eighth conclusion of law. In the Massachusetts case of *Cook v. Kent*, 105 Mass. 246, the terms of the mortgage expressly provided that the payments on the stock should be 'applied in liquidation of said principal sum.' In *Randall v. Protective Union*,—a Nebraska case reported in 60 N. W. 1019, 42 Neb. 809, 29 L. R. A. 133, and again in 62 N. W. 252,—all that was decided was that when the association was a going concern, and had itself terminated the borrower's membership, the borrower was entitled to credit on his loan the present value of his shares, and that upon the facts in that case as stated in the record the value of the shares was equivalent to the sum which had been paid on them. In *Buist v. Bryan*, 21 S. E. 537, 44 S. C. 121, 29 L. R. A. 127, the supreme court of South Carolina distinctly repudiated the doctrine of the conclusion of law above stated, as did the supreme court of Utah in the cases of *Sawtelle v. Building Co.*, 48 Pac. 211, 14 Utah, 443; *Hale v. Thomas*, 59 Pac. 241, 20 Utah, 426; *Howells v. Building Co.*, 60 Pac. 1025. The house of lords, in the cases of *Brownlie v. Russell*, 8 App. Cas. 235, and *Tosh v. Association*, 11 App. Cas. 489, held that under the contracts and by-laws before it the borrowing shareholders were entitled, although the associations were insolvent, to a credit upon their indebtedness for all sums paid in by them as dues upon their stock. In *Brownlie v. Russell* the contract expressly provided that the advance should be repaid by monthly installments. It was pointed out by Lord Bramwell in the first case, and by Lord Chancellor Herschel in the second, that there was not one word in the by-laws as to losses; and consequently there was no such requirement as there was in the by-laws of this defendant corporation, that the advanced shareholders should be charged, as against their shares, with their portion of the losses. In both the British cases the by-laws of the association provided that upon the member paying up his unpaid installments he would be entitled to a release. The intervening petitioner is therefore in a different situation from that of the borrowing members in these British cases. In the latter, however, there was laid down one doctrine of general application, which may be briefly summarized as follows: The building association scheme requires two classes of shareholders,—the advanced and the unadvanced. The same man, as to the same shares, can never be at the same time in both classes. When he obtains an advance he passes from one class definitely into the other, and all the contracts he has had with the associa-

tion as a free shareholder become merged in the new contract he makes as an advanced shareholder. It is not possible to distinguish between his relations as stockholder and borrower. No shareholder in any corporation, in the absence of special statutory requirement, can in any event be required to pay as shareholder more than the par value of his shares. When the advanced shareholder in a building association has once paid to the association the par value of his shares, with interest on his advance, he has paid all that the association can demand from him. It matters not whether it has suffered losses or not. If it has, he is no more liable to contribute towards them than is the holder of the full-paid stock of any other corporation which may become insolvent. This reasoning has unquestioned force, and yet the American theory that the advanced member's contract of membership is not merged in his contract of loan appears, after all, more logical. In its results it is certainly more equitable. If the contracts are treated as separate, the borrowing member will not pay on his stock more than the par value of his shares. He may not, it is true, be able to apply all his stock payments to the settlement of his debt, but as stockholder his liability can never exceed the par value of his shares. As has been already pointed out, the doctrine of the case of *Robertson v. Association*, 10 Md. 397, 69 Am. Dec. 145, and the cases which follow it, can be logically harmonized with that of the other long series of Maryland cases which have held usurious many building association contracts with their advanced members, by recognizing that payments on the stock are not in themselves directly payments on the loan. The English rule that in cases where the association has become insolvent all payments by the advanced member to the association are to be credited as against his advance has, it must be admitted, one practical merit of great importance. By it the prompt and therefore cheap settlement of the affairs of such an association is facilitated. The accounts between the association and every one of its advanced members can be struck at once finally and with absolute precision. No rule which does not permit the crediting of dues on the loan can have any such result, for until all the assets are finally collected it is impossible to say what will be the percentage of loss which each stockholder will suffer, and therefore the amount coming to each stockholder as a dividend on his stock payments must remain uncertain. The value to all parties concerned of a prompt, certain, and relatively cheap method of settlement cannot be questioned. It does not seem right, however, to purchase it at the sacrifice of the rights of the investing members, and by applying a rule of winding up which cannot be reconciled with the mutual character of the association. The court of appeals of Maryland has declared that such an association is 'bound to treat its members equally, and any by-law or contract made by it in contravention of such mutuality would be ultra vires and void.' *Baltimore Building & Loan Ass'n v. Powhatan Imp. Co.*, 87 Md. 59, 39 Atl. 274."

The receivers, the defendant Coltrane, and the complainant, a holder of full-paid stock, excepted to the third, fourth, fifth, sixth, and seventh conclusions of law, as well as to some others not above quoted, but which applied to the facts of Blake's petition the conclusions above stated. The same exceptants also filed exceptions to a few of the master's findings of fact. Blake, the intervening petitioner, and other holders of advanced shares, excepted to the first, eighth, and ninth conclusions of law, and to the subsequent conclusions which applied the principles therein stated. The master further found, as his twelfth conclusion of law, that the petitioner was not entitled to credit the admission fees paid by him upon his account with the association. To this finding no exceptions were filed.

William Hepburn Russell and Richard S. Culbreth, for complainant and receivers.

Fielder C. Slingluff, for defendant association.

Morrill N. Packard, for intervening petitioner, Blake.

Thomas Foley Hisky, Edwin J. Farber, Charles F. Harley, George H. Lamar, Douglass & Douglass, and William Pinkney Whyte, for various borrowing or advanced shareholders.

MORRIS, District Judge, after making the foregoing statement, said:

Notwithstanding the very able and learned presentation of the law by the special master under his eighth conclusion of law, I am not satisfied that there is any substantial difference in respect to the liability for losses by the borrowing shareholder between the contracts made in the present case and the contracts in the cases cited from the court of appeals of Maryland. The by-laws of the Baltimore Building & Loan Association, with regard to the rights of borrowers who paid off their loans, were quite frequently altered. Prior to 1896 the by-laws provided that a borrower could repay his loan at any time before maturity, and if at repayment he also canceled the shares on which the loan was based he should receive in settlement the full amount of dues paid, together with 6 per cent. per annum thereon for average time, but would receive no credit for premium or interest paid on account of the loan. In the by-laws of 1899 there appears an alteration by which the borrower, if he repays his loan and cancels his stock, is to receive the withdrawal value of his shares. With regard to the withdrawals prior to 1896 it was provided that the withdrawing shareholder should receive the amount paid in on his shares, together with 6 per cent. interest, but, if the losses had exceeded the profits, they should be charged up to the shares in good standing pro rata, and the amount so charged should be deducted from the amount to be paid upon withdrawal. The bonds executed by Blake and the deeds of trust executed by him provide that in case of the voluntary payment by consent of the parties, or of default and enforcement of the deed of trust, he was to be credited with the value of the shares of stock, to be determined by the board of directors according to the rule of valuation in the by-laws or by the vote of the directors. The present case is one to which the provision of the by-laws with regard to the voluntary repayment of the advance by the borrowing shareholder does not apply in terms. The considerations influencing a borrower to enter into a building association contract are principally the small periodical payments spread over a number of years. This, together with the large amount for which the property is accepted as security, are the advantages to be offset against the high rate of interest. When by insolvency of the association the loan is prematurely matured the consideration is lost, and the borrower is not in the situation of one who for his own profit voluntarily asks to be allowed to pay his loan. The case principally relied upon by the exceptants as declaring the Maryland rule as to what results flow from the insolvency of building and loan associations incorporated under the Maryland statutes, and as to the liability of the borrowing shareholder to be charged with losses, is the case of *Association v. Zucker*, 48 Md. 448. That was a case in which Zucker, the borrower, had covenanted to pay the stipulated weekly dues until the association had sufficient funds on hand to pay \$100 for every unredeemed share of its stock, clear of all losses and liabilities. The contract made Zucker chargeable with losses, because the number of his payments was increased by

every loss. But the court of appeals declared the Maryland law to be that losses could only be taken into account in a settlement with a borrowing shareholder when the association was a going concern, and then as an element in the estimation of how long the borrower's payments would have to continue in order to mature the stock as contemplated in the charter of the association, and that the only way in which a borrower under such a contract could be made to contribute to losses was by the prolonged or extended payment of weekly dues. In the present case the by-laws and the contract have provided for a settlement by consent of parties upon application of the borrower; also for a settlement if because of his default it became necessary to enforce the deed of trust; but no provision is made for the insolvency of the association, and its enforced winding up, and the sudden maturing of the repayment of the amounts advanced. In essentials, I can see no sufficient ground upon which to distinguish the present case from *Association v. Zucker*. The ruling in *Zucker's Case* was reaffirmed by the court of appeals of Maryland in *Association v. Jaecksch* (1879) 51 Md. 198.

Building and loan associations are the creatures of state statutes. It is found by the special master that by no reasonable probability could the borrowers from the Baltimore Building & Loan Association have ever escaped paying at least 13 per cent. per annum for the use of the money advanced, and only by virtue of the statutes expressly legalizing building associations is it legal in Maryland to exact over 6 per cent. for the use of money. What the state statutes allow, and what they have not granted the privilege of doing, is a question of construction, which, when settled by the Maryland courts, is controlling. And the question as to what are the mutual rights of shareholders as to each other, when such an association chartered under the Maryland law has to be wound up and its assets distributed, for the reason that such rights grow out of the special law of their incorporation, is, I think, a matter of local law, as to which the Maryland decisions control, when they have settled it. This is not a question of general commercial law or of general equity procedure, but it is a question into which enters the construction of the Maryland statute and the general policy of the Maryland law in respect to a peculiar class of contracts, only valid at all to the extent they are legalized by Maryland legislation. "The construction given a statute of a state by the highest tribunal of such state is regarded as part of the statute, and is as binding upon the courts of the United States as the text." *Leffingwell v. Warren*, 2 Black, 599, 17 L. Ed. 261; *Bucher v. Railroad Co.*, 125 U. S. 555-582, 8 Sup. Ct. 974, 31 L. Ed. 795. I think it may be fairly stated that since 1878, long before the incorporation of the complainant association, it was settled in Maryland that upon a winding up the borrowing shareholder did not contribute to the losses of a building association incorporated under the Maryland law. In *City of Detroit v. Osborne*, 135 U. S. 492-498, 10 Sup. Ct. 1012, 34 L. Ed. 260, it was said by the supreme court, "There should be in all matters of a local nature but one law within the state, and that law is not what this court might determine, but

what the supreme court of the state has determined;" and in that case it was held that the federal court was controlled by the law settled by the courts of Michigan, contrary to the general law, that municipal corporations in Michigan were not liable for neglect to keep streets in repair. *City of Richmond v. Smith*, 15 Wall. 429-438, 21 L. Ed. 200; *U. S. v. Morrison*, 4 Pet. 124, 7 L. Ed. 804; *Association v. Rector*, 38 C. C. A. 686, 98 Fed. 171. In *McMurray v. Gosney*, 106 Fed. 11, Circuit Judge Acheson, holding the United States circuit court in Pennsylvania, in a proceeding to foreclose a mortgage of lands in Pennsylvania given by a borrowing stockholder to an Illinois building and loan association, refused to follow the Pennsylvania rule of settlement, and was controlled by the rule in Illinois.

Holding these views, I am constrained to dissent from the conclusion of the special master that the Maryland court of appeals has not decided the question of the right of the intervening petitioner to have credit for the payments made as dues upon his stock, without deduction for losses, and to sustain the exceptions of the interveners to the conclusions of the special master on that question. The conclusion which I have reached, that the Maryland rule is controlling in the winding up of this association, renders it unnecessary to consider whether, if this court were not so controlled, I would adopt the conclusion reached by the special master in his ninth conclusion of law, and which he has most ably sustained by the citations and reasons submitted by him. That conclusion and the authorities cited in its support all rest upon the assumption that the enterprises under consideration were mutual associations. Before adopting the rule found by the special master in his ninth conclusion, I should have to consider most seriously whether or not, as the association in the present case was actually carried on, any real mutuality existed between the unredeemed and the redeemed shareholders. I am entirely satisfied of the correctness of the special master's seventh conclusion of law, that the intervening petitioner is entitled to credit for all the sums paid as premium, for the reasons stated by him, and the exceptions to that conclusion are overruled. All the exceptions to the special master's findings of fact are overruled, and all the exceptions to his conclusions of law are overruled, except the exceptions to his eighth and ninth conclusions of law, and to his tenth, eleventh, and fourteenth conclusions, in which application is made of his eighth and ninth conclusions. The exceptions to such eighth, ninth, tenth, eleventh, and fourteenth conclusions are sustained to the extent indicated by this opinion.

The rule of settlement with borrowing stockholders will be as follows: (1) The amount due by the borrowing stockholder as of March 21, 1900, is to be ascertained by charging him with the amount advanced to him, with interest thereon from the time such advance was made to him, and by crediting him with the amounts paid by him for dues, premium, and interest as of the date when paid by him, according to the rule for the application of partial payments prevailing in Maryland. No credit shall be allowed him for any sums

paid as admission fees or fines. That is, the account between the defendant association and the intervening petitioner, Charles C. Blake, shall be stated in the manner in which the master has done in his report, upon the assumption that the rule in *Association v. Zucker*, 48 Md. 448, should be followed, a copy of which account is attached hereto as part of this opinion. By that account it appears that Blake had overpaid the association on his two loans the sum of \$109.51. As to such overpayment it is equitable that Blake, to that extent, should be considered as a stockholder, and should share with the other stockholders in the dividends which may be allotted to them. (2) Upon settlement being made in accordance with the rule above stated, his stock on which the advance was obtained shall be canceled, his bonds surrendered to him, and the property conveyed by his deed of trust shall be reconveyed to him. The special master will submit a form of decree in conformity with the foregoing ruling.

#### Statement of Account.

Charles G. Blake in account with the Baltimore Building & Loan Association of Baltimore City for \$1,000 advanced him by it, December 21, 1892. Account stated as in *Association v. Zucker*, 48 Md. 448:

Date.	No. of Days Since Last Transaction.	Debit.	Credit.	Balance.
1892.				
Dec. 21.	..	\$1,000 00	.....	.....
Dec. 31.	10	1 64	\$ 9 32	\$992 32
1893.				
Jan. 25.	25	4 08	16 00	980 40
Feb. 25.	31	5 00	16 00	969 40
Mar. 29.	32	5 10	16 00	958 50
Apr. 29.	31	4 88	16 00	947 38
May 27.	28	4 36	16 00	935 74
June 29.	33	5 08	16 00	924 82
July 26.	27	4 10	16 00	912 92
Aug. 21.	26	3 90	16 00	900 82
Sept. 30.	40	5 92	16 00	890 74
Oct. 28.	28	4 10	16 00	878 84
Nov. 25.	28	4 04	16 00	866 88
Dec. 30.	35	4 99	16 00	855 87
1894.				
Jan. 30.	31	4 36	16 00	844 25
Feb. 24.	25	3 47	16 00	831 70
Mar. 31.	35	4 78	16 00	820 48
Apr. 28.	28	3 78	16 00	808 26
May 28.	30	3 99	16 00	796 25
June 30.	33	4 32	16 00	784 57
July 28.	28	3 61	16 00	772 18
Aug. 29.	32	4 06	16 00	760 24
Sept. 29.	31	3 87	16 00	748 11
Oct. 29.	30	3 69	16 00	735 80
Nov. 24.	26	3 15	16 00	722 95
Dec. 31.	37	4 40	16 00	711 35

Date.	No. of Days Since Last Transaction.	Debit.	Credit.	Balance.
1895.				
Jan. 28.	28	3 27	16 00	698 62
Feb. 26.	29	3 33	16 00	685 95
Mar. 27.	29	3 27	16 00	673 22
Apr. 29.	33	3 65	16 00	660 87
May 25.	26	2 82	16 00	647 69
June 24.	30	3 19	16 00	634 88
July 31.	37	3 86	16 00	622 74
Aug. 30.	30	3 07	16 00	609 81
Sept. 30.	31	3 11	16 00	596 92
Oct. 22.	22	2 16	16 00	583 08
Nov. 25.	34	3 26	16 00	570 34
Dec. 28.	33	3 09	16 00	557 43
1896.				
Jan. 27.	30	2 75	16 00	544 18
Feb. 26.	30	2 68	16 00	530 86
Mar. 30.	33	2 88	16 00	517 74
Apr. 27.	28	2 38	16 00	504 12
May 26.	29	2 40	16 00	490 52
June 27.	32	2 58	16 00	477 10
July 25.	28	2 20	16 00	463 30
Aug. 29.	35	2 67	16 00	449 97
Sept. 26.	28	2 07	16 00	436 04
Oct. 31.	35	2 51	16 00	422 55
Nov. 28.	28	1 95	16 00	408 50
Dec. 26.	28	1 88	16 00	394 38
1897.				
Jan. 30.	35	2 27	16 00	380 65
Feb. 27.	28	1 75	16 00	366 40
Mar. 27.	28	1 69	16 00	352 09
Apr. 24.	28	1 62	16 00	337 71
May 29.	35	1 94	16 00	323 65
June 26.	28	1 49	16 00	309 14
July 30.	34	1 73	16 00	294 87
Aug. 28.	29	1 40	16 00	280 27
Sept. 25.	28	1 29	16 00	265 56
Oct. 30.	35	1 53	16 00	251 09
Nov. 27.	28	1 16	16 00	236 25
Dec. 25.	28	1 09	16 00	221 34
1898.				
Jan. 29.	35	1 27	16 00	206 61
Feb. 26.	28	95	16 00	191 56
Mar. 28.	28	88	16 00	176 44
Apr. 30.	35	1 01	16 00	161 45
May 28.	28	74	16 00	146 19
June 25.	28	67	16 00	130 86
July 30.	35	75	16 00	115 61
Aug. 27.	28	53	16 00	100 14
Sept. 24.	28	46	16 00	84 60
Oct. 29.	35	49	16 00	69 09
Nov. 26.	28	32	16 00	53 41
Dec. 31.	35	31	16 00	37 72
1899.				
Jan. 28.	28	17	16 00	21 89
Feb. 25.	28	10	16 00	5 99
Mar. 25.	28	03	16 00	.....

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\$1,199 34

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\$1,209 32

Balance overpaid, \$9.98, carried to account of advance of \$300.



Charles G. Blake in account with Baltimore Building & Loan Association of Baltimore City for \$300 advanced him by it June 21, 1895. Account stated as in Association v. Zucker, 48 Md. 448:

Date.	No. of Days Since Last Transaction.	Debit.	Credit.	Balance.
1895.				
May 25.	..	.....	\$ 1 80	.....
June 21.	27	\$300 00	01	\$298 19
June 24.	3	15	1 80	296 54
July 31.	37	1 80	5 70	292 64
Aug. 30.	30	1 44	5 70	288 38
Sept. 30.	31	1 47	3 90	285 95
Oct. 22.	22	1 08	4 80	282 18
Nov. 25.	34	1 58	4 80	278 96
Dec. 28.	33	1 51	4 80	275 67
1896.				
Jan. 27.	30	1 36	4 80	272 23
Feb. 26.	30	1 34	4 80	268 77
Mch. 30.	33	1 46	4 80	265 43
Apr. 27.	28	1 22	4 80	261 85
May 26.	29	1 25	4 80	258 30
June 27.	32	1 36	4 80	254 86
July 25.	28	1 17	4 80	251 23
Aug. 29.	35	1 45	4 80	247 88
Sept. 26.	28	1 14	4 80	244 22
Oct. 31.	35	1 40	4 80	240 82
Nov. 28.	28	1 11	4 80	237 13
Dec. 26.	28	1 09	4 80	233 42
1897.				
Jan. 30.	35	1 34	4 80	229 96
Feb. 27.	28	1 06	4 80	226 22
Mch. 27.	28	1 04	4 80	222 46
Apr. 24.	28	1 02	4 80	218 68
May 29.	35	1 26	4 80	215 14
June 26.	28	99	4 80	211 33
July 31.	35	1 22	4 80	207 75
Aug. 28.	28	96	4 80	203 91
Sept. 25.	28	94	4 80	200 05
Oct. 30.	35	1 15	4 80	196 40
Nov. 27.	28	90	4 80	192 50
Dec. 25.	28	88	4 80	188 58
1898.				
Jan. 29.	35	1 08	4 80	184 86
Feb. 26.	28	85	4 80	180 91
Mch. 26.	28	83	4 80	176 94
Apr. 30.	35	1 02	4 80	173 16
May 28.	28	80	4 80	169 16
June 25.	28	78	4 80	165 14
July 30.	35	95	4 80	161 29
Aug. 27.	28	74	4 80	157 23
Sept. 24.	28	72	4 80	153 15
Oct. 29.	35	88	4 80	149 23
Nov. 26.	28	69	4 80	145 12
Dec. 31.	35	83	4 80	141 15
1899.				
Jan. 28.	28	65	4 80	137 01
Feb. 25.	28	63	4 80	132 84
*Mch. 25.	28	61	14 78	118 67
Apr. 29.	35	68	20 80	98 55
May 27.	28	45	20 80	78 20
June 29.	28	36	20 80	57 76
July 29.	35	33	20 80	37 29
Aug. 26.	28	17	20 80	16 66
Sept. 30.	35	08	20 80	.....
		\$351 22	\$355 28	

\*See \* note on opposite page.

Overpayments, with dates, number of days prior to the 21st of March at which they were made to the association, and simple interest thereon to March 21, 1900:

Dates.	No. of Days.	Payments.	Int. Thereon.
Sept. 30.	168	\$ 4 06	\$0 11
Oct. 28.	140	20 80	46
Nov. 25.	112	20 80	37
Dec. 30.	77	20 80	25
Jan. 27.	49	20 80	17
Feb. 24.	25	20 80	09
		<hr/>	
		\$108 06	\$1 45
Interest .....		1 45	

Total interest and principal.....\$109 51

\*Note. From March 25, 1899, there is credited on this account the payments made by the intervening petitioner on both his loans, the loan of \$1,000 having been, according to the account stated upon this theory, completely paid up by the payment made March 25, 1899.

### KING et al. v. THOMPSON et al.

(Circuit Court of Appeals, Sixth Circuit. June 10, 1901.)

No. 896.

#### 1. APPEAL—PARTIES—ALLOWANCE IN OPEN COURT.

The allowance of an appeal in open court at the same term at which the decree is entered binds all parties to the record, and brings into the appellate court all parties necessary to a determination of the rights of the appellant, without the necessity of citation or severance.

#### 2. SAME—SUFFICIENCY OF BOND.

An appeal bond is sufficient, although signed by one only of two or more appellants, where good and sufficient security is taken, and approved by the judge of the trial court.

#### 3. RAILROADS—MORTGAGES BY FOREIGN CORPORATION—PRIORITY OF JUDGMENTS UNDER OHIO STATUTE.

Rev. St. Ohio 1880, §§ 3393-3400, inter alia authorize the reorganization of railroad companies, and the execution by them of mortgages and deeds of trust, but provide that the lien of such mortgages and deeds of trust shall be postponed to the lien of judgments recovered against the reorganized company for labor or materials, or for damage losses or injuries suffered or sustained through the misconduct of its agents, etc. They further provide (section 3399) that: "A corporation of another state possessing a railroad which is partly in such other state and partly within this state may exercise and enjoy within this state all its powers, privileges, faculties and franchises for the purpose of such railroad and its business, not inconsistent with the laws of this state; and all mortgages and deeds of trust made by such corporation upon its railroad, equipments or other property within this state shall operate in the same manner and with the like effect as hereinafore provided with respect to companies so reorganized." *Held*, that it was within the powers of the legislature to attach such conditions to the right given to foreign corporations to mortgage railroad property within the state, and that the effect of such provision was to postpone the lien of mortgages executed after its enactment by a company of another state, a part of whose road was in Ohio, as to such part, to judgments obtained against it in the state for personal injuries.

### Appeal from the Circuit Court of the United States for the Northern District of Ohio.

The facts in this case, so far as it is necessary to state the same with a view to an understanding of the questions involved, are as follows: In 1881 the Pittsburg & Western Railroad Company, a corporation of the state of Pennsylvania, was organized. It subsequently leased the lines of certain railroads in Ohio. It also had a part of its line in the state of Pennsylvania, and operated altogether a line from Pittsburg to Akron, Ohio. The Pittsburg & Western Railroad Company having made default in the interest due on its mortgage bonds, a decree was entered on April 23, 1887, in the United States circuit court at Pittsburg, and a similar decree entered April 27, 1887, in the Northern district of Ohio, whereby all the property of the Pittsburg & Western Railroad Company was sold to a certain committee. On June 25, 1887, the purchasers, under the laws of Pennsylvania, organized a new railroad company, known as the Pittsburg & Western Railway Company, and subsequently the property purchased at the sale of the Pittsburg & Western Railroad Company was transferred to the Pittsburg & Western Railway Company, which is a corporation of the state of Pennsylvania. By the ownership of a part of the line in Pennsylvania and the acquired leasehold interest and rights of the former company, the Pittsburg & Western Railway Company became possessed of a railroad partly in Pennsylvania and partly in Ohio, which it continuously operated until a receiver was appointed in certain foreclosure proceedings commenced on March 2, 1896, in which Thomas M. King was appointed receiver. Proceedings were also begun, ancillary to the principal suit in the Western district of Pennsylvania, in the Northern district of Ohio. In 1887 the Pittsburg & Western Railway Company issued and sold bonds to the amount of \$10,000,000, secured by mortgage on all its property in Pennsylvania and Ohio. On May 25, 1891, it issued a second mortgage, under which bonds to the amount of \$2,500,000 have been sold. The intervening petitioners, Samuel M. Thompson, guardian of Frank H. Wakelee, and Robert Smith, guardian of Mary Grace Davis, filed their intervening petitions in the foreclosure proceedings in the Northern district of Ohio, claiming priority under the Ohio statute over the mortgages thus made by the Pittsburg & Western Railway Company. On these intervening petitions the matter came on to be heard at the April term, 1900, of said court. On consideration the court found that at the October term, 1895, Frank H. Wakelee, by Samuel M. Thompson, his said guardian, recovered a judgment against the Pittsburg & Western Railway Company in the sum of \$14,000, which judgment was recovered on account of personal injuries suffered or sustained on or about the 4th day of October, 1892, directly on account of the fault, neglect, and misconduct of said the Pittsburg & Western Railway Company, and of its officers and agents. The court further found that on the 5th day of November, 1898, said Mary Grace Davis, by her said guardian, Robert Smith, recovered in said court against the Pittsburg & Western Railway Company the sum of \$10,000 for personal injuries sustained in like manner on or about the — day of March, 1893. And the court further found that the Pittsburg & Western Railway Company ever since 1887 has been a corporation of the state of Pennsylvania; that said company was organized by four purchasers at judicial sale of the railroad property, rights, and franchises, under authority of the statutes of the state of Pennsylvania; also that said Pittsburg & Western Railway Company operated a railroad in the states of Ohio and Pennsylvania, and held that the judgments constituted a first lien on the property in the state of Ohio, superior to the mortgages and liens executed by said Pittsburg & Western Railway Company, and were entitled to be paid first from the proceeds of sale of the property in Ohio; that the lien of said mortgages was postponed to the liens of said judgments, and inferior to them in law and in equity; and a decree for their payment from the proceeds which might arise from a judicial sale of the property in Ohio was made accordingly.

A. W. Jones, for appellants.

George F. Arrel, for appellees.

Before LURTON, DAY, and SEVERENS, Circuit Judges.

DAY, Circuit Judge, after stating the foregoing facts, delivered the opinion of the court.

Preliminary questions have been argued concerning the sufficiency of the bond and undertaking to bring this case in review before this court, and it is alleged that the assignments of error are insufficient. We have examined these assignments, and, while they are open to criticism as not being entirely specific, nevertheless, in view of the importance of the principal question presented, and the view we take of the case, we have concluded to look into this record, notwithstanding the alleged defects in the manner in which the assignments are made. It is also urged that the Pittsburg & Western Railway Company, defendant in the original foreclosure proceeding, is a necessary party to this appeal. Conceding, without deciding, that such is the case, the notices of appeal by the Mercantile Trust Company and King, receiver, were given and appeal allowed in open court at the time of the entry of the decree in the case upon the intervening petitions. In such case there is no necessity to issue a summons and take an order of severance for a party not joining in the appeal. The appeal was taken in open court at the time the decree was entered. The railway company and other parties were presumably present, and bound to take notice thereof. They then had an opportunity to join in the appeal, if they desired to do so, and by refraining they signify their purpose not to appeal. In such case no citation is necessary. The parties are already in court, and the action of the court binds all the parties to the suit. An appeal allowed in this manner binds all the necessary parties to the appeal, without citation or summons and severance. They have constructive notice of the appeal, and may join therein at their election. In this case the receiver's appeal raises all the questions which the railroad company would raise by its separate appeal, and by its silence it signifies a willingness to let his appeal settle the rights of the parties. This was expressly ruled in *McNulta v. Com'rs*, 39 C. C. A. 545, 99 Fed. 328; *Rice Co. v. Libbey*, 105 Fed. 825, decided in the circuit court of appeals for the Seventh circuit, and we are disposed to concur in the conclusions therein reached.

The objections made to the bond for appeal is that it is not signed by the trust company, one of the appellants. The bond is signed by one of the appellants, with sufficient sureties thereon, and was duly approved by the circuit judge allowing the appeal. The statutory obligation is fulfilled when good and sufficient security is taken. *McClellan v. Pyeatt*, 1 C. C. A. 241, 49 Fed. 259.

This brings us to the principal question in the case: Do the judgments recovered against the Pittsburg & Western Railway Company under the statutes of Ohio have preference in payment over the mortgages executed and delivered by said company which are the subject of foreclosure in the original proceedings herein? In 1861 the legislature of Ohio passed a law entitled "An act to regulate the sale of railroads and the reorganization of the same." 58 Ohio Laws, p. 70, passed April 11, 1861. This act, with some minor

changes not necessary to be noticed now, was incorporated into the Revised Statutes of Ohio of 1880 (sections 3393-3400), which sections are given in a note at the end of this opinion. The act of April 11, 1861, while it purported to be for the regulation of the sale of railroads and their reorganization, undertook in section 7 (now 3399, Rev. St. Ohio), to make certain regulations with reference to corporations having railroads partly within and partly without this state. While the constitution of Ohio provides that no bill shall contain more than one subject, which shall be clearly expressed in its title, this provision has been held by the supreme court of Ohio to be only directory to the legislature, and other subjects than those mentioned in the title have been frequently included. *Pim v. Nicholson*, 6 Ohio St. 176. A principal purpose of this act was to provide for the reorganization of railroad companies when proceedings are pending in a court of the state for the sale of the same, and permits a reorganization upon written agreement of two-thirds in interest of the creditors and two-thirds in interest of the stockholders of the company. When the stockholders and creditors have agreed in writing upon a plan of reorganization, a judgment or decree is to be entered, which shall become a lien upon all the property and upon all the franchises and powers of the company; but the unsecured debtors of the company, holding certain claims, may be paid in bonds of the reorganized company. Trustees on behalf of the parties to said agreement are to meet not less than once a week for four consecutive weeks, in pursuance of notice in newspapers printed in New York and Philadelphia and each county on the line of the railroad. In the reorganization meeting parties to the agreement are permitted to vote, not exceeding one vote for every \$50 par value of the stock held by such party, and at said meeting a majority of the persons present may change the name of the corporation, fix the number of directors, and perform other duties specified in the statute. On reorganization the title and franchises and property of the railroad of the original company are vested in the reorganized corporation. The corporation is given power, at any time within six months after the reorganization, to assume such debts of the original company, to make such adjustment with the bondholders of the original company or its stockholders as it may deem expedient, with power to issue bonds, and secure same by deeds of trust, and may establish preferential stock, and confer upon the holders of any bonds which it may issue or assume to pay a right to vote for every \$50 par value of each bond. These unusual privileges and rights given to the reorganized company, particularly the right of the bondholders to act in the corporation, and take part in the management with equal privileges with stockholders, undoubtedly led the legislature to adopt section 6 of the original law, now section 3398 of the Revised Statutes of Ohio, to wit:

"The lien of the mortgages and deeds of trust authorized to be made by the preceding section shall be postponed to the lien of judgments recovered against the company, after its reorganization, for labor thereafter performed for it, or for materials or supplies thereafter furnished to it, or for damages, losses, or injuries thereafter suffered or sustained by the misconduct of its agents, or in any action founded on its contracts or liability as a common carrier thereafter made or incurred."

That is, claims of this meritorious class were not to be superseded in right of payment by liens created after the reorganization, in favor of persons controlling the corporation. Recognizing that a railroad organized outside of the state might wish to avail itself of the provisions of this act, it was enacted in section 7, now section 3399, that the provisions of this act should extend and apply to corporations whose railroads are partly within and partly without the state. It gave to such corporations, whether incorporated under the statutes of this state or otherwise, the privilege of reorganizing under this law, and it is also provided that a corporation of another state, possessing a road partly within and partly without the state, may exercise and enjoy within this state all its powers, privileges, faculties, and franchises for the purpose of such railroad and its business, not inconsistent with the laws of this state; and then follows this important provision: "And all mortgages and deeds of trust made by such corporation upon its railroad, equipments, or other property within this state, shall operate in the same manner and with the like effect as hereinbefore provided with respect to companies so reorganized;" and it is further provided that "such part of the railroad as is within this state shall be subject to taxation, and to all regulations of law, in the same manner as railroads of this state in like cases and the corporations owning the same shall be subject to all duties in respect thereto imposed by law, and may sue and be sued in all cases and in the same manner as a company of this state might sue or be sued." Giving this language its plain meaning, gathered from the terms used, we find this act not only providing a plan of reorganization of which corporations owning railroads partly within and partly without this state may avail themselves, but giving such corporations the right to mortgage property within this state. In this section (3399), providing for the operation of mortgages and deeds of trust, the act affects not only railroads reorganized under the other sections, but extends to corporations of another state possessing a railroad which is partly in such other state and partly within this state, whether reorganized under the act or not, whose mortgages upon property within this state are to operate in the same manner, and with like effect, as provided in the act with respect (in the original act) "to those corporations reorganized under this act" (in the Revised Statutes), "with the like effect as hereinbefore provided with respect to companies so reorganized,"—equivalent expressions, giving to the securities of such corporations the same operation as the law gives to those of a corporation which has availed itself of the right to reorganize thereunder. It is said that this construction gives an operation to such mortgages different than is given to the mortgages of domestic railroad corporations not reorganized under the act, or those of foreign corporations which do not come within the terms of the law. This entire subject is within legislative control, and the right to fix legislative limitations on the privilege of foreign corporations to mortgage their property in the state is undoubted. The meaning of the language used is plain, and gives little occasion for judicial construction. That the section (St. April 11, 1861) embodied in section 3399 of the Revised Statutes of

Ohio has an effect beyond provisions for reorganizations thereunder is manifest from a decision of the supreme court of Ohio in the case of *State v. Sherman*, 22 Ohio St. 411. In that case, while the supreme court of Ohio held that the Pittsburg, Fort Wayne & Chicago Railway Company was not a corporation of the state of Ohio, it also held that it had a right, as a foreign corporation, to maintain and operate its road within the state, and in that connection Chief Justice Welch, who delivered the opinion of the court, used this language:

"There is not only no law of Ohio prohibiting the ownership and use of railroads in the state by foreign corporations, and no public policy of the state to be contravened thereby, but there is abundant legislation directly to the contrary. The legislation brought in review by the agreed statement in this case abundantly shows that the policy of the state has been and is not only to permit, but to invite and encourage, such ownership and use, and to place foreign companies, in this respect, on a perfectly equal footing with domestic companies. It would be strange were it otherwise. To invite their co-operation in works of great public concern, and then discriminate against them in point of right to use and enjoy their property in the state, would not only be unjust to them, but unwise for the state. If any discrimination does exist, it is in regard to the power of condemning and appropriating private property to the use of the roads. In this case we find what we construe to be an express grant of that power. The Pennsylvania act incorporating the defendants gives them power to condemn and appropriate private property, and by section 7 of our act of April 11, 1861, it is provided that 'a corporation of another state possessing part of a railroad which is partly in such other state and partly within this state, may exercise and enjoy within this state all its powers, privileges, faculties, and franchises for the purpose of said railroad and for its business, not inconsistent with the laws of this state and the provisions of said act.' This provision clearly gives the right to condemn and appropriate private property in Ohio, to all railroad corporations of other states, which have the power of condemnation and appropriation given them in their charters of incorporation, and whose roads lie partly within this state."

In other words, the chief justice found in section 7 of the act of April 11, 1861, above quoted, the broad power conferred upon corporations of another state possessing a railroad partly within and partly without the state to exercise all their powers, including the right of eminent domain. It is argued in this connection that so much of section 3399 as provides that foreign corporations of the class named shall be liable to taxation and to all regulations of law as railroads of this state, places foreign corporations on an equality with domestic corporations, and, except when reorganized under this statute, such foreign corporation has the right and power to make mortgages which do not yield to the class of claims mentioned in section 3398. When general language is used in a statute providing general regulations, it is familiar law that it must yield in force and effect to a specific provision upon the same subject. The mortgages in foreclosure in this proceeding were executed long after this statute passed, and in such case, as was said by Chief Justice Fuller, in construing a somewhat similar statute in Georgia in the case of *Railway Co. v. Bouknight*, 17 C. C. A. 181-185, 70 Fed. 442, 30 L. R. A. 823: "The law enters into and becomes a part of the contract, as if it were there in express terms." *Brine v. Insurance Co.*, 96 U. S. 634, 24 L. Ed. 858; *Insurance Co. v. Cushman*, 108 U. S. 51, 2 Sup. Ct.

236, 27 L. Ed. 648; *Provident Inst. for Sav. v. Jersey City*, 113 U. S. 506, 5 Sup. Ct. 612, 28 L. Ed. 1102; *Railroad Co. v. Hamilton*, 134 U. S. 301, 10 Sup. Ct. 546, 33 L. Ed. 905. In this opinion the chief justice also quotes with approval the following language of Justice Bradley in *Provident Inst. for Sav. v. Jersey City*, 113 U. S. 506, 5 Sup. Ct. 612, 28 L. Ed. 1102:

"What may be the effect of those statutes, in this regard, upon mortgages which were created prior to the statute of 1852, it is unnecessary at present to inquire. The mortgages of the complainant were not created prior to that statute, but long subsequent thereto. When the complainant took its mortgages, it knew what the law was. It knew that by the law, if the mortgaged lots should be supplied with Passaic water by the city authorities, the rent of that water, as regulated and exacted by them, would be a first lien on the lots. It chose to take these mortgages subject to this law, and it is idle to contend that a postponement of its lien to that of the water rents, whether after accruing or not, is a deprivation of its property without due process of law. Its own voluntary act—its own consent—is an element in the transaction."

We have no doubt that the mortgages in question, in so far as they covered property in the state of Ohio, were subject to the rules and regulations prescribed by the statutes of Ohio, and that the mortgagees must be presumed to have assented to the right of the state to regulate mortgages given upon property within its borders, and in force at the time the securities were given.

We think, therefore, that by proper construction this statute, permitting foreign railroad corporations of a certain class to transact business in Ohio, has expressly included in its regulations that mortgage liens upon the property within the state shall be postponed to judgments recovered upon the demands stated in the statute. We think the learned judge did not err in holding that the judgments of this class in this case were prior liens, and that he properly concluded that they were entitled to payment out of the proceeds of the sale of the property of the Pittsburgh & Western Railway Company in Ohio in preference to mortgages executed by that company. The judgment is therefore affirmed.

#### NOTE.

Sections 3393 to 3400, inclusive, of the Revised Statutes of Ohio of 1880, referred to in the opinion, read as follows:

"Sec. 3393. When proceedings are pending in any court for the sale of the road of a company, under a mortgage or deed of trust, and two-thirds in interest of the creditors and two-thirds in interest of the stockholders of the company agree, in writing, upon a plan for the readjustment or capitalization of the debt and stock of the company, the court shall render judgment against the company for the amount due and in arrear upon such securities, which judgment shall, from its rendition, become a lien on all the property embraced in such securities, and upon all the franchises and powers of the company, including its franchise to be and act as a corporation, conferred by the charter and the amendments to the charter of the company; and upon a sale had under such judgment, and a purchase at such sale by trustees on behalf of the parties to such agreement, appointed by the agreement, all the property so bound by the judgment, including said franchises, shall vest in such trustees; but every such agreement shall provide that the unsecured debts of the company, incurred for repairs or running expenses, shall be paid in money, or bonds of the reorganized company of the highest class issued, as hereinafter pro-



vided; and a copy of this agreement shall be filed in such court before the rendition of the judgment.

"Sec. 3394. The trustees shall, as soon as practicable after the sale, call a meeting of the parties to the agreement by a notice signed by a majority of the trustees, or of their survivors, and published not less than once a week for four consecutive weeks in a newspaper printed in the cities of New York and Philadelphia, and in a newspaper printed in each county on the line of the railroad, specifying the day, place and object of such meeting—the place to be on the line of the railroad. At such meeting each of the parties to the agreement shall be entitled to vote according to the provisions thereof, but not exceeding one vote for every fifty dollars of the par value of the debt or stock of such party, according to a list of voters and of their respective interests, which shall be prepared by the majority of the trustees, who are empowered to act as judges of the election; such meeting, by a majority in interest of the persons present, in person or by proxy, shall be competent to retain or change the name of the company, to decide for the time being the amount of its capital and the number of shares into which such capital shall be divided, to fix the number of directors and their term of office, to elect such directors, a majority of whom shall be residents of the state or states in which such railroad is situate, and to do all things necessary or proper to reorganize the company; but any creditor shall be entitled to become a party to the agreement aforesaid, either at or any time before the meeting in this section provided for, and any stockholder shall be entitled to become a party to such agreement at any time within one year after such meeting.

"Sec. 3395. A certificate, under the common seal of the company, specifying its name and the railroad which it is to hold, maintain and operate, shall be filed in the office of the secretary of state; and a copy of such certificate, duly certified, shall, in all courts and places, be evidence of a compliance with all the conditions and provisions of the two preceding sections, and of the due reorganization and existence of the company.

"Sec. 3396. Upon such reorganization and a conveyance by the trustees, or of such of them as shall be vested with the legal title, or their survivors, all the railroad and other property and franchises and things purchased as aforesaid, and all the franchises, powers, faculties, privileges and immunities which were possessed or enjoyed by the original company, or by any company with which it had been consolidated, shall pass to and be vested in the company as reorganized; and the same, and all property and things which the reorganized company shall thereafter acquire, except as hereinafter provided, shall be taken, held and disposed of for the use and benefit of the creditors and stockholders of the company, who shall have become such upon and after such reorganization, according to their respective rights, but subject to the powers of the company, and shall be in no wise chargeable in respect to any debt, liability or claim of any creditor or stockholder which subsisted prior to the sale and reorganization herein provided for, but all property of the original company not embraced in the sale shall, upon the reorganization, be vested in the company as reorganized, in trust for all parties interested therein as creditors, stockholders or otherwise.

"Sec. 3397. Such company shall likewise have power, at any time within six months after the organization, to assume such debts or liabilities of the original company, and to make such adjustments or exchanges with any bondholder of the original company, and, within one year, with any stockholder, as it may deem expedient, and may use for such purpose any bonds or stock which it may be authorized to issue or create; and it may make and issue such bonds, payable at such times and places, and bearing such rates of interest not exceeding 6 per centum per annum, as it may deem expedient, and may secure the payment of any bonds which it may issue or assume to pay by mortgages or deeds of trust of its railroad, or any other of its property, real or personal, and may include therein with its road all its cars and other rolling stock and equipments, and any machinery, tools, implements, fuel, materials, and all other things then held or thereafter acquired for constructing, operating or repairing the road, or

for repairing or replacing any of its equipments or appurtenances as part and parcel of the road and as constituting with the road one property, and may include in such mortgages or deeds of trust all franchises held by the company and connected with or related to the road, and all other corporate franchises of the company, all which franchises, including the franchise to be a corporation, in case of sale by virtue of any such mortgage or deed of trust, or of any judgment specified in the next section, are hereby declared to pass to the purchasers, so as to enable them to reorganize the company in the manner hereinbefore provided; and such company may issue capital stock to such aggregate amount as it may deem proper, not exceeding any limit which may be fixed by agreement with the trustees purchasing as aforesaid, and may establish preferences in respect to dividends, in favor of any class of the stock, in such order and manner as it may deem expedient, not exceeding such limit as may be fixed by agreement as aforesaid; and may, if authorized by the agreement, confer on holders of any bonds which it may issue or assume to pay, such rights to vote at all meetings of stockholders, not exceeding one vote for every fifty dollars of the par amount of the bonds, as may have been provided for in the agreement, which rights, when once fixed, shall attach to and pass with such bonds, under such regulations as the by-laws may prescribe, to the successive holders thereof, but shall not subject the holder to any assessment by the company, or to any liability for its debts, or entitle any holder to dividends.

"Sec. 3398. The lien of the mortgages and deeds of trust authorized to be made by the preceding section shall be postponed to the lien of judgments recovered against the company, after its reorganization, for labor thereafter performed for it, for materials or supplies thereafter furnished to it, or for damages, losses or injuries thereafter suffered or sustained by the misconduct of its agents, or in any action founded on its contracts or liability as a common carrier thereafter made or incurred.

"Sec. 3399. The provision of the seven preceding and the next succeeding sections shall extend and apply to companies whose railroads are partly within and partly without this state; a company of this state, possessing such a railroad, shall have capacity to exercise without this state all its powers, privileges, faculties and franchises; a corporation of another state, possessing a railroad which is partly in such other state and partly within this state, may exercise and enjoy within this state all its powers, privileges, faculties and franchises for the purpose of such railroad and its business, not inconsistent with the laws of this state; and all mortgages and deeds of trust made by such corporation upon its railroad, equipments or other property within this state shall operate in the same manner and with the like effect as hereinbefore provided with respect to companies so reorganized; but such part of the railroad as is within this state shall be subject to taxation, and to all regulations of law, in the same manner as railroads of this state in like cases, and the corporation owning the same shall be subject to all duties in respect thereto imposed by law, and may sue and be sued in all cases and in the same manner as a company of this state might sue or be sued.

"Sec. 3400. Railroads and other property mortgaged therewith by such company may, if the court deems it expedient, be sold without appraisal at judicial sales under judgments upon such mortgage; but in such case, in order to prevent sacrifices and protect the interests of all concerned, the court shall fix a minimum sum below which no sale shall be made; and, in order to fix that amount, the court may, if it deems it expedient to do so, refer the subject to a master, with instructions to take testimony and report the sum."

## SWIFT &amp; CO. v. KORTRECHT et al.

(Circuit Court of Appeals, Sixth Circuit. June 15, 1901.)

No. 927.

## 1. APPEAL—PARTIES—ALLOWANCE IN OPEN COURT.

The allowance of an appeal in open court at the same term at which the decree is entered binds all parties to the record, and brings into the appellate court all parties necessary to a determination of the rights of the appellant, without the necessity of citation or of severance.

## 2. SAME—DISMISSAL—DEFECTIVE BOND.

While, for greater certainty, all obligees in an appeal bond should be named therein, an appeal duly allowed will not be dismissed by the circuit court of appeals because they are not so named, but opportunity will be given to file a new bond.

Appeal from the Circuit Court of the United States for the Western District of Tennessee.

On motions to dismiss appeal.

James H. Malone and John P. Edmondson, for appellant.

R. G. Brown, for appellees Kortrecht and others.

Randolph & Randolph, for appellees Memphis Nat. Bank and others.

Before LURTON, DAY, and SEVERENS, Circuit Judges.

LURTON, Circuit Judge. This case is heard upon two motions made by one of the appellees, the Memphis National Bank, to dismiss the appeal on the following grounds:

"(1) That appellant has not made Augusta Kortrecht, Minnie A. Graham, individually, Thos. J. Graham, Jr., Stewart B. Graham, Octavia Mary Graham, Arthur S. Graham, F. T. Edmondson, guardian ad litem, Jno. M. Seons, trustee, Benjamin W. Hirsh, trustee, and T. J. Lathem, trustee, all defendants to their cross bill, parties to this appeal, as required by law, and has not summoned or notified them of this appeal.

"(2) That the appeal bond given by appellant herein is made payable to A. H. Kortrecht et al., the names of the obligees other than A. H. Kortrecht not being set out."

The persons named in the motion as not made parties to the appeal were all defendants to a cross bill filed by the appellant, Swift & Co., and the appeal is from the decree disallowing the relief sought under the cross bill. The appeal was prayed and allowed in open court at the same term at which the decree was pronounced. That a citation was ordered and issued to certain appellees was superfluous. No citation or other notice than that resulting from the allowance of the appeal was necessary. The case is controlled by the opinion in *King v. Thompson* (decided by this court at this session), 110 Fed. 319.

The motion to dismiss because the names of all the obligees in the appeal bond are not set out must be also disallowed. This court has acquired jurisdiction by the allowance of the appeal. This is the return term, and an appeal will not be dismissed without allowing the appellant to give the requisite bond here. *O'Rielly v. Edrington*, 96 U. S. 724, 726, 24 L. Ed. 659; *Brown v. McConnell*, 124 U. S.

489, 490, 8 Sup. Ct. 559, 31 L. Ed. 495. Without deciding that a bond running to "A. H. Kortrecht et al." would not inure to all of the appellees, we are of opinion that the obligees should be named for certainty. It is accordingly ordered that the appellant file a proper appeal bond on or by July 2d next.

The court prefers that causes shall be orally argued, when reasonably possible. This case has been submitted upon briefs upon the motions to dismiss and upon the merits. The court directs that the cause be restored to the hearing docket, and requests oral argument upon the merits when the cause shall be again called.

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BUTTS v. CLEVELAND, C., C. & ST. L. R. CO.

(Circuit Court of Appeals, Sixth Circuit. July 2, 1901.)

No. 942.

**CARRIERS—INJURY TO PASSENGER—PROXIMATE CAUSE.**

A passenger, notified that the car he was on was to be cut from the train, started forward, and as he was crossing to the next car the separation took place, and as he took hold of the doorknob of this car the brakeman called out, "Look out! Look out!" whereupon he, acting on a sudden impulse that there was danger in front, stepped back, and fell between the cars. *Held*, that neither want of time to get to the forward car nor the giving of the signal to "look out" was the proximate cause of the accident, but plaintiff's own act in stepping back from a position of safety; and hence he could not recover.

In Error to the Circuit Court of the United States for the Northern District of Ohio.

The plaintiff sustained a severe personal injury while traveling as a passenger on the defendant's line of railway between Springfield, Ohio, and Cleveland, Ohio. At Gallion, an intermediate station, notice was given that the car, in which plaintiff was riding, would go no further, and that passengers must take seats in other cars. This notice seems to have been given while the movements necessary to cut the car out were being made. All of the passengers except the plaintiff moved into the car next in the rear, but plaintiff says that he was told that he had better go into the car next in front, as all of the seats in the rear car were occupied. He accordingly started forward, crossed the platform of both cars, and had his hand on the doorknob of the car in front, and was about to enter, when a brakeman on the same platform called out: "Look out! Look out!" Acting upon a sudden impulse, he instantly stepped backward, without looking. A separation had, in the meantime, occurred between the car he was on and that he had just left, and into the gap thus formed plaintiff unwittingly fell, and was badly hurt. The connection between these cars had been cut before plaintiff stepped from one to the other, but the separation was not made until he had reached the platform of the car into which he was going. Upon these facts the court below instructed the jury to find for the defendant in error.

Jones & Anderson, for plaintiff in error.

E. A. Foote, for defendant in error.

Before LURTON, DAY, and SEVERENS, Circuit Judges.

LURTON, Circuit Judge, having made the foregoing statement of the case, delivered the opinion of the court.

The insistence for the plaintiff in error is that the plaintiff should

have been allowed to go to the jury both upon the question as to whether the railroad company had allowed him a reasonable time to change from one car to the other before cutting the train, and, second, whether it was not negligence, under the circumstances stated, for the trainmen to call out, "Look out! Look out!" without giving notice as to the danger he was called upon to guard against. The train was a fast through passenger train, composed of two sections, consolidated at Gallion. Undoubtedly, the plaintiff was entitled to a reasonable time to make the change from one car to the other. There was no fault alleged as to the manner of cutting this car out, or as to the movement of the train. The complaint is that the separation of the two cars should not have been made just at the time it was made. But the separation was not made until every passenger had left the car to be cut out, and after the plaintiff had, in fact, reached a place of safety upon the car in which he was to continue his journey. If, from his position at the door of the car, he desired to enter, he had been shaken or jostled off by some rough movement of the train, the complaint that he had not had time to get into the car and in his seat would have merit. The proximate cause of his fall was not, therefore, the want of time to get from one car to the other before the separation, but his own backward step after he had safely reached the door of the car he wished to enter. He says he did this as a consequence of the call to "look out," made by the brakeman who cut the cars apart; that his impulse was to step backward, in order to brace himself against an apprehended collision ahead. These two cars were connected by a vestibule. He was not, therefore, in danger from a movement to his right or his left. He was in safety if he stood still, and might, in perfect security, have opened the door, and entered the car in front of him. The only danger was that he should step backward, and thus between the cars just separated. To warn him against this the trainmen called, "Look out! Look out!" It was intended to thereby advise him not to move without caution. If he had looked before moving, he would have seen the danger behind him. He acted upon a sudden impulse that there was danger in front. It is possible that, if no warning had been given, he would not have stepped backward, but would have opened the door, and entered the car in which he was to continue his journey. He did just what the trainmen intended he should not do, and made the only movement he could make attended with danger. That movement was the proximate cause of his hurt, and, unless such a movement might have been reasonably expected as a consequence of the warning given him, his accident was a blameless misfortune.

Counsel for plaintiff in error say that under the circumstances the most natural thing plaintiff could have done when thus warned was "to throw his foot back as a brace for whatever was to come," and that, if his movement was the most natural movement which he could make, it should have been anticipated that he would do that very thing, and that a warning given in such ambiguous terms was negligent. But such a warning should have been understood in the light of the circumstances known to the plaintiff. He knew the car he came out of was to be cut out. That meant separated from the

car he was about to enter. He knew he was the last man to leave that car, and could but know that the separation was likely to occur so soon as the car was empty. In charging the jury, Judge Clark, in respect to the probable effect of such a warning, and after saying that its meaning would depend upon circumstances, said:

"But a natural interpretation of it, it seems to me, is to attract the man's attention, and cause him, in fact, to look, and see what the trouble is, and then act in view of that. That is the purpose of any signal of warning, unless you go further, and state what you mean. If you say, 'Look out, the cars are backing!' or, 'Look out, the cars are separating!' or, 'Look out, the cars are about to collide!' of course, there would be no room for interpretation then. The man would know what was meant. But when you say, 'Look out!' the natural significance and the natural purpose of that is to put the man on guard, and cause him to be watchful, and to look quickly, and see what the trouble is, and govern himself accordingly. If Mr. Butts had looked to see what the trouble was, he would, of course, necessarily have discovered that the cars were open behind him. When we speak of what men might do, they might act differently. One man might have pushed the door open quickly, and rushed into the car. That would have seemed to be the rational thing to protect himself. Another might have run down the steps, and jumped off. Another might have stood perfectly still, and held to the door-knob. Another might have looked out to see what the trouble was, and, seeing it, acted in view of that trouble. But was it actionable negligence for the company, when the cars were separated, to say, 'Look out!'? If they had said nothing at all, and the man, for any reason, had not gotten into the door, stepped back, and fell, might it not have been said that it was negligence not to give warning,—not, in other words, to put the man on guard that there was danger close to him, when those cars had become separated? Is, then, the signal that was given, or the warning, 'Look out!' the proximate cause of this injury? Or, if neglect at all, to state the proposition in another form, was the injury which resulted the natural and probable consequence of such an act of negligence? The railroad company owes to its passenger the highest degree of care and skill for his safety. It is above what is ordinary; but it is not an insurer of the life of the passenger. It is not required to anticipate or to guard against an injury which is not the natural and probable result of an act that is alleged to be negligent, apart from the question whether the act is in itself negligent or not."

When an act complained of as the proximate cause of injury to another is not in itself wanton, and the result is not that which might reasonably have been anticipated as a natural and probable effect, there is no actionable negligence. *Railway Co. v. Kellogg*, 94 U. S. 469, 475, 24 L. Ed. 256; *Railway Co. v. Elliott*, 5 C. C. A. 347, 55 Fed. 949, 20 L. R. A. 582; *McGowan v. Railroad Co.*, 91 Wis. 147, 64 N. W. 891; *Hoag v. Railroad Co.*, 85 Pa. 293; *Railway Co. v. Taylor*, 104 Pa. 306, 315; *Cleveland v. Steamboat Co.*, 125 N. Y. 299, 26 N. E. 327. In *Railway Co. v. Kellogg*, cited above, it is said:

"But it is generally held that, in order to warrant a finding that negligence, or an act not amounting to wanton wrong, is the proximate cause of an injury, it must appear that the injury was the natural and probable consequence of the negligence or wrongful act, and that it ought to have been foreseen in the light of the attending circumstances."

The signal given was intended to put the plaintiff upon his guard. It seems to us too plain for discussion that it could not be anticipated that the natural and probable consequence of such a warning would be to make the plaintiff in error do the very thing it was intended to warn him against. The whole matter occurred in an instant of time. The separation occurred just as the plaintiff crossed from one car to

the other. It was natural, when this was seen, that some signal should be given to put the plaintiff on his guard. As plaintiff had every reason to apprehend, under the circumstances, that the car he had left would be immediately cut out, it was not to be reasonably anticipated that he would so far misapprehend the warning given as to retrace his steps without looking to see whether the expected separation had not occurred. The trouble is, he did not use his head. He neither reflected nor looked about him. He did just what he ought not to have done, and took the only possible course attended with danger. The proximate cause of his injury was his own inconsiderate action,—action which could not have been reasonably anticipated as a consequence of the warning given. The facts were undisputed. The question of proximate cause, upon the facts we have stated, was a question of law. The judgment must be affirmed.

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CUNNINGHAM et al. v. METROPOLITAN LUMBER CO.

(Circuit Court of Appeals, Sixth Circuit. July 2, 1901.)

No. 919.

1. PUBLIC LANDS—CONFIRMATION OF HOMESTEAD CLAIMS—CONSTRUCTION OF STATUTE.

Act March 2, 1889 (25 Stat. 1008), forfeiting certain land grants made by congress to the state of Michigan to aid in the construction of railroads, but confirming the title of bona fide purchasers from the grantees, provided that such confirmation should not apply to any tract "upon which there were bona fide pre-emption or homestead claims on the first day of May, 1888, arising or asserted by actual occupation of the land under color of the laws of the United States, and all such pre-emption and homestead claims are hereby confirmed." *Held*, that such provision did not vest title in the pre-emption and homestead claimants to the land occupied by them, but merely confirmed their claims as they then stood, leaving it incumbent on them to comply with the requirements of the law in the usual manner before acquiring title.

2. SAME—RIGHTS OF HOMESTEAD CLAIMANT—CUTTING OF TIMBER.

A homestead settler, who has not perfected his right so as to entitle him to a patent, has no right or authority to cut and remove timber from the land, and can give no title to such timber as against the United States.

3. REPLEVIN—JUDGMENT—MICHIGAN STATUTE.

Under Comp. Laws Mich. 1897, § 10,675, which authorizes the court in an action of replevin to admit evidence showing the special property in, or partial ownership of, the property in controversy by either party, and to "render such judgment as shall be just between the parties," a court has power to direct a verdict for a defendant for nominal damages only, leaving the property taken under the writ in the possession of the plaintiff.

4. SAME—EQUITIES OF PARTIES.

A purchaser of logs from a homestead claimant of public lands subsequently adjudged to have no title or right to sell such logs, who purchased with knowledge that the seller's title was in controversy in the courts, is not equitably entitled to repayment from the rightful owner of the sum expended in cutting such logs as a condition to their recovery in replevin.

Evans, District Judge, dissenting.

In Error to the Circuit Court of the United States for the Western District of Michigan.

This action of replevin was instituted by the defendant in error April 1, 1896, against plaintiffs in error, to recover possession of a large number of feet of pine logs cut by the plaintiff in error Cunningham from the S. W.  $\frac{1}{4}$  of section 25, in township 44 N., of range 36 W., in the state of Michigan, which he had previously sold by contract to his co-plaintiff in error the Menominee Bay Shore Lumber Company, which, for convenience, will be called the "Bay Shore Lumber Company." The defendant in error claimed this timber by purchase of the same as standing timber from the Lake Superior Ship Canal, Railway & Iron Company, which, for convenience, will be called the "Canal Company," and which company claimed title to the disputed land. The case went to trial at the May term, 1898, of the United States circuit court at Marquette, Judge Severens presiding, and resulted in a verdict in favor of the defendants below for the full assessed value of the property in controversy, and which had been taken under the usual writ, and delivered to the plaintiff in the action below. In disposing of a motion for a new trial, which was sustained, Judge Severens said:

"Upon attentive consideration of this case, I am satisfied that a new trial must be granted. The reasons for this conclusion are as follows: The act of forfeiture of March 2, 1889, revested the title to the land in question in the United States. The saving clause therein contained confirmed Cunningham in his position as a homesteader, if he was such, in good faith, on the day therein specified, and gave him the right to acquire the title in the ordinary way. It did not give him the land out and out. This, it seems to me, is the correct view to take of the effect of that legislation; and it was, as it sufficiently appears, the view of the supreme court of the United States as shown by the last paragraph of its opinion in the case of *Iron Co. v. Cunningham*, 155 U. S. 385, 15 Sup. Ct. 103, 39 L. Ed. 183. His sale of the timber standing thereon, upon which the Menominee Bay Shore Lumber Company relies, was without right. The title to it was in the United States. If he had perfected his title to the land, his patent would probably have had relation back, and would have inured to the benefit of the purchaser of the timber. This he failed to do, and, as the doing of it involved his own personal conduct and action, there was no power to coerce him to reside upon the land, and otherwise comply with the requisites for gaining the title. The effect of the consent decree in the case of the bill filed by the United States originally against the Lake Superior Ship Canal & Iron Company, the Metropolitan Lumber Company, and the W. D. Wing Company, Limited, in which the Keweenaw Association, Limited, was subsequently added as party defendant, and the cross bill of the Lake Superior Ship Canal Company, etc., and the Keweenaw Association, Limited, against the United States et al., was to vest the plaintiff herein with such rights as the United States had in this land on the date of the filing of the original bill, which was December 19, 1890, and as between the plaintiff here and the United States the former was substituted to the rights of the latter in the timber which stood upon the land at the date last mentioned. This right to both land and timber was subject to be defeated if Cunningham had perfected his right to the title of the land; but, as he never did this, the title to both land and timber remains in the party to whom the title of the United States was transferred by the consent decree. The Menominee Bay Shore Company contends—and, I think, rightly—that the above-mentioned consent decree was not binding upon it, it not being party to that suit. It is not necessary to determine, however, how that was. It has no standing on which to object to the transfer by the United States of its rights in this land to any person whom it should choose. If it had not been for that transfer by the United States, the United States would have the title to this timber, and the defendant would have been subject to such a suit as this on its behalf. It was not prejudiced by the transfer from the United States effected by the consent decree. From these considerations it is clear that the Menominee Bay Shore Lumber Company was not entitled to the judgment, either for the return of this property or for its value, as it had no title whatever. The former judg-



ment proceeded upon legal rulings which, I think, were erroneous, and the verdict and judgment must be set aside, and a new trial ordered. Whether or not, in view of the fact that the consent decree was entered after the commencement of this suit, there should have been a nominal judgment against the plaintiff, without a judgment for the return of the property or its equivalent, which would affect the question of the costs in the action, or whether the plaintiff should be entitled to a general verdict and judgment in its favor, is a question not necessary to be now determined. It may quite properly be deferred until the new trial shall take place. Let an order be entered in accordance with these conclusions."

The case was again brought to trial at the May term, 1900, of said court, Judge Wanty presiding. On the second trial Judge Wanty, accepting the views expressed by Judge Severens on the motion for a new trial, directed the jury to return a verdict in favor of the defendants below for nominal damages in the sum of six cents, but not for a return of the property or its value, to which direction exception was duly taken. Judgment was thereupon pronounced upon the verdict, and to reverse that judgment this writ of error was brought.

This parcel of land has been the subject of much controversy, beginning with an action of ejectment brought by the Canal Company against Cunningham, which was finally disposed of on writ of error in the supreme court of the United States. *Iron Co. v. Cunningham*, 155 U. S. 354, 15 Sup. Ct. 103, 39 L. Ed. 183. It may be stated briefly that the quarter section in dispute was a part of lands originally included in certain land grants made by congress to the state of Michigan to aid in the construction of railroads, and forfeited under certain conditions, not necessary to be named, by the act of congress of March 2, 1889, to the United States. The proviso to section 3 of the act of congress is in this language: "Provided, however, that where the original cash purchasers are the present owners this act shall be operative to confirm the title only of such said cash purchasers as the secretary of the interior shall be satisfied have purchased without fraud and in the belief that they were thereby obtaining valid title from the United States. That nothing herein contained shall be construed to confirm any sales or entries of lands, or any tract in any such state selection, upon which there were bona fide pre-emption or homestead claims on the first day of May, eighteen hundred and eighty-eight, arising or asserted by actual occupation of the land under color of the laws of the United States, and all such pre-emption and homestead claims are hereby confirmed." It was adjudged in that case that at the time of the passage of the act of March 2, 1889, forfeiting to the United States the titles to the lands granted to Michigan, neither the plaintiff nor the defendant had any title to the tract in controversy in that action. It was further adjudged that the words "homestead claim," as used in this act, included cases in which the claimant was, on the 1st of May, 1888, in actual occupation of the lands with a view of making a homestead of it, whether he had or had not made a formal application at the local land office, and that the defendant in error in that case, Cunningham, was, on the 1st of May, 1888, in occupation of the tract claimed by him, and, therefore, within the terms of the confirmatory act, a bona fide claimant of a homestead. It is unnecessary for the purposes of this case to notice the further progress of the ejectment case of the Canal Company against Cunningham, beyond saying that, after the case was disposed of by the supreme court of the United States, a new trial was taken by the company in the court below, as it had the right to do under the statute of the state of Michigan; and subsequently, by the consent of parties, a final judgment in said ejectment suit was rendered in favor of the company and against Cunningham. On October 19, 1890, a bill was filed in equity in the circuit court of the United States for the Northern division of the Western district of Michigan against the Canal Company, the Metropolitan Lumber Company, and others, in which it was alleged that the title to these lands was in the United States, and seeking to enjoin the cutting of timber thereon. Afterwards, on application of what is called the Keweenaw Association, Limited, which had acquired the title of the Canal Company subject to the sale of timber to defendant in error, it was allowed to appear as a defendant in the equity cause, and in the further

progress of the case cross bill and supplemental cross bill were filed, making various pre-emption and homestead claimants parties, and among them the plaintiff in error Cunningham; and that case finally resulted in a consent decree entered in November, 1896, disposing of all the questions involved, and settling all of the rights in issue. By this decree it was adjudged, in effect, that the title to the lands in controversy at the time of the commencement of that suit was vested in the Canal Company, and by due transfer since the commencement of the suit had become vested in said Keweenaw Association, Limited, and that none of the other parties, either plaintiffs or defendants, had any right, title, or interest in such lands, and that the decree should operate as a conveyance from the United States and all of the defendants of all right and title to said lands to said Keweenaw Association, Limited, the lands being particularly described. The contract by which plaintiff in error Cunningham agreed to cut and sell to the Bay Shore Lumber Company the timber in question was dated October 30, 1895. On November 14, 1896, the Bay Shore Lumber Company received a letter from the Canal Company, which, given just as written, is as follows:

"I have been informed that you have bought from Mr. W. A. Cunningham the pine timber on the southwest quarter of section 25, T. 44 N., R. 36 W., and are about to cut it. I could hardly believe it, because I suppose you must know that this land is part of the canal grant, and is claimed by the Keweenaw Association, Limited, as its property. The Keweenaw Association, Limited, has a right to a new trial, and has availed itself of that right, so that the title is by no means finally decided, and all means possible will be resorted to, to prevent the cutting of the timber by other parties. The title is in litigation in a suit between the United States and the Keweenaw Association, Limited, and in that suit we have an order allowing us to cut the timber, for which we have given bonds.

"I write you this, as it is possible that you may have been led to believe that the title to this tract is settled. Cunningham certainly has no title. It is either the land of the Keweenaw Association, Limited, or the land of the United States."

The receipt of the letter was acknowledged with the statement that it had been referred to the company's attorney, the letter of acknowledgment being as follows: "Your favor relating to the Cunningham timber is received, and referred to Mr. B. J. Brown." At this date the Bay Shore Lumber Company had advanced to Cunningham \$290.46. The contract between Cunningham and the Bay Shore Lumber Company, among other stipulations, contained the following paragraph:

"The balance of the price for said logs shall be paid when all of said logs shall have been so delivered afloat in the Main Point river, as aforesaid, and said first party shall have furnished to said second party evidence satisfactory to it that there is no valid adverse claim to said logs, or any part thereof; that the same are free and clear from all liens and incumbrances; and that there are no labor claims against the same which may be the subject of a lien thereon."

F. O. Clark and B. J. Brown, for plaintiffs in error.

D. H. Ball, for defendant in error.

Before LURTON, Circuit Judge, and CLARK and EVANS, District Judges.

CLARK, District Judge, after making the foregoing statement of the case, delivered the opinion of the court.

The contention of plaintiffs in error is that the proviso to the act of congress of March 2, 1889, confirming the rights of homestead claimants, as construed by the supreme court of the United States in *Iron Co. v. Cunningham*, 155 U. S. 354, 15 Sup. Ct. 103, 39 L. Ed. 183, had the effect to change the inchoate homestead claim recognized by the act into an absolute title, so that thereafter home-

stead claimants in the situation of Cunningham stood clothed with full title without the necessity of the payment of any sum to the United States, or otherwise complying with such regulations and conditions as would have been required by law in the absence of the confirmatory grant contained in this act of congress. Under such circumstances it is insisted that Cunningham, being vested with full title, transferred to the Bay Shore Lumber Company, by his contract with it, a valid title to the timber cut and removed from the quarter section in dispute, and that, while the consent decree entered in the United States circuit court in the suit in equity is conclusive against Cunningham, such decree did not defeat or affect the title to this timber previously acquired by said contract. Indeed, the defense in the court below, and the right to judgment on the replevin bond against the plaintiffs for the value of the timber, are distinctly rested upon the soundness of the proposition that the act of congress vested in Cunningham by confirmation a complete and valid legal title. In this view we are unable to concur. Such a construction of the act would not be just to the United States, and it was certainly more than justice to a homestead claimant in Cunningham's situation required. It was the intention of congress to recognize such equitable considerations as existed in favor of those who had undertaken in good faith to acquire a homestead, and to comply with the general law and regulations of the land office in relation to such a claim, and enable them to go forward in the ordinary way, and perfect their right by compliance with the law. Any other interpretation would, as we have said, lead to manifestly unjust results, and such a construction is never to be adopted in the absence of words which clearly imply and necessarily require such a result. It is now well established, and not controverted, that, if Cunningham's position was that of a homestead claimant in possession of an inchoate right, not yet perfected so as to entitle him to a patent, he was without right or authority, until he perfected his claim to cut timber from the land, except so far as was necessary for cultivation of the land, and that by cutting and removing timber under such circumstances neither Cunningham nor a purchaser from him could acquire any right or title to timber so cut as against the United States. *Railroad Co. v. Lewis*, 162 U. S. 366, 16 Sup. Ct. 831, 40 L. Ed. 1002; *U. S. v. Mock*, 149 U. S. 277, 13 Sup. Ct. 848, 37 L. Ed. 732; *Stone v. U. S.*, 167 U. S. 178, 17 Sup. Ct. 778, 42 L. Ed. 127; *Shiver v. U. S.*, 159 U. S. 491, 16 Sup. Ct. 54, 40 L. Ed. 231. Such, also, has been the uniform ruling in many adjudged cases on the circuit. As the lands had been forfeited to the United States by the act of March 2, 1889, subject only to the homestead claim of Cunningham, and others in like situation, it results from the views we have expressed that the title to the timber on the quarter section in controversy was in the United States at the time of the contract between Cunningham and the Bay Shore Lumber Company; and when the timber was cut and removed a right of action existed in favor of the United States against Cunningham and his purchaser, the Bay Shore Lumber Company, for the value of all timber cut and removed; and this right, by the compromise decree

in the equity suit, was, in effect, vested in the plaintiff below, now the defendant in error; and, if the court below possessed power and authority to render such judgment as would meet the ends of justice, it is quite clear that the judgment below was right. The court's instruction to the jury to return a verdict in favor of the defendants below for nominal damages, and the judgment pronounced upon the verdict for such damages and the costs, were rulings in favor of the defendants to which they could not and did not object, their contention being that they were entitled to demand judgment for the value of the property taken under the writ, and delivered to and disposed of by the defendant in error. The principles governing the action of replevin as known to the common law have been modified by statutory enactments in Michigan. Section 10,675 of the Compiled Laws of Michigan of 1897 reads as follows:

"When either of the parties to an action of replevin at the time of the commencement of the suit shall have only a lien upon, or special property, or part ownership in the goods and chattels described in the writ, and is not the general owner thereof, that fact may be proved on the trial, or on the assessment of value, or on the assessment of damages in all cases arising under this chapter; and the finding of the jury, or court, as the case may be, shall be according to such fact, and the court shall thereupon render such judgment as shall be just between the parties."

It is not deemed necessary for the purposes of this case to set out other provisions in relation to the same subject. In *Darling v. Tegler*, 30 Mich. 54, the action was in replevin, and the plaintiff failed to maintain the suit for want of demand of possession before the institution of the suit, but it was established by the undisputed evidence that the defendant, while in lawful possession, was without any valuable interest in the property, and that the plaintiff was the true owner thereof. The supreme court of Michigan, on error, construing the above and other sections of the Compiled Laws of Michigan, held that, as the uncontroverted proof showed that the defendant was a possessor without any valuable interest in the property, he could recover no damages beyond his special interest, and, as the proof stood, merely nominal damages. Mr. Justice Campbell, speaking for the court, and referring to statutes regulating the action of replevin, observed that these statutes "limit the judgment to the just rights of the parties." "For the reason," continued the court, "that there is no foundation in the proofs or record for any damages, so much of the judgment as gives damages to defendant must be reversed, with costs of this court, and as to all other matters the judgment must be affirmed." See, to the same effect, the late case of *Joseph v. Braudy*, 112 Mich. 579, 70 N. W. 1101. Now, we do not understand that counsel differ as to the effect of this legislation in regard to the action of replevin. On the contrary, it is conceded, or, if not, is too evident to be denied, that the court, in giving judgment for either party in the action, is not limited to a judgment for the recovery of the property in specie, or damages for its value, but may, in the very language of the statute, "render such judgment as shall be just between the parties." It was suggested, rather than argued, that the Bay Shore Lumber Company was equitably entitled to such judgment as would reimburse it for the

amount actually paid to Cunningham under its contract with him for the purchase of the timber. It is not to be doubted that when that contract was entered into it was well understood that Cunningham's title was in dispute. The right to this quarter section of land was then, and had previously been, in an atmosphere of controversy; and the contract, as we have seen, contained a stipulation designed to protect the company, as between itself and Cunningham, against payment beyond a certain sum until any question as to his title should be removed; and within 15 days after the execution of the contract that company was distinctly notified by letter of the suit brought in equity by the United States, and that the question of title to this parcel of land was involved in that case. There is no doubt that the validity of Cunningham's title, and his right to sell and transfer timber on the land to the Bay Shore Lumber Company, were distinctly staked upon the proposition, so ably urged in this court, that the act of congress of May 2, 1889, had the effect to clothe Cunningham with a complete legal title to this quarter section of land. The position of the Bay Shore Lumber Company is not different from that of any other person or party acting under a mistaken view of the law, but with full knowledge of all the facts. It is certain that there is, in the legal sense, no equitable consideration in such a situation as this.

Judge EVANS, while entirely agreeing with the other views expressed, is of opinion that section 10,675 of the Michigan Statutes and the justice of the case require that, instead of directing a verdict of six cents, the circuit court should have charged the jury to find for the Menominee Bay Shore Lumber Company the amount it had expended under the contract with Cunningham in cutting the timber and putting it on the water, prior to notice of the consent decree; but the majority of the court agree that the result reached in the court below was substantially "just between the parties." Judgment affirmed.

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UNITED STATES v. SMITH et al.

(District Court, E. D. New York. July 18, 1901.)

EMINENT DOMAIN—ELEMENTS OF DAMAGES—PUBLIC BUILDING ERECTED UNDER LICENSE.

The United States purchased a site for a life-saving station, taking a conveyance from the life tenant, which gave it the right to maintain a building thereon as long as desired, and to remove the same at any time. Owing to injury by the tides, the building erected was subsequently moved back to a new location on the land of the grantor, with his acquiescence, and was there maintained until his death. It was placed on spiles two feet from the ground. Held that, being a public building built and maintained under license from the owner of the ground, it remained the property of the United States, and the remaindermen were not entitled to be paid therefor in proceedings subsequently instituted by the government to condemn the land.

Proceedings by the United States to acquire land on Great South Beach, in the town of Brookhaven, Suffolk county, New York.

George H. Pettit, U. S. Atty.

Clarence G. T. Smith (Asa A. Spear, of counsel), for defendants Smith.

THOMAS, District Judge. These proceedings are instituted by the United States to acquire title to lands on which it long since erected wooden buildings, suitable for, and connected with, two life-saving stations. The principal buildings stand on spiles, which rise about two feet above the ground in which they are imbedded. The present question is whether the owners are entitled, upon the appraisal, to be paid for the buildings. In 1876 the United States purchased of Egbert T. Smith two pieces of land, bordering on Great South Bay, Long Island. The deed provides:

"That the said party of the first part, in consideration of the sum of one hundred dollars lawful money of the United States, does by these presents grant, demise, release, and convey unto the said United States the right to use and occupy all that certain lot of land situate on the south beach of Long Island in the above-named town, county, and state, and thus described and bounded: On the north by the waters of the Great South Bay; on the east, south, and west by lands of Egbert T. Smith, one square acre, the center of which bears S.  $\frac{1}{2}$  by compass from Smith's Point, for a building site for Life-Saving Station No. 17, Third district, be the contents what they may, with full right of egress and ingress thereto, in any direction, over other lands of the grantor, by those in the employ of the United States, on foot or with vehicles of any kind, with boats, or any articles used for the purpose of carrying out the intentions of congress in providing for the establishment of life-saving stations, and the right to pass over any lands of the grantor in any manner in the prosecution of said purpose, and also the right to erect such structures upon the said land as the United States may see fit, and to remove any and all such structures and appliances at any time, the said premises to be used and occupied for the purposes named in said act of March 3, 1875, to have and to hold the said lot of land and privileges unto the United States from this date for the purpose aforesaid. And it is further stipulated that the United States shall be allowed to remove all buildings and appurtenances from the said land whenever it shall think proper, and shall have the right of using other lands of the grantor for passage over the same in effecting such removal."

Smith owned a life interest in the land under the will of his father, which terminated upon his death in 1889, and the present claimants, children of Egbert T. Smith, as remainder-men, succeeded to all rights in the land. Before the death of the life tenant, it is claimed that on account of injuries thereto from the rising tides, the original building at Smith's Point was moved back about 200 feet, and its location fixed upon land of which Egbert T. Smith was also life tenant. This removal from the land purchased, if it occurred, took place in 1876 or 1877, and it must be assumed to have been with the consent of the life tenant, and to have been acquiesced in by him, so as to relieve the United States from the position of a trespasser. Smith's house was about two miles distant, and it is impossible to believe that for twelve years he did not visit this portion of his premises, and have full knowledge of the location of the buildings. Indeed, one of the remainder-men—his son—states that he saw the building moved, that he worked in the station six years after its removal, and that his father was, at least on one occasion, at the station after the building was moved. Therefore, as between the

life tenant and the United States, the building belonged to the United States. *Dame v. Dame*, 38 N. H. 429, 75 Am. Dec. 195. The question then is, do the buildings belong to the remainder-men, so as to entitle them to compensation therefor? Undoubtedly the United States, at the death of the life tenant, owned the buildings, and was entitled to remove them. The land had been acquired for public purposes by the government, enabled at any time to take the same *uninvitum*, pursuant to the statutes of the state of New York. The grant by Egbert T. Smith indicates an intention to convey a right to use permanently, if the United States so desired, and the defect of title was curable by condemnation of the outstanding interests. The remainder-men left the United States in undisturbed possession of the property until the spring or summer of 1897, when actions of ejectment were brought by owners of the fee against certain individuals alleged to be in possession of the premises. They were presumptively the men in charge of the station. Thereupon, in January, 1898, after failure to acquire the property by purchase, proceedings were begun similar to those now at bar. These proceedings proved defective, and were discontinued, and the present proceedings were begun in February, 1901.

The court is unwilling to countenance the claim that public buildings of the United States, erected on the land of a life tenant by the latter's consent, became the property of remainder-men, so as to entitle the latter to compensation therefor in proceedings instituted to acquire title. The property had been sought and appropriated for public purposes, and defects in title were curable, if not by voluntary purchase, at least through compulsory proceedings. It would be an intolerable rule that should forfeit to those succeeding to possessory rights structures erected rightfully for public agencies, even though there be laches in acquiring the outstanding title; and such has been the all but uniform holding of the courts. *Railroad Co. v. Goodwin*, 111 Ill. 273, 53 Am. Rep. 622; *Ellis v. Railroad Co.*, 125 Ill. 82, 17 N. E. 62; *Cohen v. Railroad Co.*, 34 Kan. 158, 8 Pac. 138; *Morgan's Appeal*, 39 Mich. 675; *Justice v. Railroad Co.*, 87 Pa. 28; *Greve v. Railroad Co.*, 26 Minn. 66, 1 N. W. 816; *Railroad Co. v. Armstrong*, 46 Cal. 85; *Railroad Co. v. Dunlap*, 47 Mich. 456, 11 N. W. 271; *Lyon v. Railway Co.*, 42 Wis. 538; *Lewis, Em. Dom.* § 507. In the case of *U. S. v. Land in Monterey Co.*, 47 Cal. 515, it appears that the United States entered upon land tortiously by ejecting the owners, and erected thereon a stone building, "the foundations of which were set in the soil," and it was held that the building pertained to the land, and was the property of the owner. Such is not the present case. It has been considered generally that the owner is entitled only to just compensation for his property, and that payment for improvements placed upon land appropriated for public purposes would be something more than just compensation. The buildings are not the property of the owners of the land, and they should not be paid for what does not belong to them. This is justice towards the United States. But it also should do justice to the owners, by compensating them for the value of the use and occupation of such premises from the death of the life tenant. It is

not within the power of this court to enforce such payment in this proceeding, but it is within the power and duty of the government to do it.

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SMITH et al. v. NORTHERN PAC. RY. CO.

(Circuit Court, D. Washington, N. D. August 31, 1901.)

WITNESSES—DEPOSITIONS—EXAMINATION OF ADVERSE PARTY—STATE STATUTE.

Under the act of March 9, 1892 (2 Supp. Rev. St. U. S. p. 4), providing that, in addition to the mode of taking the depositions of witnesses in causes pending in the courts of the United States, depositions or testimony may be taken in the mode prescribed by the laws of the state in which the courts are held, interrogatories propounded, as provided by 2 Ballinger's Ann. Codes & St. §§ 6008-6010, by the plaintiff, to be answered by the defendant, in an action at law in the circuit court of the United States, district of Washington, are proper, and should not be stricken from the files.

Action at Law. Heard on motion to strike from the files interrogatories propounded by the plaintiff, to be answered by the defendant, or its officers or employes having knowledge of the facts. Motion denied.

Brady & Gay, for plaintiffs.

James F. McElroy, for defendant.

HANFORD, District Judge. It is provided in the Code of this state that:

"A party to an action or proceeding may be examined as a witness, at the instance of the adverse party, or of one of several adverse parties, and for that purpose may be compelled in the same manner and subject to the same rules of examination as any other witness to testify at the trial, or he may be examined on a commission.

"Instead of the examination being had at the trial as provided by the last section, the plaintiff, at the time of filing his complaint or afterwards, and the defendant, at the time of filing his answer or afterwards, may file in the clerk's office interrogatories for the discovery of facts and documents material to the support or defense of the action, to be answered on oath by the adverse party.

"\* \* \* A private corporation may be interrogated in the same manner as individuals and it shall not be excused for a failure to answer any proper interrogatory unless it shall show that no one in its employ or connected with, or interested in it, can give the desired answers or information." 2 Ballinger's Ann. Codes & St. §§ 6008-6010.

In a number of instances parties have heretofore attempted to proceed under this statute by filing interrogatories in actions at law pending in this court, and it has been the practice of the court to refuse to compel parties to answer, and, upon motion, to strike the interrogatories from the files; the rulings of the court in such cases having been made in deference to the decisions of the supreme court of the United States in the cases of *Ex parte Fisk*, 113 U. S. 713, 5 Sup. Ct. 724, 28 L. Ed. 1117, and *Railroad Co. v. Botsford*, 141 U. S. 250, 11 Sup. Ct. 1000, 35 L. Ed. 734. On the argument of this motion, the question has been raised for the first time in this court whether the more recent decision of the supreme court and changes in the law do not require a change of practice. The case of *Railroad*



*Co. v. Botsford* has not been expressly overruled, but the principles of that decision have been departed from by the supreme court in its decision in the case of *Railroad Co. v. Stetson*, 177 U. S. 172-177, 20 Sup. Ct. 617, 44 L. Ed. 721, in which it was decided that a circuit court of the United States, in the state where such practice is authorized by statute, may properly require a plaintiff in a civil action to recover damages for a personal injury to submit to a physical examination by surgeons for the ascertainment of facts provable upon the trial. In the opinion of the court by Mr. Justice Peckham, that case was distinguished from *Railroad Co. v. Botsford* by the fact that in one case the examination was authorized by statute, and in the other case there was no statute. The ground upon which the cases were distinguished is not an important consideration in the determination of this motion, as the right, which the plaintiff claims is founded upon the statute above quoted and the last decision of the supreme court referred to, does, in my opinion, go a long way towards supporting the claim, because, in principle, there is no difference between an examination by requiring a party to answer interrogatories upon oath as a means of ascertaining the truth, and a physical examination of a person for the discovery of evidence. In *Ex parte Fisk* it was considered that, as congress had prescribed the mode of procedure in the taking of proof in common-law actions in federal courts, a party could not be subjected to examination pursuant to a state law, because the statutes of the United States exclude such practice. Since that decision was rendered, however, congress has adopted the practice of the state courts as to the mode of taking depositions and testimony by the act of March 9, 1892 (2 Supp. Rev. St. U. S. p. 4), which reads as follows:

"That in addition to the mode of taking the depositions of witnesses in cases pending at law or equity in the district and circuit courts of the United States, it shall be lawful to take the depositions or testimony in the mode prescribed by the laws of the state in which the courts are held."

The circuit court of appeals for the First circuit has held that this statute was intended to simplify the practice of taking depositions in the instances authorized by the federal laws, and that it does not authorize the taking of depositions in instances not previously authorized by the federal statutes, and that it does not confer additional rights to obtain proof by interrogatories to be answered by the adverse party in actions at law. *Register Co. v. Leland*, 37 C. C. A. 372, 94 Fed. 502. With all due deference to that learned court, the construction thus given to the statute is in my opinion unwarranted, for two reasons, viz.: First, it interpolates and reads into the statute words of limitation which congress did not see fit to put into it; and, second, it fails to give effect to all the words which the act contains, because, if only depositions may be taken in the mode prescribed by the laws of the state, then the words "or testimony" are meaningless and superfluous, whereas the rules for the interpretation of statutes require the court to give effect to every word of a statute, if it is possible to do so consistently with the manifest intent of the legislature. I concur with Judge Lacombe in his opinion in the case of *International Tooth-Crown Co. v. Hanks' Dental Ass'n*

(C. C.) 101 Fed. 306, in which he construed the act of March 9, 1892, as providing additional modes of taking testimony, so as to enable the federal courts to avail of all modes prescribed by the laws of the different states, and adapted to the several communities where the courts sit; and I especially concur in his statement that "the practice of examination before trial \* \* \* is a most wholesome one; it tends to simplification of the trial, and frequently leads to settlement out of court."

In this case some of the interrogatories propounded are proper, and should be answered; others are in my judgment unnecessary and improper, and, upon application of the defendant, the court will relieve it from the burden of supplying information from sources to which the plaintiffs, as well as the defendant, can go; but the motion which has been made to strike the interrogatories entirely from the files must be denied.

# NEW RIVER MINERAL CO. v. ROANOKE COAL & COKE CO.

(Circuit Court of Appeals, Fourth Circuit. July 6, 1901.)

No. 399.

## 1. APPEAL—QUESTIONS REVIEWABLE—RULING ON MOTION FOR NEW TRIAL.

It is the settled rule of the federal courts that the action of a trial court in granting or refusing a new trial is not reviewable.

## 2. PROCESS—EVIDENCE OF RETURN—PRESUMPTION.

Where an action was commenced under Code Va. 1887, § 3211, as amended by Acts 1895-96, p. 140, by notice of a motion for judgment, which the statute requires to be returned within five days after service, the question whether return was made within that time is one of fact, which may be determined upon evidence, although the date of the return is not indorsed on the notice, the mode of return not being prescribed; and where it is shown that the return was in fact made, and the cause duly docketed, the presumption is that the sheriff complied with the law, and made the return within the prescribed time.

In Error to the Circuit Court of the United States for the Western District of Virginia.

This case comes up by writ of error to the circuit court of the United States for the Western district of Virginia. Under the law prevailing in Virginia (section 3211, Code 1887), amended by act of assembly (Acts 1895-96, p. 140), any person entitled to recover money by action on any contract may, on motion before any court which would have jurisdiction in an action otherwise than under section 3215, obtain judgment for such money after 15 days' notice, which notice shall be returned to the clerk's office of such court within 5 days after the service of the same, and after such 15 days' notice the motion shall be docketed. This is a summary mode of obtaining trial; the notice playing the part both of the writ and declaration. The notice must be accompanied by a copy of the cause of action. Pursuing this mode of relief, the Roanoke Coal & Coke Company, defendant in error here, issued a written notice to the New River Mineral Company, plaintiff in error here, that on the first day of the next term of the court of Wythe county, Va., being 13th February, 1899, it would move for judgment against it for the sum of \$5,665.31, with interest as stated in said notice. A copy of the account was annexed to the notice. It was dated 10th January, 1899, and there is indorsed upon it a certificate of the sheriff of Wythe county, dated 12th January, 1900, that it was served on an agent of defendant 12th January, 1900. On the same day, 10th January, 1900, a

writ of attachment was issued out of the clerk's office of Wythe county, at the suit of the Roanoke Coal & Coke Company, attaching a large amount of property of the last-named company, and served by the same sheriff, who made due return thereof on the same 12th January, 1900. Upon filing the proper petition and bond, this cause was removed into the circuit court of the United States for the Western district of Virginia. As soon as the cause was docketed in this court, the defendant below moved the court to dismiss the cause, because the record does not show that the notice was returned to the clerk's office of the circuit court of Wythe county five days before the February term, 1899. Thereupon, the court ordered that the clerk of the court of said county do forthwith certify to the court when said notice was returned to his office in relation to said return. The clerk in answer to that order, and as to the time of filing the notice in the Roanoke Coal & Coke Company against the New River Mineral Company, says: "That he is unable to state anything positive, except that he sees, on looking at the papers, this indorsement: 'Tax, \$6.20, paid. Filed in clerk's office of Wythe circuit court January 16, 1899.' While this indorsement only seems to be on the levy made by the sheriff, and the notice and attachment not attached to the same, I think said indorsement was made for the filing of said notice and attachment on that date." The court refused the motion. The answer was filed, issue joined, and verdict had before a jury for plaintiff. The defendant moved for a new trial, which was refused. Judgment was entered on the verdict, leave was given to defendant to get a writ of error, and the cause is here on the assignments of error. These are two in number: (1) Because the court erred in refusing to quash and dismiss the notice, because the same had not been returned to the clerk's office of the circuit court of Wythe county, as provided by section 3211 of the Code of Virginia, as amended by acts of assembly of 1895-96. (2) Because the court did not grant a new trial.

M. M. Caldwell and W. S. Poage (Walker, Poage & Caldwell and Blair & Blair, on the briefs), for plaintiff in error.

John R. Johnson and Archer A. Phlegar, for defendant in error.

Before SIMONTON, Circuit Judge, and MORRIS and BOYD, District Judges.

SIMONTON, Circuit Judge (after stating the facts as above). The well-settled rule of this court is that the action of the circuit court in refusing or granting a new trial is not reviewable. The rule is so well settled, and has been declared so often by this court, that no citation of authority is necessary.

The only question in the case is that raised by the first assignment of error: Was the notice issued under the Virginia statutes returned by the sheriff within the time required by law? This being a mode of suit, the creation of statute, the statute must be followed strictly. The statute does not prescribe the mode of the return by the sheriff. Whether he returned it is a fact to be ascertained. There is no doubt that the notice and the return got into the clerk's office, for the cause was duly filed and docketed by the clerk. Did it get there within the five days after service? It was served on 12th January, 1900. On the bundle of papers, including this notice, with the return indorsed, the clerk had put: "Tax, \$6.20, paid. Filed," etc., "January 16, 1899." This tax is levied upon the sum sued for in the cause, and is ascertained upon examination of the bill of particulars. In this case it was levied upon the \$5,665.31, sued for in the notice. The strong, almost conclusive, inference of fact is that this notice, with its bill of particulars, was at that date, in the clerk's

office, filed within the five days. If with this we take the presumption of law that the sheriff did his duty, the contrary not appearing (*Ross v. Read*, 1 Wheat. 486, 4 L. Ed. 141; *Gonzales v. Ross*, 120 U. S. 605, 7 Sup. Ct. 705, 30 L. Ed. 801), the conclusion must follow that the court below did not err in refusing the motion to quash. "The presumption of law, until the contrary is proved, is that the officer has performed his duty (1 Greenl. Ev. § 40; *Freem. Ex'ns*, § 355; *O'Bannon v. Saunders*, 24 Grat. 138; *Hartwell v. Root*, 19 Johns. 345, 10 Am. Dec. 232; *Maury v. Cooper*, 3 J. J. Marsh. 224; and *Egery v. Buchanan*, 5 Cal. 53), and it is, therefore, to be presumed, in the absence of evidence to the contrary, that the return on the execution in this cause, being without date, was made while the sheriff had the right to make it, and in due time." *Rowe's Adm'r v. Hardy's Adm'r*, 97 Va. 678, 34 S. E. 625.

The judgment of the circuit court is affirmed.

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MERCHANTS' INS. CO. OF NEWARK, N. J., v. BUCKNER et al.

(Circuit Court of Appeals, Sixth Circuit. July 2, 1901.)

No. 932.

1. LIBEL—MALICE—ACTUAL AND IMPLIED—CHARGE TO JURY.

Where the court properly charged on the subject of malice in an action for libel, and what was said was unexceptionable as far as it went, and there was no request to instruct the jury on the difference between actual and implied malice and compensatory and exemplary damages, the judgment should not be disturbed because there was no special charge on those points.

2. APPEAL—EXCEPTIONS—REVIEW.

Where exceptions to the admission of testimony are general in their character, failing to point out the grounds of exception, such exceptions do not furnish a proper basis for review in an appellate court.

3. LIBEL—DEFENSES—PUBLICATION.

Where a libelous letter is sent to the secretary of a local board of underwriters, it is immaterial whether such board is a legal organization or not, since the writing and publishing of the letter would be equally effectual to damage the reputation of plaintiff in either case.

4. SAME—PLEADING—JOINDER OF CAUSES.

Plaintiffs, who were formerly partners, sued for a libel published of them in their firm name, alleging facts which entitled each to recover for injuries sustained by him individually, and claiming no damage to the business of the firm as such. *Held* that, though there was an improper joinder of causes of action and parties, such objections were waived, under Civ. Code Prac. Ky. §§ 113, 114, by failure of defendant to take advantage of such misjoinder by motion before answering.

In Error to the Circuit Court of the United States for the District of Kentucky.

A. B. St. John, for plaintiff in error.

Reuben A. Miller and Geo. W. Jolly, for defendants in error.

Before LURTON, DAY, and SEVERENS, Circuit Judges.

DAY, Circuit Judge. This case has once before been under consideration in this court. *Insurance Co. v. Buckner*, 98 Fed. 222, 39 C. C. A. 19. It is unnecessary to restate the particulars of the case,

which are fully disclosed in the former report. The action is one for libel arising from the writing and publication of a certain letter by an agent of the insurance company. Of the numerous errors assigned, five principal ones are urged upon our attention in the brief and oral argument for the plaintiff in error.

1. It is claimed that in an action for libel the law distinguishes two classes of malice,—malice in fact, or actual malice, and malice in law, or implied malice. Actual malice, it is alleged, alone entitles the party to recover exemplary damages; and it is urged that the court erred in not pointing out this distinction to the jury, and limiting the recovery to compensatory damages, in the absence of proof of actual malice. An examination of the charge in this respect shows that the court properly charged upon the subject of malice, and what was said is entirely unexceptionable, so far as it goes. Had the attention of the trial judge been called by a proper request to the necessity of instructing the jury upon the difference between actual and implied malice and compensatory and exemplary damages, no doubt they would have been instructed upon those propositions. In the absence of a request, the charge being free from error, we find nothing in this assignment to warrant interference with the judgment.

2. It is next urged that it was error to permit evidence of the good reputation of defendants in error, no attack having been made upon their reputation by the plaintiff in error at the trial. We find it unnecessary to pass upon this proposition, in view of the state of the record. The exceptions to the admission of testimony of this class are general in their character, failing to point out the ground of exception. It is well settled in the federal courts that such exceptions fail to afford a proper basis for review in an appellate court. The ground of the exception should be disclosed, in order that the court may act understandingly, and correct the error if one has been made. *Railroad Co. v. Hellenthal*, 31 C. C. A. 414, 88 Fed. 116; *Burton v. Driggs*, 20 Wall. 125, 22 L. Ed. 299; *Toplitz v. Hedden*, 146 U. S. 252, 13 Sup. Ct. 70, 36 L. Ed. 961.

3. It is claimed that the court below erred at the trial in permitting evidence of the publication of the letter in question, because the local board of underwriters at Hopkinsville, to whose secretary the alleged libelous letter was sent, was an illegal organization, as it sought to control by an illegal combination the business of insurance at that place. We fail to appreciate the materiality of this objection. This action in no wise concerns the legal organization of the board. Its objects may have been to restrain trade and prevent competition, rendering the organization illegal under the laws of Kentucky. This would afford no excuse to the plaintiff in error for sending a libelous letter to its secretary, with the publication of such letter, which would naturally follow. The question in this case is as to the responsibility of the plaintiff in error for its publication. The writing and publishing of this letter would be equally effectual to damage the reputation of the defendants in error if it be conceded that the board was illegally organized.

4. Evidence of publication of the alleged libel is claimed to have been admitted, which, owing to its remoteness, should have been ex-

cluded, and for which publication the plaintiff in error was not legally responsible. This assignment of error may be disposed of by further reference to the rule requiring objections to the admission of testimony to be definite, and to state the grounds thereof. The objections under this head are all general in their character, and too indefinite to lay the foundation for a review of the questions sought to be made.

5. Objections were taken to the charge, and the refusals of requests to charge based upon the theory that the action in this case was prosecuted for the recovery of damages to the plaintiffs below for an alleged libel upon the firm of Buckner & Co., of which they were members. It may be conceded that a joint action for slander or libel cannot be maintained by two or more individuals because the spoken or written words were uttered or written at the same time respecting several persons. Such wrongs furnish the ground for separate actions, and the parties have no community of interest which will enable them to sue jointly. To enable a firm to recover in an action for libel prosecuted on behalf of a partnership, damages must be limited to those which are suffered by the firm as such. When the reputation of the individual members is alleged to be injured by libelous publications concerning the firm, action must be brought by them separately. Admitting the soundness of these general principles, we think an examination of the pleadings shows that this action was not brought to recover on behalf of the firm for an injury to the partnership business. Plaintiffs below described themselves in the petition as "late partners under the style of Buckner & Co." Facts are stated which entitle Samuel S. Buckner and Frank G. Buckner to recover for injuries sustained by them individually. No damage is claimed to the business of the firm as such. In this view of the petition and the causes of action alleged, we have a case of misjoinder of causes of action as well as misjoinder of parties plaintiff. At the common law an attempt to recover in this manner with such misjoinder of parties and causes of action would result in a verdict for the defendant, and the court might instruct the jury so to find. At common law advantage of such misjoinder could be taken at any stage of the proceedings. In this case the practice is controlled, being upon the law side of the court, by the Kentucky Code of Procedure. An examination thereof shows that, where there is a misjoinder of causes of action, advantage must be taken thereof before answer, by motion requiring the plaintiff to elect between the causes of action,—to prosecute one and strike out the others. In the absence of such a motion the objection is waived. The rule is the same in that state in case of misjoinder of parties, which likewise must be taken advantage of by motion, in the absence of which the objection is deemed to be waived. Civ. Code Prac. Ky. §§ 113, 114; *Dean v. English*, 18 B. Mon. 132; *Yeates v. Walker*, 1 Duv. 84; *Caldwell v. Caldwell*, 2 Bush, 446; *Sale v. Crutchfield*, 8 Bush, 636-646. Had seasonable advantage been taken of this misjoinder, undoubtedly the plaintiffs below could have been required to prosecute separate actions for their alleged grievances. The insurance company by answering to the merits waived the objections as to misjoinder. Prob-

ably no prejudice has resulted to the plaintiff in error, as the defendants in error are both estopped by the judgment obtained from prosecuting further actions. Finding no error in the record, the judgment of the circuit court is affirmed, with costs.

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In re MADDEN.

(Circuit Court of Appeals, Second Circuit. August 22, 1901.)

**BANKRUPTCY—GROUNDS FOR REVIEW OF ORDER.**

Where an order requiring a bankrupt to execute an assignment to the trustee of a life insurance policy, which he had assigned to another prior to the adjudication, does not purport to affect the rights of the assignee, neither such assignee nor the bankrupt can complain of it, since the title of the bankrupt passed to the trustee by operation of law under Bankr. Act 1898, § 70.

Petition for Revision of Proceedings of the District Court of the United States for the Eastern District of New York, in Bankruptcy.

Henry B. Heylman and Raphael J. Moses, for petitioners.

Charles N. Morgan, for bankrupts.

Before WALLACE, LACOMBE, and SHIPMAN, Circuit Judges.

PER CURIAM. This is a petition of review of an order of a court of bankruptcy requiring the bankrupt to execute an assignment to the trustee in bankruptcy of a certain contract between himself and the Equitable Life Assurance Society of the United States. It appears that prior to the adjudication of bankruptcy the bankrupt had assigned the contract to Matilda J. Madden, his wife. As the order does not purport to pass upon the rights of Matilda J. Madden, and reserves them undetermined, she is not aggrieved, and is unaffected by it. The bankrupt himself is not aggrieved by the order, because by section 70 of the bankruptcy act the trustee takes by operation of law the bankrupt's title to all documents relating to his property. The petition of review is dismissed, for the reason that there is nothing in the order of which either of the petitioners has reason to complain.

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In re KELLAR.

(District Court, N. D. Iowa, Cedar Rapids Division. August 17, 1901.)

**1. BANKRUPTCY—PREFERENCES—INTEREST PAID IN ADVANCE ON RENEWAL OF NOTES.**

Payments of interest in advance, made by an insolvent within four months before his bankruptcy to a bank to secure a renewal of notes held by the bank, do not constitute preferences, within Bankr. Act 1898, § 57g, which the bank must surrender before proving its claim.

**2. SAME—DEPOSITS APPLIED BY BANK IN PAYMENT OF OVERDRAFT.**

Deposits made by an insolvent in a bank within four months prior to his bankruptcy, and applied by the bank to the payment of an overdraft previously made, constitute a preference, within the meaning of

Bankr. Act 1898, § 57g, which must be surrendered by the bank before it can prove a claim against the bankrupt's estate, notwithstanding such deposits and their application were in the usual course of business, and without knowledge on the part of the bank of the insolvency of the depositor.

In Bankruptcy. On review of ruling of referee respecting claim of Hamilton County State Bank.

D. C. Chase, for creditors.

J. L. Kamrar, for bank.

SHIRAS, District Judge. In due season after the adjudication in bankruptcy was entered in this case, the Hamilton County State Bank proved up its claim against the estate in the sum of \$8,386.26, it being stated in the proof filed that the indebtedness was for money loaned, the same being evidenced by promissory notes executed by the bankrupt. Some time after the allowance of this claim, the trustee filed an application to have the allowance set aside, and for an order refusing the approval of the claim, unless the bank should repay certain payments received by it after the insolvency of the bankrupt. Upon the hearing before the referee it appeared that the bankrupt had, from time to time, obtained extensions or renewals of his indebtedness to the bank, and, in accordance with the usual custom, had paid in advance the interest charged by the bank for such renewals. It further appeared in evidence that the bankrupt, during the continuance of the business transacted by him, had kept an open account with the Hamilton County State Bank, and that, after his insolvency had intervened, he had, from time to time, overdrawn his account up to the sum of \$600, so that, in addition to the amounts due the bank upon the promissory notes held by it, he had become indebted in the sum named for moneys advanced him. It further appeared that by deposits subsequently made this indebtedness for overdrafts had been fully paid, and when the petition in bankruptcy was filed there was a sum to the credit of the bankrupt upon the running account, which was paid to the trustee. The several payments or deposits upon the open account were all made after the actual insolvency of the bankrupt. Upon this state of facts the referee ruled that the payment of the interest charged for the several renewals of the notes was not a preferential payment within the meaning of the bankrupt act, and that the bank had the legal right to apply the deposits made from time to time in liquidation of the indebtedness created by the overdrafts, and that such application did not constitute a preferential payment, and therefore the referee refused to set aside the allowance of the claim of the bank as prayed for, and, this ruling having been excepted to, the questions presented thereby have been certified to this court for consideration.

The ruling of the referee to the effect that the payments of interest made to the bank upon the several renewals of the indebtedness due it cannot be deemed to be preferences within the meaning of clause "g" of section 57 of the bankrupt act is clearly correct, and is therefore affirmed. These payments of interest were not made upon the pre-existing debts or claims, nor for the purpose of reducing the amount



of the sums then due the bank. They were made for the purpose of procuring an extension of time of the maturity of the loans, in order to secure the right to the use of the money for the stipulated period. This was a present consideration, given by the bank to Kellar, for which he then paid the bank the sums received by it. The interest money was not paid on a debt then due, but solely to secure the right to the use of the money for a further stipulated period, and in no just sense can it be said that the receipt of the money by the bank as a consideration for the extension or renewal of the loans was a preferential payment upon the loans themselves.

The remaining question presented by the exceptions to the ruling of the referee is not so easy of solution. There is certainly much to be said in favor of the view taken by the referee to the effect that the bank had the right to apply in payment of the debt to it created by the overdrafts the deposits subsequently made, without being held liable to the charge of receiving a preference on its claim, and if the evidence justified the finding that the overdrafts were permitted or contracted for on the faith of special sums to be thereafter deposited it might be held that the right to the deposit was created when the overdraft was made; but it is not shown that such was the fact. It is undoubtedly true that the bank expected that Kellar would, from time to time, make deposits which could be applied in payment of the sums due on account; but the same promise of payment was made to every creditor who sold goods to the bankrupt, and it cannot be held that because the debtor, when he created the debt, either by buying goods or borrowing the money, promised to pay in the future, therefore such a right was created in favor of the creditor that he might receive the payment after the insolvency of the debtor without it being deemed a preference under the provisions of section 57 of the act. Some stress is laid in the argument upon the fact that the deposits were made and applied in the usual course of business, without knowledge on part of the bank of the actual insolvency of the debtor. In the opinion filed by this court when this case was before it on exceptions respecting the claims of the Warfield-Pratt-Howell Company this question was considered at length, and the conclusion was reached that the fact of the preference being received did not depend on the knowledge, or lack of it, of either the creditor or the bankrupt, nor upon the fact that the transaction was in the ordinary course of business. In *re Kellar* (D. C.) 109 Fed. 118-123. The opinion by this court was filed on the 27th day of May, 1901, and on the same day the supreme court handed down its decision in *Pirie v. Trust Co.*, 21 Sup. Ct. 906, 45 L. Ed. 1171, in which it is expressly ruled that a creditor who has received payment of money from an insolvent debtor, without knowing or having cause to believe that the debtor was insolvent, or that a preference was intended, could not, under the provisions of clause "g" of section 57 of the act, prove up his claim, unless he surrendered to the trustee the payment received; and this decision settles the question that an actual preference cannot be retained by a creditor seeking to prove the balance of his claim, upon the theory that the payments were received in the ordinary course of business, and without knowledge of the insolvent condition of the

debtor. The conclusion of the referee that the payment of the overdrafts in the manner stated did not constitute the giving of a preference seems to be based upon the legal proposition "that the bank had the legal right to apply the deposits to liquidate the indebtedness created by the overdrafts," and in the brief of counsel are cited authorities in support of the proposition that the bank had a lien on the moneys deposited in such sense that it had the right to apply the same in payment of any debt due it. Under the rules of the common law this right doubtless existed, but the question is, what change has been made therein by the enactment of the bankrupt act? It will be kept in mind that the indebtedness by way of overdrafts and the depositing of the several sums applied in payment thereof all occurred after the date of the insolvency of Kellar. If the latter, after his insolvency, had gone to the bank with \$600 in money, and had in terms paid the same in discharge of the debt due upon the overdrafts, can there be any question that such a payment would have constituted a preference? The sums due upon the overdrafts were debts due from the bankrupt, and the payment thereof after the actual insolvency of the debtor certainly gives the bank a preference over the other creditors, without regard to the particular method by which the payment was brought about. In subdivision "a" of section 60 of the act a preference is defined as follows:

"A person shall be deemed to have given a preference, if, being insolvent, he had procured or suffered a judgment to be entered against himself in favor of any person, or made a transfer of any of his property, and the effect of the enforcement of such judgment or transfer will be to enable any one of his creditors to obtain a greater percentage of his debt than any other of such creditors of the same class."

In the already cited case of *Pirie v. Trust Co.* the supreme court holds that the word "property" in this section includes money, and that a "transfer is defined to be not only the sale of property, but every other and different mode of disposing of or parting with property. All technicality and narrowness of meaning is precluded. The word is used in its most comprehensive sense, and is intended to include every means and manner by which property can pass from the ownership and possession of another, and by which the result forbidden by the statute may be accomplished,—a preference enabling a creditor to obtain a greater percentage of his debt than any other creditors of the same class.'" The facts in the case now before the court show that the bank is a creditor of the bankrupt, and as such is seeking a dividend from the estate; that, after the insolvency of the bankrupt, the latter paid into the bank sums of money aggregating \$600; that these sums were applied by the bank to the payment in full of so much of the indebtedness due the bank as was evidenced by the overdrafts; and it is certainly clear that, if the bank is allowed to prove up its claim, and receive a dividend thereon, without repaying to the trustee the sums received after the insolvency of the bankrupt, the bank will secure a greater percentage of its debt than will the other creditors; and it is this result which the supreme court holds is absolutely forbidden by the provisions of the bankrupt act, regardless of the means or manner by which the preferences have

been brought about. Under this ruling of the supreme court, I can see no escape from the conclusion that the payments by way of deposits received by the bank after the date of the insolvency of Kellar, and applied in discharge of so much of the debt due the bank as was created by the overdrafts, must be held to be preferential payments of such a nature that the bank cannot be allowed to share in the estate, unless it repays to the trustee the payments thus made it. The ruling of the referee must, therefore, be reversed, with instructions to enter an order to the effect that, unless the bank accounts to the trustee, within some reasonable time, to be fixed in the order, for the payments applied in discharge of the overdrafts and received by the bank since the date of the insolvency of Almon D. Kellar, then the allowance of the claim of the bank shall be set aside as prayed for; and it is further ordered that the taxable costs of this proceeding are adjudged against the bank.

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In re MAGID-HOPE SILK MFG. CO.

(District Court, D. Massachusetts. August 7, 1901.)

No. 4,646.

**1. BANKRUPTCY—JURISDICTION—CORPORATIONS.**

Under Bankr. Act 1898, § 2 (1), providing that a district court may adjudge persons bankrupt who have their principal place of business, reside, or have their domicile within the district, and section 1 (19), providing that "persons" shall include corporations, except where otherwise provided, a court has jurisdiction of an involuntary petition against a corporation having its principal place of business, as distinct from its residence or domicile, within the district.

**2. SAME—SERVICE.**

Service in bankruptcy proceedings against a foreign corporation being on the commissioner of corporations of the state, appointed attorney of the corporation to receive service of process in the state, is sufficient.

**In Bankruptcy.**

M. L. Sanborn and Southard & Parker, for petitioning creditors.  
J. W. Keith and M. M. Weston, for objecting creditors.

LOWELL, District Judge. This is an involuntary petition filed against a corporation established under the laws of the state of Maine. For the present purposes of the case, it may be taken that the business of the corporation was in fact carried on altogether in Massachusetts. Certain creditors, appearing to object to the adjudication, have pleaded to the jurisdiction of this court.

The bankrupt act, by express terms, gives this court jurisdiction. Section 2 (1) provides that this court may "adjudge persons bankrupt who have had their principal place of business, reside, or have their domicile" within this district for the time specified. Section 1 (19) provides that "'persons' shall include corporations, except where otherwise specified." Taken together, these two sections give this court jurisdiction of an involuntary petition against a corporation, which, for the necessary time, has had its principal place of business,

as distinct from its residence or domicile, within this district. No sufficient reason appears to disregard the plain language of the act. In *re Marine Machine & Conveyor Co.* (D. C.) 91 Fed. 630; *Dressel v. Lumber Co.* (D. C.) 107 Fed. 255. There is no decision in favor of doing so. In *Re Elmira Steel Co.*, 5 Am. Bankr. R. 484, the corporation in question had its principal place of business in the Western district of New York, and in that district the earlier petition in bankruptcy against it was filed. Its office in Pennsylvania seems to have been merely a branch office. The adjudication in Pennsylvania probably was otherwise irregular. On the other hand, it is matter of common knowledge that corporations are established under the laws of the state of Maine for the sole purpose of doing business outside that state, and the corporation here in question appears to have been one of that class.

The respondents further objected that no valid service was obtained upon the debtor. Service was made upon the commissioner of corporations of Massachusetts, who, by a duly-executed instrument, had been appointed the attorney of the corporation to receive service of process within this state. If this court has jurisdiction here over the debtor petitioned against, sufficient service of the petition was obtained. In *Pacific Co. v. Denton*, 146 U. S. 202, 207, 13 Sup. Ct. 46, 36 L. Ed. 945, Mr. Justice Gray said of an agreement to accept service no more comprehensive than this:

"It might likewise have subjected the corporation to the jurisdiction of a circuit court of the United States held within the state, so long as the judicial acts of the United States allowed it to be sued in the district in which it was found. *Ex parte Schollenberger*, 96 U. S. 369, 24 L. Ed. 853; *Insurance Co. v. Woodworth*, 111 U. S. 138, 4 Sup. Ct. 364, 28 L. Ed. 379; *In re Louisville Underwriters*, 134 U. S. 488, 10 Sup. Ct. 587, 33 L. Ed. 991."

The plea to the jurisdiction is therefore overruled, and the respondents may plead to the merits within 10 days.

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#### DICKINSON v. SECURITY BANK OF RICHMOND.

(Circuit Court of Appeals, Fourth Circuit. July 6, 1901.)

No. 405.

#### BANKRUPTCY—PROVABLE CLAIMS—SURRENDER OF PREFERENCE.

All that the bankruptcy act requires of a creditor who has received a preference, before he will be entitled to prove his claim against the bankrupt's estate, is to place the parties in statu quo; and where the preference consisted of a note of a third party, which was credited on the debt of the bankrupt, such requirement is complied with by a return of the note, and the trustee cannot refuse to accept such note, and demand payment in cash of the amount for which the creditor took it.

Appeal from the District Court of the United States for the Eastern District of Virginia.

This case comes up on appeal from the district court of the United States for the Eastern district of Virginia, sitting in bankruptcy. The Miller China Company, a corporation of the state of Virginia, conducted business for several years in the city of Richmond in that state. It did its banking business with the Security Bank of Richmond, and at the date

of the transaction hereinafter mentioned was indebted to that bank by note in the sum of \$5,000. The bank having learned that W. M. Miller, the president of the china company, and a valuable man, was about to leave it, became uneasy with regard to the debt due the bank. Its officers visited the china company, and examined its books. Upon this examination it was found that W. M. Miller was indebted to the china company in the sum of \$742.59, and that its condition was unsatisfactory. Thereupon the bank insisted that the debt of the china company to it be reduced. To this end on 15th January, 1900, when the \$5,000 note became due, it was arranged that the bank should use a balance of \$800.08, then to the credit of the china company as a depositor in the bank, and a time note for \$742.59, given by Miller for his indebtedness to the china company. In arranging the matter, there was added to the \$800.08 the present value of this note, its face, less the interest to its maturity, and the remainder was provided for by a demand note of the china company for \$3,462.21. This mode of settlement having been determined upon, the book entries were made in the bank, in accordance with the usual banking methods. The china company was credited with this cash deposit, with the present value of the note, and with the demand note, and gave its check for \$5,000, thus closing the transaction. On 20th January next thereafter, the china company made a general assignment for the benefit of its creditors. This being an act of bankruptcy, it was at the instance of certain creditors declared an involuntary bankrupt. The arrangement with the bank having been made within the four months, under the advice of its solicitor, it offered to return all that it had received from the bankrupt, in effect canceling the transaction. To this end it offered to the trustee the note of Miller and the amount of the deposit. The trustee at first refused to receive anything less than the amount of the deposit and the cash value of the note,—in all, \$1,538.71 in money. Finally, by agreement of parties, he received in cash the \$800.08, amount of the deposit, and agreed that the question should be submitted to the referee whether the bank could return the note or pay in cash the sum of \$738.63, at which it was credited in the transaction above spoken of. The referee held that the bank should pay the cash value of the note, \$738.59, and further, that this note having matured, and there being no satisfactory evidence that notice of protest had been sent to the china company, who had indorsed it, that the bank had no claim for it against the bankrupt estate. Exceptions were taken to this conclusion of the referee, and the district court, hearing the exceptions, overruled the referee, directing the bank to deliver to the trustee, and instructing the trustee to receive, the note of W. M. Miller. A petition for leave to appeal was granted, and the case comes up on assignment of error.

John A. Lamb, for appellant.

Charles V. Meredith, for appellee.

Before SIMONTON, Circuit Judge, and BRAWLEY and BOYD, District Judges.

SIMONTON, Circuit Judge (after stating the facts as above). One of the purposes of the bankrupt act is to obtain an equal division of the assets of the bankrupt among his creditors. To this end it sets its face against preferences. All preferences made within four months of the adjudication of bankruptcy are set aside. If a creditor, during these four months, has received, however innocently, any part of the assets of the bankrupt on account of his debt, he must return it, or be debarred of any interest in the bankrupt's estate. The relations between him and the bankrupt must be restored in statu quo. Bankr. Act 1898, §§ 57-59; In re Fixen, 4 Am. Bankr. R. 10, 42 C. C. A. 354, 102 Fed. 295, 30 L. R. A. 605; Electric Co. v. Worden, 39 C. C. A. 582, 99 Fed. 400; Pirie v. Trust Co. (May

27, 1901) 21 Sup. Ct. 906, 45 L. Ed. 1171. In the present case, the bank, dealing with the china company, within four months of the adjudication, received of its assets \$800.08 in cash and the note of W. M. Miller. After the adjudication the bank returned just what it received,—the cash and the note. In *re Drummond*, 4 Biss. 149, Fed. Cas. No. 4,094. The appellant, however, insists that the bank purchased the note from the china company for its face value less the discount, and that it must now account for this value in cash. But the transaction shows no such purchase. The bank, the creditor, with the view of reducing its claim upon the china company, took part of its assets. In order to ascertain how much of the claim was thus provided for, it was necessary to ascertain the value of these assets. The deposit had its fixed value, \$800.08. The time note was valued at its then present value,—that is to say, its face, less the interest until maturity. These were deducted from the \$5,000 claim, and the remainder ascertained. The bank did not take the note for discount in the regular course of business, or pay money for it. Nor did it part with the note. When, by the operation of the bankrupt law, the whole transaction was annulled, it returned the note and the cash deposit, and everything was put in statu quo. Even if the transaction were fraudulent, all that the bank could be required to do would be to return the asset or its value. In *re Heinsfurter* (D. C.) 97 Fed. 198. In this case the bank has returned the asset, and it is admitted that its value is nothing. It is supposed, however, that inasmuch as there is no satisfactory evidence that the note was protested at maturity, or of any evidence of its dishonor given to the china company it is discharged. But no claim is made on the china company as indorsee of this note. Nor is its claim against Miller at all impaired because of want of notice of its dishonor. All that the bank has done has been to return to the china company this part of its assets, exactly as it had received it. We see no error in the decision of the district court, and it is affirmed.

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In re MACKEY.

(District Court, D. Delaware. August 21, 1901.)

No. 31.

**1. BANKRUPTCY—PLACE OF BUSINESS.**

The defendant lived with his family on a farm in Pennsylvania, and the branches of business conducted by him were raising and selling farm products, buying and selling farm products, selling farm products on commission, and buying and forthwith slaughtering live stock and selling the meat. He had a stall in a market house in Wilmington, Delaware, where he exhibited and sold all but a comparatively small proportion of the produce handled by him. What he sold in Wilmington was not delivered pursuant to contract entered into elsewhere, but the contract of sale and the delivery of the subject of sale were contemporaneous and effected at his stall. *Held* that his principal place of business was in Wilmington.

**2. SAME—FARMER—DEFINITION.**

"A person engaged chiefly in farming", within the meaning of the bankruptcy act, is one whose chief occupation or business is farming;

and one's chief occupation or business, so far as worldly pursuits are concerned, is that which is of principal concern to him, of some permanency in its nature, which he deems of paramount importance to his welfare, and on which he chiefly relies for his livelihood or as the means of acquiring wealth, great or small.

8. SAME—OCCUPATION.

That one may principally devote his physical exertions or his time or his capital to a given pursuit, while a factor entitled to consideration, is not in all cases determinative of the question whether that pursuit is his chief occupation or business.

4. SAME.

It is impracticable, if not impossible, to define with precision the facts which will in all cases determine whether one is engaged chiefly in farming, and each case must be decided on its own circumstances.

6. SAME—FORMER PURSUIT.

No construction of the bankruptcy act is admissible which would permit an insolvent person, who had committed an act of bankruptcy within four months next preceding the filing of the petition, to evade the provisions of the statute, by engaging in farming after the commission of the act and before the filing of the petition.

6. SAME—PETITION OF CREDITORS.

Under section 59f of the bankruptcy act creditors other than original petitioners may at any time before an adjudication of bankruptcy or the dismissal of the original petition, and whether before or after the expiration of four months from the act of bankruptcy, join therein in order to supply any deficiency in the amount of provable claims originally set forth in the petition; insufficiency in amount of such claims not being an incurable jurisdictional defect.

(Syllabus by the Court.)

In Bankruptcy.

William F. Kurtz, for petitioning creditors.

J. Frank Ball, for bankrupt.

BRADFORD, District Judge. Proceedings were instituted in this case for the adjudication of William D. A. Mackey as an involuntary bankrupt. The creditors' petition was filed March 21, 1901, setting forth, among other things, that the defendant, for the greater portion of six months next preceding the filing of the petition, had his principal place of business in the Third Street Market, in the City of Wilmington and district of Delaware; that the defendant was insolvent; and that on or about January 1, 1901, he committed an act of bankruptcy in that he then made a general assignment for the benefit of his creditors. The defendant, in his answer, among other things, alleged as follows:

"And the said respondent further answering respectfully suggests and avers that 'the District Court of the United States for the District of Delaware' to which said petition was presented, has no jurisdiction to adjudge him a bankrupt, as in said petition prayed because:

"1st. The said respondent has not had his principal place of business or resided or had his domicile within the respective territorial jurisdiction of the said court for the preceding six months or the greater portion thereof from the time of the filing of the said petition in bankruptcy.

"2nd. That for the preceding six months to the filing of the said petition and for a long time prior thereto and continuously to this date, the chief place of business, residence and domicile of the respondent has been and now is in Elk Township, near Hickory Hill, in the County of Chester and State of Pennsylvania, and within the territorial limits and jurisdiction of

the District Court of the United States in and for the Eastern District of Pennsylvania.

"3rd. That for the preceding six months, or the greater portion thereof, to the filing of the said petition the said respondent did not have a place of business, within the purview of the Act of Congress relating to Bankruptcy, within the territorial limits of the said court.

"4th. That for the preceding six months, to the filing of the said petition, and for many years prior thereto and continuously to this date, the respondent has been engaged chiefly in farming or tilling the soil, being owner or occupant of a farm of one hundred and twenty acres, situate near Hickory Hill, Chester County, Pennsylvania, which he personally conducted, and in the carrying on of which and the business done thereon, the greater part of his debts were contracted, and he is therefore excepted by express terms from the operation of the said Act of Congress relating to Bankruptcy."

No application having been filed or made by the defendant within the time allowed for the filing of the answer for a trial by jury, such trial was by virtue of section 19a of the Bankruptcy Act waived, and the case has been heard on the pleadings and evidence by the court without the intervention of a jury.

Among the powers conferred on courts of bankruptcy by section 2, is the following:

"To adjudge persons bankrupt who have had their principal place of business, resided, or had their domicile within their respective territorial jurisdictions for the preceding six months, or the greater portion thereof, or who do not have their principal place of business, reside, or have their domicile within the United States, but have property within their jurisdictions, or who have been adjudged bankrupts by courts of competent jurisdiction without the United States and have property within their jurisdictions."

The defendant had not at any time after the act of bankruptcy any property in the district of Delaware; nor did he reside or have his domicile there for six months or the greater portion thereof prior to the filing of the petition. On the contrary, for many years prior to and until after the petition was filed, he continuously resided and had his domicile on his farm in Chester county, Pennsylvania. But it is contended that for the greater portion of six months next preceding the filing of the petition, he had his principal place of business in the City of Wilmington in this district. The petition, as before stated, was filed March 21, 1901. For several years prior to and inclusive of December 24, 1900, the defendant occupied a stall in the Third Street Market in Wilmington, for the exhibition and sale of meat, eggs, poultry, vegetables and other farm produce. Nearly all he sold, except grain, hay, and possibly some straw, was brought by him from his farm in his market wagon to the Third Street Market, and there disposed of. A comparatively trifling proportion of the contents of his wagon was sold and delivered at Newark and other places in this district, including several stores in Wilmington; but all the rest was taken to his market stall. He attended market once a week, leaving home early on Friday morning and reaching his stall about noon of the same day. During the afternoon of that day and the forenoon of Saturday he was employed in selling the produce he had brought from Chester county, leaving Wilmington about midday and reaching his home late in the evening of the same day. A portion of what he sold from his wagon or stall consisted of products of his farm, and the



residue, being the larger portion, was furnished to him principally in Chester county by others, to be sold on commission, or was bought by him principally there for re-sale on his own account, or consisted of calves, lambs, or other live stock bought by him from others and slaughtered and prepared on his farm. He also bought in Wilmington a portion, though small, of what he sold at his stall. What he bought from others in Chester county was paid for there and, after selling produce on commission for persons in that county, he there made settlement with them. Most of the produce furnished to him by others in that county was delivered on his farm and thence taken to his market stall. While he bought chiefly in Chester county, he sold almost exclusively in Wilmington, and principally at his stall. There is no evidence that what he there disposed of was delivered pursuant to contract entered into elsewhere, and in the absence of such evidence, it must be assumed that, in marketing the produce, the contract of sale and the delivery of the subject of sale were contemporaneous and effected at his stall. The fact that he gathered in Pennsylvania what he disposed of in Delaware is immaterial. His business was raising and selling, buying and selling, selling on commission, and buying, slaughtering and selling. Selling was an essential part and the consummation of his business. A horse dealer or butcher may buy his stock in many states, but if horses or cattle are bought with a view to their sale at a certain place in Delaware, and that place is the principal place of sale, it is undoubtedly his principal place of business. So here, under the circumstances disclosed by the evidence, it must be held that the principal place of business of the defendant was in Wilmington, in this district, and that it was such during the greater portion of six months next preceding the filing of the petition; Friday and Saturday, September 21 and 22, 1900, being days on which the defendant was in occupation of his stall.

Section 4b excepts from its provisions a "wage-earner or a person engaged chiefly in farming or the tillage of the soil". It is admitted that the defendant was not a wage-earner or a person engaged chiefly in the tillage of the soil, in the sense in which those terms are employed in the act. But it is contended that he was "a person engaged chiefly in farming". A person engaged chiefly in farming is one whose chief occupation or business is farming. The chief occupation or business of one, so far as worldly pursuits are concerned, is that which is of principal concern to him, of some permanency in its nature, and on which he chiefly relies for his livelihood or as the means of acquiring wealth, great or small. That one may principally devote his physical exertions or his time to a given pursuit, while one of the factors entitled to consideration, is not in all cases determinative of the question whether that pursuit is his chief occupation or business. One may own, reside on and operate a farm and at the same time be engaged in the business of buying and selling stocks and other securities. The latter occupation may consume only an hour or two and the balance of the day be devoted by him to his farm, yet it does not follow that his chief occupation or business is not dealing in stocks or other secu-

rities. If such dealing is of principal concern to him and chiefly relied on by him for his subsistence and financial advancement, and if he treats it as of paramount importance to his welfare, he would not be within the category of persons chiefly engaged in farming, even were his farm to yield him some profit. Nor does the amount of capital invested necessarily determine in all cases what one's chief occupation or business is. It, like the amount of time devoted, is undoubtedly a factor to be considered, but often is not conclusive. One may erect a palatial residence in the country, and own the farm on which it stands. It becomes part of the farm, and the farm may be skillfully operated and yet not yield in profits a hundredth part of the interest on the investment. The owner may be engaged in profitable manufacturing or mercantile pursuits which enable him to pay in full the cost of his house, and thereafter maintain it from the profits on his business capital, though less than such cost. No one would in such case contend that the owner of the farm was chiefly engaged in farming because most of his capital was invested in it. It is evident that it is impracticable, if not impossible, to define with precision the facts which will in all cases determine whether one is engaged chiefly in farming, and that each case must be decided on its own circumstances. It may, however, legitimately be stated, generally, that, if it appears in a given case that one's occupation or business which is of principal concern to him, not ephemeral, but of some degree of permanency, and on which he mainly relies for his livelihood and financial welfare, be other than farming, he is not "a person engaged chiefly in farming". No one should be held exempt from the provisions of the bankrupt act on this ground unless it satisfactorily appears that he comes within the exception. The evidence on this branch of the case is voluminous and has received careful attention. The defendant, for many years and until after his act of bankruptcy, owned and operated a farm of 122 acres in Elk Township, Chester county, of which 100 acres were arable and the rest woodland. The year 1900 appears from the evidence to have been an average year with respect to the amount of crops raised on the farm. During that year the total value, according to the maximum figures as to quantity and value given by the defendant, of all crops raised there, including hay, wheat, potatoes except second size, oats, buckwheat, rye, corn and straw, was not in excess of \$1,665.10, of which a large proportion, valued at \$699.20 was fed or otherwise used on the farm; leaving a balance, valued at \$965.90, sold by the defendant. It further appears from the evidence of the defendant, that during 1900 he raised on his farm for sale eight calves, twenty-five lambs, twenty-five pigs and from twelve to fifteen dogs, the aggregate value of which, according to his figures, did not exceed \$660. He derived from his farm certain other produce so trivial in amount and value as not to require special mention. It is safe to conclude that on a liberal estimate, the total value of the farm produce for sale did not exceed \$1,700, and was probably several hundred dollars below that amount. The defendant had a slaughter-house on his farm and was largely engaged in buying calves and lambs for slaughter and sale. They

were slaughtered on his farm and sold, as before stated, principally at his stall in Wilmington. With few exceptions, they were not raised or vealed on his farm, but, when bought, were forthwith slaughtered. In 1900 while he raised only eight calves he had in his market wagon each week on an average four to five calves. Indeed, with the number of cows on his farm in that year, it would not have been possible to veal more than thirty calves, had they been brought there for that purpose, of which there is no sufficient evidence. During the same year he raised only twenty-five lambs, yet his wagon each week contained on an average at least three lambs. The evidence shows that the value of the calves and lambs alone, not raised or vealed by him, but bought by him from others and slaughtered and sold from his wagon or stall, was far in excess of the total value of all crops of the farm, together with all calves, lambs and pigs raised there, and without any deduction for grain or straw fed or otherwise disposed of on the farm, and was at least twelve times the value of the lambs and calves raised or vealed on his farm, and about six times the value of all pigs, dogs, lambs and calves raised or vealed there. He also sold on commission from his wagon or stall in Wilmington a considerable quantity of farm products supplied to him by others, a portion of which consisted of chickens, butter and eggs. He took on an average each week in his wagon to market from fifteen to twenty chickens, most of which, as stated by his son, were sold on commission or had been bought by the defendant from others; and from seventy-five to one hundred pounds of butter, all of which was sold on commission or had been bought by him from others; and three crates containing ninety dozen eggs, of which not more than five dozen were produced on his farm; eighty-five dozen being either sold on commission or bought by him from others. His wagon rarely returned with produce in it. Without going into further detail, it appears from the evidence, taken as a whole, that during 1900 the value of the meat and other produce taken by the defendant to market could not have been less than \$6,000, and that, on a liberal estimate, of this meat and produce, the produce from his farm, including meat, did not amount to more than \$850., leaving a balance of not less than \$5,150., representing the value of meat and other produce sold by him on commission or bought by him from others. This balance is approximately three times as large as the total value of all the crops on the farm sold by him, together with the total value of all meat and other produce of the farm sold from his wagon or at his stall during 1900. The evidence is also clear that it would not have been possible to raise on a farm of the size of that of the defendant more than a small proportion of what he marketed here and that the most extensive and important branch of his business consisted in buying and slaughtering live stock and preparing and selling the meat. Further, nearly, if not quite, as extensive as the farming branch of his business was his occupation of selling on commission. In so far as he bought and forthwith slaughtered live stock and prepared and sold the meat, he was a butcher, and not a person engaged in farming within the meaning of the bankruptcy

act; and, in so far as he sold on commission farm or other produce supplied to him by others, his business was other than farming. These branches of business are frequently carried on by persons living in cities and towns, and it is not unusual to find them also conducted by persons living in the country. From motives of economy or natural inclination in many cases, persons engaged in such business have their homes on farms; but this circumstance does not of itself change the nature of the business nor the character of those employed in it. With the defendant there lived on the farm as their home his wife, a daughter, a son about twenty-two years old, and a hired boy about twelve years old. The defendant, with the assistance of his son and hired boy, carried on all branches of his business. At least two and a half days in each week, Thursday afternoon, Friday and Saturday, were devoted to his business other than farming. He states in a general way that the balance of each week was given up to farming; but there is no evidence that during or before 1900 more than two and a half days were on an average actually employed each week in conducting the farming branch of his business, and in the absence of such evidence it may well be doubted whether such was the fact. Whatever were the farming exigencies during those days in each or any week, they yielded to the demands of the business to which those days had been devoted, as of paramount importance. A large proportion of the defendant's indebtedness, aside from amounts representing purchase money for his farm, was incurred in his branches of business other than farming. The evidence as a whole has satisfied me that the defendant did not chiefly rely on farming for his livelihood or for the means wherewith to pay his debts; that farming was not considered by him as of paramount importance; that it was not of principal concern to him; that it was not his chief occupation or business; and that, consequently, he was not "a person engaged chiefly in farming" in the sense of the bankruptcy act. There is no satisfactory evidence that after the act of bankruptcy and until the filing of the petition, or at any time between the occurrence of those events, the defendant was "engaged chiefly in farming". Nor should I deem it material if he had been so engaged during that period. No construction of the bankruptcy act is admissible which would permit an insolvent person, who had committed an act of bankruptcy within four months next preceding the filing of the petition, to evade the provisions of the statute by engaging in farming after the commission of the act and before the filing of the petition. In *re Luckhardt* (D. C.) 101 Fed. 807. As was well said in that case, "the excepted occupations are not designed as a refuge for insolvent debtors laden with property and fleeing from other callings."

At the hearing the defendant, having obtained leave of the court in that behalf, filed certain amendments to his answer, denying that he was indebted to the petitioning creditors in the amounts set forth in their petition, and alleging that his total indebtedness to them was less than the sum of \$500 required by section 59b. The evidence sustained this allegation and subsequently, during the hearing and more than four months after the alleged act of bankruptcy, the coun-

sel for the petitioning creditors representing other creditors of the defendant presented their petitions, praying to join in the original petition under section 59f, in order to supply the deficiency in the amount of provable claims set forth in the original petition, and to conform to the requirements of the statute. Opposition was made on the part of the defendant to the granting of leave to the latter creditors to join in the original petition, but this court, after some hesitation and on careful consideration of the point, allowed their application. The position was taken by the defendant that the joining of such creditors in the original petition, if permitted, virtually would constitute a new petition, which must be considered filed as of the day of such joinder; that by virtue of section 3b a petition in involuntary bankruptcy must be filed within four months next after the act of bankruptcy; and that, the deed of assignment having been recorded December 28, 1900, more than four months before application was made for such joinder, it would be beyond the jurisdiction of the court to allow it. This contention cannot, in my opinion, be sustained. It is a familiar canon of construction, applicable to statutes as well as to written instruments, that in case of seeming inconsistency or repugnancy between particular provisions or clauses resort should be had to other parts or the whole of the statute or instrument for light as to the meaning and scope of such provisions or clauses, and to ascertain whether they are not fairly susceptible of such a construction as will accord effect to each of them. This court certainly had jurisdiction over the original petition; for it contained the necessary averments, including the allegation that "your petitioners are creditors of said William D. Armstrong Mackey, having provable claims amounting in the aggregate, in excess of securities held by them, to the sum of five hundred dollars (\$500)." It is also alleged and proven that the defendant owes debts to an amount exceeding \$1,000; that he was insolvent; that he committed an act of bankruptcy; and that the original petition, which was sufficient on its face, was filed against him within four months after that act. The court did not lose the jurisdiction which it had acquired on the filing of the petition, when it appeared that the petitioning creditors had not provable claims amounting to \$500. The dismissal of the petition in such a case is necessary, unless the fault be corrected; but such fault can be cured. While the bankruptcy act requires in involuntary proceedings a petition to be filed within four months after the act of bankruptcy, it nowhere provides that the petition shall not be amended after the expiration of that period. General order 11 (32 C. C. A. xiv., 89 Fed. vii.) promulgated by the supreme court by virtue of section 30 as a proper rule or order "as to procedure and for carrying this act into force and effect", without any restriction as to time, provides that "the court may allow amendments to the petition and schedules on application of the petitioner." This power of amendment is substantial and conferred for effecting the broad purposes of the act, and is not confined to niceties of diction or other immaterial or merely formal matters. To hold that it does not embrace the insertion of material and essential averments at any stage of the proceedings before judgment, would reduce it to a shadow.

But it is not necessary to rely on general order II; for section 59f, without restriction or qualification, provides that "creditors other than original petitioners may at any time enter their appearance and join in the petition". I find no warrant in the act, considered as a whole, for restricting this provision to cases in which the petition not only contains all the required averments, but is sustained by evidence establishing each of them; nor to cases in which "creditors other than original petitioners" seek to join in the petition within four months next after the alleged act of bankruptcy; nor to cases in which creditors sufficient in number and in the amount of their provable claims originally join in the petition. Section 59 distinctively deals with the number of creditors required to join in the petition and the amount of their provable claims. By clause "d" it is provided that where the petition avers that there are less than twelve creditors, and in fact less than three creditors have joined therein, and the answer avers the existence of a larger number of creditors, a list of all the creditors with their addresses shall be filed, and notice given to them of the pendency of the petition, "to the end that parties in interest shall have an opportunity to be heard", and "if upon such hearing it shall appear that a sufficient number have joined in such petition, or if prior to or during such hearing a sufficient number shall join therein, the case may be proceeded with, but otherwise it shall be dismissed." Here the intent is clear that "prior to or during" the hearing creditors other than the original petitioners may join in the petition. There is no qualification, express or implied, that such hearing must be had within four months next after the alleged act of bankruptcy in order that such joinder may be permitted. The original petition may be filed on the last day of the four months and the hearing not be had for months thereafter, yet the clause applies to such a case. This provision shows that insufficiency in the number of creditors was not regarded by congress as an incurable jurisdictional defect. Indeed, if it were, there would be nothing before the court in which "creditors other than original petitioners" could join. It further shows that congress intended that a joinder should be allowed prior to or during the hearing, whenever had. While clause "d" relates to cases of dispute as to the sufficiency in number of petitioning creditors where it is alleged that the creditors of the defendant are less than twelve, clause "f" is broader in its terms and application. It provides that "creditors other than original petitioners may at any time enter their appearance and join in the petition." As insufficiency in the number of the petitioning creditors is not an incurable jurisdictional defect, by parity of reasoning insufficiency in the amount of provable claims of such creditors cannot be held such a defect; for the bankrupt act equally requires sufficiency in number and sufficiency in amount in order that the petition may be sustained. Clause "f" was evidently intended to correct defects of either kind at any time during the pendency of the proceedings, whether before or after the expiration of four months from the alleged act of bankruptcy. This construction of the clause is in harmony with its language, is calculated to protect the interests of creditors, and involves no hardship to the defendant. On the other

hand, to construe the provision according to the contention of the defendant would open the door to fraud and collusion between the defendant and petitioning creditors, and largely defeat the operation of the bankruptcy act, to the prejudice of the other creditors. No construction of the clause which in practice would permit the filing of a petition by pretended creditors or by creditors falsely or mistakenly representing provable claims to the requisite amount and the postponement of the hearing until after the expiration of four months from the alleged act of bankruptcy, and then, on the discovery at the hearing of insufficiency in number or in amount, exclude other creditors from joining in the petition and validating the proceedings, can be tolerated. For in such case it would be too late to file another petition for the same act of bankruptcy and bona fide creditors would be wholly deprived of the benefits of the bankruptcy act. Further, even were the language of the clause less clear, the confusion, uncertainty and embarrassment in the settlement of a bankrupt's estate which necessarily would result from the construction contended for should cause any court to reject it. For the reasons given, the joinder, in my opinion, was properly allowed in this case. The authorities support the conclusion reached. In *re Romanow* (D. C.) 92 Fed. 510; In *re Stein*, 45 C. C. A. 29, 105 Fed. 749.

Swift and Company, a corporation of Illinois, having a provable claim, established by the evidence, against the defendant, amounting to \$141.60, is one of the creditors for whom application was made to join in the original petition. Unless this claim, or a portion of it, be included in the petition, the latter will not conform to the statutory requirement as to amount. The defendant contends that the local manager of Swift and Company had no authority, express or implied, to sign and verify a petition for such joinder. The evidence fails to satisfy me that such authority existed. Leave is granted to Swift and Company, through its appropriate officer, to sign and verify a proper petition for joinder in the original petition; and, on the filing of the same on or before September 5, 1901, the defendant will be adjudged a bankrupt; otherwise the petition will be dismissed.

(September 11, 1901.)

The opinion filed in this case August 21, 1901, contains, among other things, the following:

"Swift and Company, a corporation of Illinois, having a provable claim, established by the evidence, against the defendant, amounting to \$141.60, is one of the creditors for whom application was made to join in the original petition. Unless this claim, or a portion of it, be included in the petition, the latter will not conform to the statutory requirement as to amount. The defendant contends that the local manager of Swift and Company had no authority, express or implied, to sign and verify a petition for such joinder. The evidence fails to satisfy me that such authority existed. Leave is granted to Swift and Company, through its appropriate officer, to sign and verify a proper petition for joinder in the original petition; and, on the filing of the same on or before September 5, 1901, the defendant will be adjudged a bankrupt; otherwise the petition will be dismissed."

On September 4, in open court, counsel for the petitioning creditors, for the defendant and for Swift and Company all being present,

application was made by the counsel for the petitioning creditors that certain additional creditors of the defendant having provable claims be allowed to join in the original petition, and also for a re-hearing of the case on the question whether, aside from the claim of Swift and Company, the provable claims represented by the creditors who had theretofore joined in the petition, did not amount in the aggregate, in excess of the value of any securities held by them, to \$500 or over. At the time of the application the counsel for the petitioning creditors stated that he had failed to receive any petition from Swift and Company for joinder, under the leave granted by the court. The counsel for Swift and Company then stated that shortly after the filing of the opinion he had forwarded to that company a petition for joinder, which had been duly signed and verified and had been returned to him from his client with instructions to file it; that it was then in his possession; that the instructions he had received to file it had not been countermanded; that he had not filed it and it was not his intention to file it, because of circumstances "which as counsel for Swift and Company seemed to me to justify my withholding the petition"; and that a proposition or rather a suggestion had been made to him that while Swift and Company "might receive a dividend in the case \* \* \* it might be worth the while of a creditor of the bankrupt to purchase the claim of Swift and Company." It appears from the evidence theretofore adduced in the case that the local manager of Swift and Company had filed on its behalf the original petition for joinder at the instance of the same counsel who represented that company at the time of the application now under consideration, and on his assurance that the local manager was authorized to verify and file the same. It also appeared from statements in open court that the counsel for Swift and Company had at the instance of the counsel for the petitioning creditors undertaken since the filing of the opinion to forward to that company for execution a proper petition for joinder, and, as above stated, had received it properly verified and with positive instructions to file it. The course pursued by the counsel for Swift and Company had a tendency to mislead creditors who otherwise might or would have been desirous of joining in the original petition, and certainly was not calculated to induce the court to withhold or restrict, even if it had power so to do, the right of creditors other than original petitioners to join in the petition pursuant to section 59f of the bankruptcy act. Under these circumstances, and on the application of the counsel for the defendant, who admitted that the additional creditors seeking to join in the original petition had provable claims as set forth in their respective petitions, September 6 was fixed by the court for the further hearing of the case; at which time the last mentioned petitions were filed and the petitioners therein joined in the original petition by direction of the court. The petition of Swift and Company has not been filed; but, aside from it, it appears and is admitted that the provable claims of the petitioners in excess of any securities satisfies the requirement of the act as to amount. An alleged provable claim of Walter C. Montgomery against the defendant is not included in the amount of admitted provable claims of the petitioners sufficient



to sustain the petition, Nor does the court now decide that he has not a claim which may be proven in due course against the estate of the defendant in bankruptcy. In view of these facts, it is unnecessary to determine whether the amount of provable claims, exclusive of the claims of the petitioners last joining in the original petition, was sufficient to warrant an adjudication of bankruptcy. The defendant must be adjudged a bankrupt.

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In re GROETZINGER.

(District Court, W. D. Pennsylvania. July 26, 1901.)

No. 44.

**BANKRUPTCY—INDIVIDUAL AND FIRM ASSETS.**

As between the creditors of a firm and a member thereof, real estate is assets of the firm, though the legal title was allowed to stand in the name of such member; the consideration therefor having moved from the firm, the debts assumed as part of the consideration having been entered in its books as its liability and treated as such, the taxes thereon having been assessed in its name and paid by it, and it having been included in the firm assets in the statement of assets of the firm and the partner in whose name it stood, made and signed by such member, on the strength of which firm indebtedness was contracted.

**In Bankruptcy.**

Dalzell, Scott & Gordon, for firm creditors.  
George W. Guthrie, for individual creditors.

**BUFFINGTON**, District Judge. The certificate in this case involves the question whether the proceeds of certain real estate, known respectively as the Allegheny and La Belle Tanneries, sold under proceedings in bankruptcy, shall be awarded the creditors of Adolph Groetzinger, or those of the firm of A. Groetzinger & Sons. The referee found as a fact that both properties belonged to that firm, and awarded the funds to firm creditors. Considering first the Allegheny Tannery, we find the ownership was vested May 12, 1890, in Adolph Groetzinger, who thenceforward used it as a tannery. In 1891 he associated with him in his tanning business two of his sons, the three forming the firm of A. Groetzinger & Sons. A third son was admitted to the firm three or four years later. From the time the firm was formed until its adjudication in bankruptcy, this property was used by this firm in tanning leather, and constituted for many years its sole, and always its principal, place of business. Whether it became firm property is a question to be considered in two aspects: First, as between the partners themselves; and, secondly, as against creditors. Whether, as between partners, it became firm property, is a question of intent. "Where the owner of a business takes in partners," says Bates, Partn. 263, "it becomes a question of intention whether the stock becomes partnership property or not; and an intention that it shall may be implied, in the absence of express agreement, from the nature of the property, conduct, and circumstances." "Whether it is partnership or individual

property is purely a question of intention of the partners, to be inferred from their actions and surrounding circumstances." Article "Partnership," 17 Am. & Eng. Enc. Law, p. 945. "The manner in which the property is treated on the books of the firm is usually cogent evidence as to its partnership character." Id. p. 947. As between partners, the question is also held one of intent by the courts of this state. *Warriner v. Mitchell*, 128 Pa. 160, 18 Atl. 337; *Shaffer's Appeal*, 106 Pa. 54. This tannery is listed in the assets of the firm in the statement made and signed by Adolph Groetzinger, the holder of the legal title. This, in connection with the other facts of the case, was evidence of an agreement on his part to bring such realty into the stock of the firm. The writing was sufficient to avoid the statute of frauds (*Ross v. Baker*, 72 Pa. 188); and a trust was imposed on the holder of the legal title, such as a chancellor could and would enforce, as between the parties (*Calkitt v. Thomas*, 1 Phila. 463). In addition to the written admission of the holder of the legal title that the tannery was the property of the firm, we find it was exclusively occupied by such firm for a number of years without compensation or accounting. It was assessed as firm property, and the taxes paid by the firm. During all these years it was carried on the books of the firm as an asset to the extent of \$133,000. It was so represented by Adolph Groetzinger, and, indeed, credit was obtained for some of the firm indebtedness here sought to be enforced against it upon the personal representation of Adolph Groetzinger, evidenced by his written statement, that it was firm property. In addition thereto, the tannery was burned, and subsequently replaced by the firm at an outlay of \$30,000. In view of these facts, we are of opinion the referee was warranted in his finding that, as between the partners, the Allegheny Tannery was firm property. Such being the case, is there any preventing reason why this firm property should not be applied to the payment of firm debts, in accordance with well-established general principles and the express provisions of the bankrupt act (section 5, cl. "f")? The individual creditors of Adolph Groetzinger resist such application. It will be observed they have no lien against the land, and they claim no right to it, other than the fact that the legal title was suffered to remain in Adolph. Their contention is that under the decisions of the supreme court of Pennsylvania, which they say are conclusive upon us as a rule of property, the title of this land of record stamps it as individual property, without reference to the equitable ownership thereof. A careful study of all the Pennsylvania cases shows that no decision of that state goes to the length of holding that, where the recorded title of real estate owned by a firm is allowed to stand in the name of an individual member of the firm, it will be applied to the payment of unsecured individual creditors of such partner. It is true, statements broad enough to cover the case of such unsecured individual creditors may be found in those decisions, but, when they are followed to their source, there has been no such adjudicated case; and even these statements finally come to *McDermot v. Laurence*, 7 Serg. & R. 438, and *Hale v. Henrie*, 2 Watts, 146. In these cases the title vested in the individual partners as tenants in common, and it was held that,

having so taken, the partners had irrevocably fixed the title as held individually. In *Calkitt v. Thomas*, 1 Phila. 463, the late Chief Justice Sharswood, then presiding in the district court, said:

"It must be admitted that the supreme court include creditors in their language which they have used. 'But there has been no case as yet in which it was necessary to decide that question.' *Ridgway, Budd & Co.'s Appeal*. 3 Harris, 177, comes nearest to it; yet, if it be looked at closely, it will perhaps be found only to decide that it is not competent to show by parol that real estate conveyed to two persons as tenants in common was partnership property."

In *re Zug*, 16 N. B. R. 280, Fed. Cas. No. 18,222, is cited as decisive and controlling on the question before us. The facts of that case were, however, different. There the recorded title was to the individual partners as tenants in common, and in accordance with *McDermot v. Laurence*, supra, and the cases following it, it was held that, the title having been taken by the individual partners as tenants in common, the realty was fixed as individual property, and was applicable to individual debts. The court said:

"They thereby became tenants in common of the property, in relative proportions corresponding to their original equities, viz. partners. The trust, if there was any, ceased to exist, and no subsequent use of the property could change the character thus impressed on the title. Neither of the partners, under these circumstances, would have any equity against the other to insist upon the application of the property in the first instance to the payment of firm debts, and so the joint creditors could have none."

Now, inasmuch as the claim of a firm creditor to apply firm property to firm debts rests solely on the right of the partners to such application, it is evident the *Zug Case*, where the partner's right to such application was gone, is not this case, where the Allegheny Tannery has never been conveyed to the partners as tenants in common, and where the right of the other members of the firm to demand a conveyance by Adolph of the tannery existed, and could have been enforced.

The legal title to the La Belle Tannery was vested in Adolph Groetzinger by deed of Charles Groetzinger dated June 10, 1897, and so remained at the date of the adjudication. The consideration of the conveyance, as testified by Glasser, the manager of the firm of A. Groetzinger & Co., was the cancellation by that firm of a debt owing to it by the firm of J. Groetzinger & Sons of \$52,294.44, and its assumption of the remaining indebtedness of said firm to the extent of \$183,403.73. About \$70,000 of said indebtedness was subsequently paid by the firm of A. Groetzinger & Sons. Just why the deed was made to Adolph personally does not appear. In point of fact, the debt of J. Groetzinger & Co. to A. Groetzinger & Co. of \$52,294.44 was canceled in consideration of the conveyance, and the remainder of the former firm's indebtedness was assumed by the latter. It is true, the statement in the La Belle Tannery ledger, as well as in the deed of conveyance, was that A. Groetzinger was to assume the indebtedness; but there is not only no evidence that he did so assume, but, on the contrary, the fact is shown, as we have seen, that the fifty-two odd thousand owing to Groetzinger & Sons was not assumed or paid by A. Groetzinger, and that that firm as-

sumed the rest of the indebtedness of J. Groetzinger & Co., and paid about \$70,000 of it. The testimony of Glasser was that the deed was to have been made to the firm, but that Adolph Groetzinger subsequently directed it be made to him. There is no evidence that this was assented to by the other partners. The consideration for the transfer passed from the firm, and not from Adolph Groetzinger. There can be no doubt that, as between the partners, it was regarded, held, and used as firm assets to the extent of \$153,151.39. The outstanding purchase-money mortgage upon it was entered in the books and treated as a firm liability. The property was assessed in the name of, and the taxes paid upon it by, the firm. Moreover, in the statement of the assets of the firm and of himself individually, made under the directions of Adolph Groetzinger, and signed by himself, and on the express strength of which some of the firm indebtedness here sought to be enforced was contracted, this tannery is included among the firm assets, and not among his own. These facts are not denied by Adolph Groetzinger, nor is there any proof that he ever claimed or asserted individual ownership of the property. In view of these facts, we think the referee was abundantly justified in finding as he did that, as between the partners, the La Belle Tannery was firm property. Having been thus paid for by the firm, it should be applied to the payment of firm debts (*Lacy v. Hall*, 37 Pa. 360; *Erwin's Appeal*, 39 Pa. 535; *Shafer's Appeal*, 106 Pa. 49; *Mining Ass'n v. Reed*, 80 Pa. 38; *Warriner v. Mitchell*, 128 Pa. 153, 18 Atl. 337), unless the mere fact that the legal title was allowed to remain in Adolph Groetzinger prevents. As noted above, in considering the Allegheny Tannery land, we find no adjudicated Pennsylvania case which goes to that extent in the case of general, unsecured creditors. To this case we may apply the language used in *Erwin's Appeal*, *supra*:

"There was nothing, then, either in the views with which the lot was bought, or in its subsequent use, to take the purchase out of the rule that the beneficial interest in land follows the ownership of the money which was paid for it. Had the title been taken to both Imhoff and Myers, without any assertion on its face that it was treated by them as partnership property, under the ruling in *Hale v. Henrie*, 2 Watts, 143, and several subsequent cases, they would have been but tenants in common. The absence of such an assertion would have been evidential that the partners did not intend to bring the property into partnership stock, but that they intended to take separate interests. But the legal title was conveyed to Jacob Myers alone. We are now looking for the use. With the intention to buy for the firm, with nothing to indicate a severance of interests, and with the fact that the joint funds paid for the lot, it must be that the beneficial interest was in the firm as such."

We accordingly hold with the referee that the funds of the Allegheny and the La Belle Tanneries should be applied to the firm indebtedness of A. Groetzinger & Sons, and not to the individual indebtedness of Adolph Groetzinger.

## UNITED STATES v. AIKEN et al. (three cases).

(District Court, W. D. Kentucky. March 14, 1901.)

## FEDERAL LIQUOR TAX—ACTION BY UNITED STATES ON BOND—ESTOPPEL.

Spirits deposited in a warehouse by a distiller were purchased by the United States for medicinal purposes, and removed from the warehouse, and the entire price paid by the United States, without retaining any part of the tax due thereon after making allowance for evaporation, as authorized by Act Cong. Aug. 27, 1894, § 50. Thereafter the United States brought suit on the distiller's bond against the distiller and his sureties to recover the tax due. Held that, since the United States had a lien on the spirits in the warehouse for the payment of the tax due thereon, which lien, through the United States, vested in the sureties, it was the duty of the United States to retain a sufficient amount of the price to pay the tax, and, it not having done so, it thereby deprived the sureties of their security, and hence the United States was estopped, as against them, from recovering on the bond; but such estoppel did not obtain as against the distiller, since as to him the payment of the price without deducting the tax was simply a mistake, which would not operate as an estoppel.

R. D. Hill, U. S. Atty.

C. H. Stoll and A. P. Humphrey, for defendant Alfred R. Mullens.

EVANS, District Judge. These consolidated actions were brought upon three separate bonds of a distiller to recover the taxes upon the 260 gallons of distilled spirits presently to be designated. The condition of the several bonds was alike, and bound the distiller and his sureties to pay the taxes due the United States upon all of the spirits deposited by the distiller in the warehouse in certain numbered packages, subject, of course, to be credited by the tax upon those of the spirits which had evaporated, as the same was to be allowed for, under the provisions of section 50 of the act of August 27, 1894, commonly called the "Carlisle Bill." Certain of the packages, containing something less than 3,000 gallons of spirits, according to the original gauge thereof when deposited in the warehouse, were purchased by the United States for medical purposes, and were, under the orders of the secretary of the treasury, withdrawn from the warehouse without the payment of the tax thereon. At the time of the withdrawal of these spirits they were regauged, and the packages thus withdrawn were then found by the internal revenue officers to contain less by 260 gallons than shown in the original gauge, after also deducting therefrom the Carlisle allowances for evaporation; in other words, the excessive outages from these packages, after giving to the distiller the benefit of the Carlisle allowances, amounted to 260 gallons. But, notwithstanding these facts, and the perfect knowledge of them at the time by the United States and its officers, the plaintiff paid to the owner of the spirits, or to Aiken, the distiller, the entire price agreed upon, and, without the knowledge or consent of the sureties on the bond, removed all of the spirits. Under the statutes, the United States (and I think through the United States, by substitution, the sureties on the bond) had a first lien upon the spirits, to secure the payment of the entire tax thereon, and, as the obligation and rights of the sureties must be construed and enforced

strictly, the court is of opinion that when the United States, with knowledge of the excessive outage, purchased and paid for the spirits, and took possession of and used the same, it should, in discharge of its duties to the sureties on the bond, have withheld enough of the price agreed upon to pay all the taxes due upon the packages removed from the warehouse, including the taxes upon any spirits which had evaporated, but from the payment of taxes upon which the distiller was not exempt by reason of the provisions of the Carlisle bill. Upon the facts disclosed by the answer, the rights of the sureties in respect to the money to be paid by the United States upon the purchase of the spirits were the same as their rights in respect to the spirits themselves,—that is to say, they had the right to the benefit of the lien of the United States upon all the spirits, or their proceeds, in the hands of the plaintiff, to secure the payment of the entire amount of taxes due or assessable thereon in any way. The United States had this lien for the payment of the entire taxation, and when, instead of retaining and applying the price agreed upon in discharging this lien, it paid over all the money to the seller, whoever he was, and then also took possession of all the spirits, and used them, it wronged the sureties to that extent, by depriving them of all the benefit of the lien. The court is of opinion that the neglect of the United States, under these circumstances, and when the money was in its hands, to withhold enough of the agreed price to discharge the entire taxation on the packages purchased, is, as between it and the sureties, matter of estoppel sufficient to prevent the recovery sought in this case as against the sureties on the bond. In short, when the United States had in its possession both the spirits and the money due as the price thereof, it was its duty, in ease of the sureties on the bonds, to see that enough of the purchase money was withheld and retained in its hands to discharge the lien upon the entire original contents of the purchased packages. Some light is thrown on the question by *U. S. v. Ulrici*, 111 U. S. 38, 4 Sup. Ct. 288, 28 L. Ed. 344. There is much doubt as to whether a similar result would follow as to the principal in the bonds, because no such reasons operate in his favor, and I am inclined to think that the matter of estoppel is not sufficient to exempt the principal from this liability. The United States did not estop itself against the principal by paying him or his vendee more than was due. That was simply a mistake, and not a release or an estoppel.

For the reasons indicated, the demurrer to the answer is overruled as to the surety, Alfred R. Mullens, but sustained as to defendant Aiken, the principal in the bond. The defendant Megibben is dead, and his representative does not seem to be before the court.

## STERLING REMEDY CO. v. GOREY.

(Circuit Court, N. D. Ohio, E. D. July 1, 1901.)

No. 6,071.

**1. UNFAIR COMPETITION—IMITATION OF NAME AND PACKAGE.**

Where there are strong resemblances between the name and dress of the goods of defendant and complainant, which are more observable to an ordinary purchaser than the differences, and no sufficient reason for such resemblances appears, the presumption is that they were intended to confuse and deceive purchasers; and the fact that there are differences which appear on a comparison is not a defense to a suit for unfair competition.<sup>1</sup>

**2. TRADE-NAME—DESCRIPTIVE TERM—"CASCARA."**

The word "Cascara," which is the name of a drug generally known, cannot be monopolized as a trade-name, but may be used by any one in connection with any preparation of which it is properly descriptive.<sup>2</sup>

In Equity. Suit for unfair competition. On final hearing.

Frank F. Reed and Edward S. Rogers, for complainant.

R. J. Gorey, in pro. per.

WING, District Judge. It appears from the proof in this case that the complainant, the Sterling Remedy Company, shortly before the year 1895, introduced into the market a laxative remedy containing the drug called in Spanish "cascara sagrada," meaning "bitter bark," combined with other ingredients calculated to produce the purgative or laxative effect upon persons using the remedy. The remedy was made up into dark brown, flat, slightly elongated, octagonal tablets, upon which, in a raised form, were the initials "C. C. C." These tablets were put up in rectangular tin boxes, with rounded corners, the boxes having a gray-colored background. The boxes were lithographed in this color, with gilt and blue letterpress work. The name most prominently appearing in this letterpress was "Cascarets," with underneath, in gilt and somewhat similar letters, "Candy Cathartic." There was other lettering upon the box in smaller type. The proof further shows that the defendant is a lawyer, and that in the year 1900 he prepared to make sales of cathartic remedies in a way which the complainant says is unfair, and which operates as an invasion of rights in business which it has acquired by extensive advertising. I need not go closely into the matter of the comparison between the boxes and the tablets sold by the defendant and those introduced to the market prior thereto by the complainant. When a box sold by the defendant is compared with that introduced by the complainant, such dissimilarities appear that there would be no difficulty in distinguishing the one from the other. There are similarities of effect upon the observer produced by the markings of the two boxes, and the ways in which they are

<sup>1</sup> Unfair competition in trade, see notes to Scheuer v. Muller, 20 C. C. A. 165; Lare v. Harper, 30 C. C. A. 376.

<sup>2</sup> What names subject to exclusive use, see note to Kathreiner's Malzkaffee Fabriken Mit Beschraenkter Haftung v. Pastor Kneipp Medicine Co., 27 C. C. A. 357.

advertised for sale and presented to the public. The defendant, I think, studied to so prepare his boxes and their contents that confusion would arise, which would result in the purchase of a box of the defendant's medicine by one who had become favorably disposed towards the use of the remedy introduced by the complainant. The phrase "Candy Cathartic," I think, is a fancy name, and, when used with the word "Cascarets," forms an alliterative combination of words which is catchy, and has a tendency to leave an impression in the mind of one whose attention has been called to it by either hearing the phrase or seeing the advertisement. The defendant has used this same alliterative combination, evidently with a view of getting the advantage of whatever impression a similar combination of words had made by reason of the complainant's advertisements, and introduction to the trade of its product. It was not necessary for the defendant to use this arrangement. To be sure, he uses the word "Cascara" instead of "Cascarets." I cannot escape the impression, from all of the evidence, that Gorey studied to so prepare his tablets, which are in the exact similitude of the complainant's with the exception of one letter, "G," and put them in boxes of exactly the same shape as the complainant's, boxes of a color nearly the same, with lithograph work of the same general appearance, for the purpose of taking unfair advantage of the complainant. I think that his purpose was to create a similarity, and to thus take advantage of the established trade of the complainant. Whatever differences exist (and it must be admitted that upon close comparison there are many) between the package used by the defendant and that introduced by the complainant were concessions to expediency by the defendant, with a view of using such differences as a ground of escaping the appropriate remedy, when invoked by the complainant, against unfair methods. I think the case comes fairly within the ruling laid down by his honor Judge Lurton in *Paris Medicine Co. v. W. H. Hill Co.*, 42 C. C. A. 227, 102 Fed. 148, in the first paragraph of the syllabus. In this case, as in the one referred to, I think, while there are differences between the packages, the differences are less observable than the resemblances. Unless the defendant intended to infringe upon the rights of the complainant, he has gone to extraordinary pains in imitating the package of the complainant for no purpose. If he intended to build up a trade for himself, he has much limited his chances of success by starting out with a package in form, color, and arrangement of print so similar to those already introduced by the complainant. It will necessitate a much larger expenditure of money in the way of advertising to give individuality to his wares than it would had he started with a subject-matter which had an individuality of its own. The word "Cascara" is the name of a drug generally known as a good laxative, and the defendant should not be enjoined from using that name. The phrase "Candy Cathartic," I think, is a fancy name, which has been appropriated by the complainant, and the defendant should not be permitted to use that or its plural. The defendant may sell tablets which are compounds of cascara, and, in appropriately naming them, he may use the word



"Cascara," and the decree of injunction in this case must not be so sweeping as to prevent the defendant from so doing. But he must not continue in the line of conduct which he is now pursuing, and, since he has disclosed an intention to introduce his remedy to the public dressed in a similar guise to that used by the complainant for its article, he must be enjoined from further so doing. Counsel for the complainant may draw a decree in accordance with these suggestions, which will be inspected by the court.

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HEGEMAN et al. v. SPRINGER.

(Circuit Court of Appeals, Second Circuit. July 17, 1901.)

No. 15.

COPYRIGHT—INFRINGEMENT—ACTION FOR FORFEITURE OF INFRINGING PICTURES.

A demand and refusal are not conditions precedent to the maintenance of an action based on Rev. St. § 4963, for the forfeiture of infringing sheets of a copyrighted picture, and to recover the penalty imposed by the statute.

In Error to the Circuit Court of the United States for the Southern District of New York.

Franklin Bien, for plaintiffs in error.

Truax & Crandall (William A. Hoy, of counsel), for defendant in error.

Before SHIPMAN, Circuit Judge, and WHEELER and BROWN, District Judges.

WHEELER, District Judge. This is a writ of error upon a judgment of the circuit court upon a verdict of the jury in favor of the defendant against the plaintiff in error for \$2,075 for 2,075 sheets, found in possession of the plaintiff in error, and for the forfeiture of the sheets of a lithograph of an advertising picture called the "Black Crook," made in violation of a copyright.

The principal question of fact raised upon the trial related to the artistic quality of the production, which was submitted to the jury in a manner with which the plaintiff in error was apparently satisfied, and to which no exception was taken, and about which no question now properly arises. The lithographer of the design for the copyright was asked what he knew about the preparation of it, which was objected to, and the objection was overruled, to which exception was taken. The witness answered that he knew but little about the preparation of it, only that it was given him by Mr. Bandlow to reproduce on stone. Error is assigned upon this ruling, and is sought to be sustained principally because Bandlow had not been, and was not, called. This production of the design to the lithographer appears, however, to have been a part of the *res gestæ*, and admissible of itself, as such, without Bandlow. Another error assigned arose upon the admission of testimony that an employé of those taking out the copyright afterwards went on to the road with a Black Crook

company. This also related to the history of the copyrighted picture, and may have been admissible as such at the state of the case when it was received; and whether this or the other evidence objected to was strictly so admissible when received or not, each became so wholly immaterial upon the issue finally given to the jury, that no influence upon the verdict is likely to have been so due to it that the verdict should be disturbed.

At the close of the plaintiff's case the defendant moved to dismiss, "on the ground that there has been no demand proven to entitle the plaintiff to a return of the property in question, it being an action in replevin, and that there is no allegation in the complaint of demand." This was denied, and the principal other assignment of error is upon this ruling. But this is not an action of replevin; it is an action upon the statute (section 4,965, Rev. St. U. S.) to recover a penalty and forfeiture, neither of which is by the statute founded upon a demand. *Bolles v. Outing Co.*, 175 U. S. 262, 20 Sup. Ct. 94, 44 L. Ed. 156. The right to recover the penalty and upon the forfeiture would turn upon the finding of the copyrighted sheets in the possession of the plaintiffs in error. The motion would make the right turn upon the demand and refusal, in addition to the finding in possession, which is so much more than the statute requires. No question was or is made about the finding in possession as such, and no error in this respect appears. Judgment affirmed, with costs.

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#### HALL v. AHREND.

(Circuit Court, S. D. New York. August 1, 1901.)

#### PATENTS—INVENTION—PROCESS FOR MAKING IMITATION PRESS-COPIED LETTERS.

The Hall patent, No. 423,558, for a method of producing imitation press-copied letters, claim 1, is void, the process described for treating printed letters or circulars to give them the appearance of having been press-copied being essentially the same to which letters are subjected in the actual copying, which was old.

In Equity. Suit for infringement of letters patent No. 423,558, issued to Samuel Hall March 18, 1890, for a "method of producing imitation press-copied letters." On final hearing.

Alan D. Kenyon, for complainant.

R. B. McMaster, for defendant.

LACOMBE, Circuit Judge. The specification begins:

"My invention relates to a new and useful method of producing circulars, circular letters, and similar printed matters, whereby they have the appearance of having been letterpress copied, thus giving them more consequence in the eyes of the person by whom they may be received, and inducing him to read the same. In practicing my method it will be apparent that the printed matter may be produced upon the original in such manner as preferred. The methods most favored by me are printing the same on an ordinary press in typewriter type, or by a plate in imitation of handwriting. I prefer that my process should be practiced by the employment of an endless and continuously moving web of cloth, and in order that the ink taken off upon the cloth may be removed from it, so that the original printed

matter may not be smutched or 'overprinted' by impressions taken from the cloth, I prefer to practice my invention by employing an apparatus devised by me, and shown in the drawings."

Next follows an extended description of an apparatus containing frame, water-tight tanks, squeezing rollers, web of cloth, bleaching solution, etc. The specification concludes:

"I do not herein claim the apparatus shown and described, but I do not abandon the same, since I intend to make that the subject of an application for a patent to be filed by me before the allowance of this present application."

The claims are:

"(1) The process described, consisting in first printing the original sheets; then placing their printed surfaces in contact with a moist material, and passing both together between compression rollers; then removing the ink impression received by the moist material before it is again brought in contact with the printed matter,—substantially as and for the purposes set forth.

"(2) The process described, consisting in first printing the original sheets; then placing their printed surfaces in contact with a moist material; then passing both together between compression rollers; then passing the moist material through bleaching liquor; then squeezing out the excess of bleaching liquor; then passing the moist material through water, to wash out the bleaching liquor; then pressing out the excess of water,—substantially as set forth."

The first claim only is relied upon. There is no charge of infringement of the second claim. This first claim is an extremely broad one. It would cover the operation of any old-fashioned copying press where rollers were substituted for platens, and where successive sheets of moist material were applied, the ink-impressed ones being removed before the next compression. The evidence abundantly shows that Hall was the first to conceive of the idea of advertising or of using printed circulars or letters so prepared as to present the appearance of having been press-copied, thus appealing to the attention of the recipient as being more personal. Its ingenuity may be conceded; that he was a pioneer in the introduction of that style of circular may be admitted; that it commended itself to the public is proved. Nevertheless the first claim of this patent does not cover the novel idea of using circulars which appear to have been press-copied, and the method described for giving them that appearance is not novel. The fundamental difficulty with the patent and the argument seems to be the result of a curious confusion of ideas. Thus the patent says, "Circulars \* \* \* [which] have the appearance of having been letterpress copied"; as if it were an "appearance" produced in some novel manner. In fact the circulars have the "appearance" of having been press-copied, because they have been press-copied. So the brief says patentee's is "the only known process by which such imitation letterpress copied printed circulars can be produced." But in fact they are not "imitation" letterpress copied circulars; they have been actually so copied,—of this the evidence leaves no doubt,—although the copies have not been preserved. Defendant has by his second claim covered a detailed process, which may present features of novelty when compared with the earlier art. Whether he could have obtained a patent for his discovery that the

most effectual way to commend a circular to its recipient was to satisfy him, by the evidence of the document itself, that it had been press-copied, thus inducing a belief that the copy had been deemed of importance enough to be preserved, need not be discussed. No such patent is here, only a claim for a method of making press-copies so broad in its statement that it would cover methods well known before. The bill is dismissed, with costs.

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BRILL et al. v. PECKHAM MOTOR TRUCK & WHEEL CO.

(Circuit Court of Appeals, Second Circuit. August 22, 1901.)

No. 139.

Before WALLACE, Circuit Judge, and WHEELER and THOMAS, District Judges.

PER CURIAM. A reargument was granted in this cause because the court deemed it proper to reconsider that part of its former order directing a dismissal of the complainant's bill. A majority of the court remain of the opinion that there should be no modification of the order. Accordingly a mandate will issue pursuant to the terms of the former order. 108 Fed. 267.

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WESTINGHOUSE ELECTRIC & MFG. CO. v. CATSKILL ILLUMINATING & POWER CO.

(Circuit Court, S. D. New York. August 22, 1901.)

PATENTS—INFRINGEMENT—ELECTRIC MOTORS.

The Tesla patents, No. 511,559 and No. 511,560, relating to the method and apparatus for electrical transmission of power by means of what are known as "split-phase motors," held not anticipated and valid. Claims 1 and 2 of No. 511,559 and claim 1 of No. 511,560 also held infringed.

In Equity. Suit for infringement of patents. On final hearing. See 94 Fed. 868.

This cause was heard upon pleadings and proofs. It is a suit for alleged infringement of two United States letters patent to Nikola Tesla, viz. Nos. 511,559 and 511,560, both issued December 26, 1893, on application filed December 8, 1888.

Kerr, Page & Cooper, for complainant.

Seward Davis and Charles A. Brown, for defendant.

LACOMBE, Circuit Judge. Patent No. 511,559 is for "electrical transmission of power." The specification begins:

"In certain patents heretofore granted I have shown and described a system of electrical power transmission, in which each motor contained two

or more independent energizing circuits, through which were caused to pass alternating currents having in each circuit such a difference of phase that, by their combined or resultant action, they produced a rotary progression of the poles or points of maximum magnetic effect of the motor, and thereby maintained the rotation of its movable element. In the system referred to and described in said patents, the production or generation of the alternating currents, upon the combined or resultant action of which the operation of the system depends, is effected by the employment of an alternating current generator with independent induced circuits, which, by reason of the winding or other construction of the generator, produced currents differing in phase, and these currents were conveyed directly from the generator to the corresponding motor coils by independent lines or circuits. I have, however, discovered another method of operating these motors, which dispenses with one of the line circuits, and enables me to run the motor by means of alternating currents from a single original source. Broadly stated, this invention consists in passing alternating currents, obtained from one original source, through both of the energizing circuits of the motor, and retarding the phases of current in one circuit to a greater or less extent than in the other. The distribution of current between the two motor circuits may be effected by induction or by derivation. In other words, I may pass the alternating current from the source through one energizing circuit, and induce by such current a second current in the other energizing circuit; or, on the other hand, I may connect up the two energizing circuits of the motor in derivation or multiple arc with the main circuit from the source. In either event, I make due provision for maintaining a difference of phase between the currents in the two circuits or branches. In carrying out my invention I have used various means for securing the result. For example, when I induce a current in one of the circuits from the current flowing in the other, I employ a form of converter, or bring the two circuits into such inductive relations as will produce the necessary difference of phase; or, when I obtain the two energizing currents by derivation, I make the two circuits of different degrees of self-induction by inserting a resistance or self-induction coil in one of said circuits, or I combine these devices in different ways, as I shall more specifically describe hereafter."

After a description of the drawings, the specification concludes:

"In an application filed of even date herewith, I have shown and described other ways of accomplishing this result, among which may be noted the introduction of a resistance capable of variation in each motor circuit, or the use of a resistance in one circuit and a self-induction coil in the other. In the above description I have referred mainly to motors with two energizing circuits, but it is evident that the invention applies equally to those in which there are more than two of such circuits, the adaptation of the same being a matter well understood by those skilled in the art. I do not claim in this application the specific devices employed by me in carrying out the invention; have made these the subjects of other applications."

The only claims of the patent are:

"(1) The method of operating motors having independent energizing circuits, as herein set forth, which consists in passing alternating currents through both of the said circuits, and retarding the phases of the current in one circuit to a greater or less extent than in the other. (2) The method of operating motors having independent energizing circuits, as herein set forth, which consists in directing an alternating current from a single source through both circuits of the motor, and varying or modifying the relative resistance or self-induction of the motor circuits, and thereby producing in the currents differences of phase, as set forth."

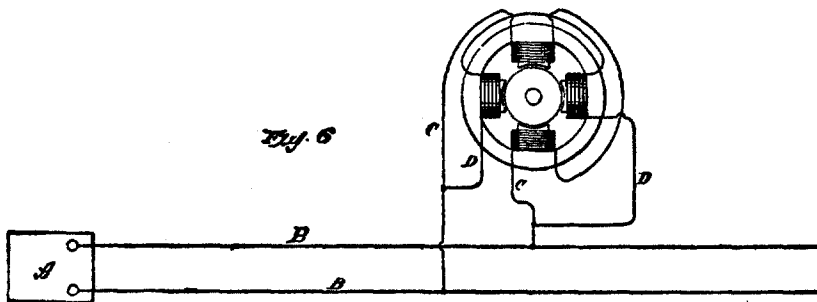
Patent No. 511,560 is for apparatus for carrying out the "derivation method" of the second claim of 511,559. It shows different arrangements of resistance or self-induction devices, or both, in the de-

rived circuits, for the purpose of securing the requisite difference of phase. The specification says:

"In explanation of what appears to be the principle of the operation of my invention, and of the functions of the several instrumentalities comprised thereby, let it be assumed that the two energizing circuits of an alternating current motor, such, for example, as I have described in my patent No. 382,280, dated May 1, 1888, are connected up in derivation or multiple arc with the conductors of a circuit including an alternating current generator. It is obvious that if both circuits are alike, and offer the same resistance to the passage of the current, no rotary effect will be produced; for, although the period of the currents in both circuits will lag or be retarded to a certain extent with respect to an unretarded current from the main circuit, their phases will coincide. If, however, the coils of one circuit have a greater number of convolutions around the cores, or a self-induction coil be included in one of the circuits, the phases of the current in that circuit are retarded by the increased self-induction. The degree of retardation may readily be secured by these means which will produce the difference in electrical phase between the two currents necessary for the practical operation of the motor. If, in lieu of increasing the self-induction of one circuit, a dead resistance be inserted, the self-induction of such circuit exerts a correspondingly diminished effect, and the phases of the current flowing in that branch are brought more nearly in unison with those of an unretarded current from the main line, and the necessary difference of phase between the currents in the two energizing circuits thus secured. I take advantage of these results in several ways. For example, I may insert variable resistances in both branches or energizing circuits, and, by varying one or the other so as to bring the phases of the two currents more or less in unison with those of the unretarded current, I may thus vary the direction of the rotation of the motor. In lieu of resistances I may employ variable self-induction coils in both circuits, or I may use a resistance in one and a self-induction coil in the other and vary either or both. This system or means of operating the motors is rendered of great practical value by employing an armature wound with energizing coils closed upon themselves, in which currents are induced by the alternating currents passing in the field coils that serve to greatly increase the mutual attractive effect between the armature and the field magnets. This use of the armature with closed coils I regard as an important feature of my invention. \* \* \*

After describing various arrangements with reference to the drawings, the specification proceeds:

"Similar results may be secured by such a construction or organization of the motor as will yield the necessary differences of phase. For example, one set of energizing coils may be of finer wire than the other, or have a greater number of convolutions, or each circuit may contain the same number of convolutions, but composed of different conductors; as, for instance, one of copper, the other of German silver. I have represented this in Fig. 6, in which the coils C are indicated by closer lines than coils D."



The two claims (out of seven) which are in controversy here are:

"(1) The combination with a source of alternating currents, and a circuit from the same, of a motor having independent energizing circuits connected with the said circuit, and means for rendering the magnetic effects due to said energizing circuits of different phase, and an armature within the influence of said energizing circuits. (2) The combination with a source of alternating currents and a circuit from the same of a motor having independent energizing circuits connected in derivation or multiple arc with the said circuit, the motor or energizing circuits being of different electrical characters, whereby the alternating currents therein will have a difference of phase, as set forth."

These patents belong to what is known as the "split-phase" system of producing motor action. From the quotations above given it will be apparent that claim 1 of No. 511,559 covers broadly both the methods of splitting phases suggested, viz. by induction and by derivation. Claim 2 of No. 511,559 covers only the method suggested by derivation, with modification of relative resistance or self-induction of the motor circuits. Claim 1 of No. 511,560 covers apparatus for carrying out the derivation method broadly by "means for rendering the magnetic effects due to the energizing circuits," which are connected with the circuit of supply, of different phase. Claim 2 of No. 511,560 is restricted to apparatus in which the energizing circuits are "connected in derivation or multiple arc with the [supply] circuit." Another patent, No. 555,190, covered apparatus for the induction method.

The testimony is voluminous, many of the questions discussed are highly abstruse, involving a degree of technical knowledge which only years of study and training could impart, and which it is not possible for a court thoroughly to absorb, no matter how able the briefs and argument, within the utmost time that can possibly be given to the study of the record. Fortunately, however, many of these questions are, so far as this court is concerned, already decided, and to that extent they need not be discussed or presented here.

Tesla, on May 1, 1888, took out patents for a system whereby alternating currents differing in phase were brought to, and passed through, independent energizing circuits in a motor, with the result that a whirling field of force was produced, which caused the armature of the motor to revolve. This is what is known as the "poly-phase system," and a large part of the testimony in this case is directed to the question whether Tesla was its inventor. That issue, with all its collateral questions, was before this court in a suit upon the fundamental patents covering that system (Nos. 381,968, 382,280, and 382,279), in which suit it was held that Tesla was a highly meritorious inventor, and was entitled to the broad claims which covered the polyphase system. That decision has been sustained in the circuit court of appeals, and reference may be had to the opinions of both courts for an elaborate discussion of that branch of the art. *Westinghouse Electric & Mfg. Co. v. New England Granite Co.* (C. C.) 103 Fed. 951.

One of the defenses set up is that the inventions are covered by other patents to the same inventor (Nos. 421,193 and 445,207). Inasmuch as a similar defense (as to No. 421,193) was interposed in

Westinghouse Electric & Mfg. Co. v. Dayton Fan & Motor Co., 106 Fed. 724, a suit decided in the Southern district of Ohio, February 6, 1901, and overruled, it was not pressed in argument here.

Another defense is that No. 511,559 is invalid for the reason that it is for a function of the machines of No. 511,560. That was disposed of on demurrer adversely to defendant, and, of course, was not re-argued here.

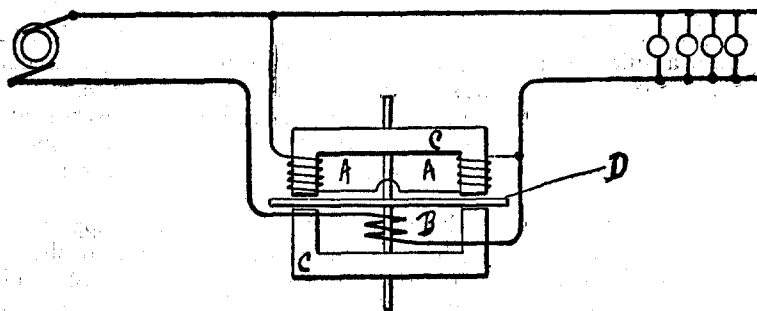
Question is raised as to the date of invention. The application was filed December 8, 1888, but the patentee undertook to show a disclosure of the invention to others prior to April 22, 1888. The same question upon the same evidence was decided in Tesla's favor in the Dayton Fan & Motor Case. It is suggested in supplemental brief that it was not argued in that case. An independent examination of the testimony leads to the same conclusion. The two witnesses are men of education, special training, and character. Their evidence is clear, direct, and specific. It is not weakened by cross-examination. Indeed, they were hardly cross-examined at all. Moreover, there were circumstances which were well calculated to fasten the disclosure in the mind at least of one of them; for it awakened doubts as to the advisability of letting the polyphase patents go through the patent office without some modification, and finally the dates of application for those patents and entries of charge in the register of one of the witnesses fix the date otherwise than by mere recollection. The evidence is highly persuasive, and the same conclusion is reached as in the Dayton Case.

In an action in the Eastern district of Pennsylvania (Electric Co. v. Scott [C. C.] 97 Fed. 588), two other patents to Tesla were involved, one of which (No. 511,915) covers the mode of obtaining difference of phase by induction, as the second claim of No. 511,559 covered the other mode by derivation. The first claim of No. 511,559, as was said before, is the generic claim which covers both modes. It is apparent, therefore, that in that suit questions as to novelty and patentability of the broad claim, as to the state of the art and the measure of invention displayed, were necessarily presented.

In the Dayton Fan & Motor Co. Case and in the Scott Case the courts both held that the patents were not anticipated, and that the question of invention should be resolved in favor of the patents. It is not understood that the present record discloses any alleged anticipations or any earlier patents or publications which were not in one or other or both of these suits, and their conclusions on that branch of the case will be followed here. This reduces the case to a question of infringement.

The defendant's device is an alternating current Watt motor meter, in which there is a rotating disk which is put in motion by currents flowing through coils so arranged relatively to the disk as to produce such rotation. The testimony on this branch of the case is voluminous and highly technical, and in parts extremely difficult of comprehension by any one save an experienced electrician. It would be idle to undertake to discuss it at length. The Scheefer meter is indicated in defendant's brief by the following diagram:





A, A, are coils of fine wire; B, a coil of coarse wire; C, a square iron core; D, the rotating disk. Whatever this diagram may or may not show, it is contended by complainant that current from the circuit to which the meter is connected divides so that part passes through A, A, and part through B; and that is not denied. It seems to be well settled that, for reasons which it is not necessary to detail, currents traversing such a circuit as B are not retarded to the same extent as are those traversing such a circuit as A, A. The natural consequence would seem to be that there would be a difference in phase between such currents, and that there would result the shifting or progression from pole to pole of the magnetic resultant which Tesla described in his polyphase patents. It would be expected that such shifting would rotate the disk. When current is passed through the Scheefer meter the disk rotates. If this were all, it would seem that infringement is made out.

Defendant, however, contends that infringement is not shown for several reasons:

(1) That the patents cover motors only, and the Scheefer device is a meter. This is a mere verbal distinction without apparent merit. The patents do contemplate the production of power, but they are wholly silent as to the amount of power. The Scheefer meter exerts power, its disk rotates against the action of a permanent magnet, and turns the spindle which operates the registering devices.

(2) That apparatus, to be within the patents, must operate by the so-called "Tesla rotating field,"—the "whirling field of force" of the polyphase patents, produced by a difference in phase of the currents in the energizing circuits. That proposition is undoubtedly correct. Defendant further contends that the Scheefer meter does not so operate, and therefore that it does not infringe. Between the elaborate theories of the opposed experts as to the mode of operation of this meter it might be difficult to choose. It is thought that the practical tests do not sustain this last proposition. One of defendant's witnesses experimented with a meter having both currents in the same phase, but the meter he used was not the meter complained of. He made changes in some of the coils before he experimented. It is true that complainant's experts admit that there will be a movement of the disk with reduced speed when currents are in phase, but this admission is qualified by the further statement that "the Scheefer meter, as actually constructed and operated, has a very great differ-

ence of phase between its currents, and this fact is the chief operative cause in the meter. The addition of 15 degrees phase difference between the fields adds slightly to the rotative effort, and increases the accuracy of the meter." Upon this branch of the case the conclusion arrived at is that expressed by one of complainant's experts:

"The Scheefer meter works normally with a difference of phase between the currents. The increased difference of phase between the fields is a refinement which may be overlooked entirely in determining the question of the presence of the inventions of these patents. Without the difference of phase between the currents, the Scheefer meter would not be a Watt meter, and would not be sufficiently powerful or sensitive to be a meter of any kind. The effective cause of the operation is therefore the difference of phase of the currents."

Various other conflicting theories as to why and how the revoluble part of the meter revolves need not be enlarged on. The preponderance of evidence indicates that in the Scheefer meter, as sketched above, there are independent energizing circuits; that alternating current from a supply circuit is passed through both; and that by variation or modification of the relative resistance or self-induction of these energizing circuits they are put into different phase, and that the revoluble disk becomes effectively operative because such arrangement exerts its influence through the development of the whirling field of force which is characteristic of the Tesla method. In consequence there is shown infringement of both claims of No. 511,559 and of the first claim of No. 511,560. As was said before, the second claim of No. 511,560 is restricted to apparatus in which the energizing circuits are connected in derivation or multiple arc with the supply circuit. There seems to be some conflict in the proof as to how the Scheefer meter is arranged relatively to the supply circuit, and complainant's witnesses are not entirely in accord. There is not such a preponderance of evidence that both energizing circuits are connected in multiple arc with the supply circuit, and infringement is therefore not made out. Decree accordingly.

# BROWN v. PUGET SOUND REDUCTION CO.

(Circuit Court, D. Washington, N. D. July 3, 1901.)

## 1. PATENTS—INFRINGEMENT—ORE-ROASTING FURNACES.

The Brown patent, No. 471,264, for an ore-roasting furnace, claim 1, held infringed by a furnace constructed in accordance with the Ropp patent, No. 532,013.

## 2. SAME.

The right of a purchaser of a patented machine or structure to use the patent is merely an incident to his ownership and use of the particular machine or structure purchased, and the fact that the same proves defective, and incapable of being used, gives him no right to substitute therefor an infringing machine.

## 3. SAME.

The Brown patent, No. 471,264, for an ore-roasting furnace, claim 1, construed on an application for a preliminary injunction, and held not infringed by the Holthoff-Wethey furnace, constructed under patents Nos. 559,647 and 640,058, which contains no "supplemental chamber" in which the carriers for operating the rabblers or stirrers travel, such as is

made an element in the combination of the claim, but consists of one oven, having a single wall, the track for the carriers being placed on the outside of such wall, and the slot in the same through which the stirring rods enter being closed by a series of shutters which swing to permit the rod to pass, and then drop back into place, while the upper part of the furnace above the slot is supported by steel columns standing outside of such track.

Bill for an injunction by Horace F. Brown, the patentee named in United States letters patent No. 471,264, for an ore-roasting furnace, complaining of an infringement of said patent by the Puget Sound Reduction Company, in the use of an ore-roasting furnace constructed according to the specifications in United States letters patent No. 532,013, issued to Alfred Ropp, and in the use of another ore-roasting furnace constructed according to the specifications of United States letters patent No. 559,647 and No. 640,058, issued to Arthur Wethey. Heard upon an application by the complainant for an injunction pendente lite. Injunction granted as to the Ropp furnace, and denied as to the Wethey furnace.

Charles E. Shepard (P. C. Dyrenforth and Douglas Dyrenforth, of counsel), for complainant.

Francis H. Brownell (Winkler, Flanders, Smith, Bottum & Vilas, of counsel), for defendant.

HANFORD, District Judge. The defendant is the proprietor of, and engaged in operating, ore-smelting works at Everett, in the state of Washington, and has set up for use in its establishment one ore-roasting furnace constructed by representatives of the complainant according to the specifications of his patent; also one ore-roasting furnace constructed by the Park & Lacey Company according to the specifications of the Ropp patent; and a third ore-roasting furnace of the style known as the "Holthoff-Wethey Furnace," constructed by the Edward P. Allis Company, according to the specifications of the Wethey patents. The several patents referred to all cover improvements in apparatus for stirring the ore during the process of roasting, and moving it continuously upon the hearth from the feeding hopper to the discharge end of the oven. Previous to Mr. Brown's invention, the process of rabbling the heated ore in reverberating furnaces was done either by manual labor by means of rakes thrust into the oven through side openings, or by mechanism entirely within the oven, and exposed to the injurious effects of heat, fumes, and dust. The hand operation was slow and expensive, and all machinery operating within the hot chamber of the oven was soon destroyed by the deleterious effects of heat, fumes, and dust. The primary object of Mr. Brown's patent is to utilize power for operating rabbling apparatus, and to protect the running gear from exposure to the heat, fumes, and dust within the ovens; and the means to accomplish this object, described in his specifications, consists of a brick arch containing two central compartments, one above the other, which constitute the ovens in which the ore is roasted. On each side of the central compartment there is a supplemental chamber within the outer walls of the arch, and separated from the central

compartment by a partition wall, which is divided by a longitudinal slot, the upper part of the partition being suspended from above, and the part below the slot being supported by the same construction which supports the floor or hearth of the oven. Within these supplemental chambers a track is constructed upon which trucks are made to run, and from each truck an arm, to which blades for plowing the ore are attached, extends laterally through the slot into the central compartment. The trucks are attached to endless chains mounted upon pulley wheels, which are rotated by mechanical power, and by this means they are impelled to move upon the tracks forward from the feed end of the upper oven to the other end, and down to the tracks below, and back to the starting point, passing revolving doors which close each end; and as the trucks move the blades stir the mass of heated ore within the ovens, and keep it moving gradually from the feed end of the upper oven to an opening in the hearth near the other end, through which it descends to the lower hearth, and is then moved the same way in the opposite direction to the place of discharge. The arch is braced and strengthened by iron or steel T rails set upright outside of the walls, and bound by cross-ties under the bottom and over the top; and the outside walls have openings, with doors, for regulating the admission of air.

In the argument which has been made before me, counsel for the complainant has claimed an infringement by the defendant of only the first claim of the patent, which is in the following words:

"(1) In an ore-roasting furnace, having means for stirring and advancing the ore, a supplemental chamber at the side of the main roasting chamber, and cut off from said main chamber by a wall or partition, and carriers in said supplemental chambers, connected with the stirrers, but removed from the direct action of the heat, fumes, and dust, substantially as herein described."

The validity of the complainant's patent has been adjudicated in the United States circuit court for the district of Colorado, and the decision rendered by Judge Hallett in that case has been affirmed by the United States circuit court of appeals for the Eighth circuit, and in the same case it was also adjudged that a furnace constructed according to the specifications of the Ropp patent infringes the Brown patent (*Metallic Extraction Co. v. Brown* [C. C. A.] 104 Fed. 345); and the decision referred to has been followed in another district within the Eighth circuit. After reading all the affidavits filed in this case, and giving due consideration to the arguments, I find that no new evidence of sufficient importance to distinguish this case from the cases which have been adjudged in the Eighth circuit has been furnished, and the opinions referred to appear to me to rest upon the facts and the law. While this court is not bound by the rule of comity to decide a patent case contrary to a belief in the mind of the judge as to the right of the matter, still the decisions of other courts should have weight in resolving any doubts. *Mast, Foos & Co. v. Stover Mfg. Co.*, 177 U. S. 485-496, 20 Sup. Ct. 708, 44 L. Ed. 856. I consider that the reasons set forth in the opinions of Judge Hallett and Judge Thayer are good and sufficient, and I find no ground to justify this court in rendering a conflicting decision.

The defendant makes a special defense, and claims the right to use the Ropp furnace on the ground that it was installed as a substitute for one of Brown's patented furnaces, which it bought and paid for, and which was removed because it did not work satisfactorily. In an affidavit by the manager of the defendant company it is asserted that two of Brown's furnaces were installed by the defendant, and that they proved to be defective and unsatisfactory, so that the defendant could not compete with other smelting companies because of expenses and losses occasioned by frequent interruptions caused by the breaking of the partition walls, which made it necessary to shut down and cool off, as the interior walls in the Brown furnace are not accessible, and cannot be repaired without cooling the entire furnace sufficiently for workmen to enter them; and that, having paid the complainant a royalty for the use of his patent, he should not be heard to complain because the defendant has incurred the expense of constructing a new furnace upon a different pattern. This special defense cannot be maintained. It is well settled by numerous authorities that the monopoly granted by letters patent is absolute during the term of the patent, and the owner of it is entitled by the law to prohibit all use of infringing machines and structures. The purchaser of a patented machine or structure has the right to use what he has bought, but no right to make another machine or structure like it, nor to buy one from an infringer. His right to use the patent is a mere incident to his ownership of the particular machine or structure sold to him by the patentee, and when it is worn out or destroyed the right to use the invention ceases. *Wilson v. Simpson*, 9 How. 109, 13 L. Ed. 66; *Cotton Tie Co. v. Simmons*, 106 U. S. 89-95, 1 Sup. Ct. 52, 27 L. Ed. 79; *Wade v. Metcalf* (C. C.) 16 Fed. 130; *Machine Co. v. Gibson* (C. C.) 46 Fed. 488; *Id.* (C. C.) 50 Fed. 423; *Id.*, 5 C. C. A. 451, 56 Fed. 143; *Alaska Packers' Ass'n v. Pacific Steam Whaling Co.* (C. C.) 93 Fed. 672. Upon the showing made, the complainant is clearly entitled to have an injunction restraining the defendant from making any further use of the Ropp furnace until the final hearing.

The Holthoff-Wethey furnace, according to the description of it in the specifications of the patent and the model exhibited to the court, is double-decked, like the Brown furnace, and closely resembles it in other particulars, to such an extent that a mere casual observation would probably create an impression that the chief difference between the two is in the superior construction of the Holthoff-Wethey furnace; but to reach a just determination of the rights of the parties a close examination of the two patents is necessary. The Holthoff-Wethey furnace has but a single oven, the ceiling and roof of which is arched; the side walls have longitudinal slots. At each end there are swinging doors. Immediately below the roasting hearth there is a cooling floor of the same length and breadth as the roasting hearth, but this cooling floor is not inclosed by side walls or swinging doors at the ends. There are no supplemental chambers on each side of the roasting hearth, and the slotted walls of the oven are not interior partitions, but are at all times accessible from the outside. Outside of each wall there is a row of perpendicular steel columns

supporting beams which support the oven. The columns connect with cross-ties, giving additional strength to the entire structure. In the spaces between the rows of upright columns and the side walls single rails are laid, upon which trucks actuated by endless chains and sprockets and mechanical power make circuits from the feeding end of the oven to its other end, thence to the plane of the cooling floor, and back to the starting point, passing swinging doors at each end. The trucks are connected in pairs by a shaft reaching from a truck on one track through the slotted walls and across the oven to its connection with a truck on the track on the opposite side, and the shaft inside the oven has appended to it blades, which stir and move the ore as the trucks move from end to end of the oven, and, passing down to the floor below, continue to stir and move the mass of ore on the cooling floor as it is gradually moved towards the place of discharge. Another important feature of the Holthoff-Wethey furnace is the means provided for closing the slots. This is accomplished by a series of fan-shaped pieces of metal, each being suspended by a pin, which acts as a pivot. As the shaft moves onward, and comes in contact with these suspended pieces of metal, they each swing forward and upward, and then, by force of their own weight, drop back into their proper positions, acting as shutters to keep outside air from entering the oven, and to retain the heat, fumes, and dust within. The Holthoff-Wethey furnace is well calculated to avoid the principal defects found in the Brown patent, one of which is made the cause of complaint by the defendant, viz. that the suspended part of the partition wall will not maintain its integrity very long when the furnace is in use, and its nonaccessibility causes great inconvenience. A smelter, to be profitable, should be operated continuously; and frequent stoppages to repair interior partition walls necessarily increase the expense of operating, and reduce the profits. In the next place, the open slot between the oven and the supplemental chambers prevents complete accomplishment of the primary object of Brown's invention. With the opening in the partition wall, the carriers can only be partially protected from heat, and the accumulation of fumes and dust must be nearly as rapid in the supplemental chambers as in the central compartments; but the question to be decided is not whether the Holthoff-Wethey furnace is an improvement over the Brown furnace, but whether it infringes rights granted to the complainant, because, during the life of the complainant's patent, he is entitled to suppress the use of improvements which do in fact embody the invention covered by his patent. In considering the question of infringement it is necessary to consider that Mr. Brown's invention does not consist of an original creation. His patent is for a combination of well-known devices and materials to supply means for applying mechanical power so as to operate machinery, and make it useful in a way not previously known. Mr. Brown is not to be considered as a pioneer in the art, in the sense of being the first to plan and construct machinery for rabbling. His idea is only one step in the evolution of perfected rabbling apparatus. Now, looking to the first claim of his patent, which is the only claim brought in question at the present time, it is strikingly apparent that

one of the main elements of the claim is the supplemental chambers in which the tracks for the carriers to run upon are situated. The outside walls of these supplemental chambers are also outside walls of the arch, and support and strengthen the entire structure. These outside walls not only inclose the supplemental chambers, but they inclose the central compartments as well. In the Holthoff-Wethey furnace there are no partition walls separate and distinct from the outside walls of the arch, and, the slotted walls being the only walls under the arch, it is impossible to find supplemental chambers, or anything corresponding to this element of Brown's patent. The rows of upright steel columns outside of the arch support and strengthen the structure, and to that extent they are a substitute for the outside walls, which form a part of Brown's construction; but they are not walls. The fan-shaped pivoted metal shutters which operate automatically to keep the slots closed perform in part the function of an outside wall, but they give no support or strength to the structure; therefore they are not outside walls; and the shutters and columns together do not constitute outside walls, because they do not act in combination, nor inclose the tracks on which the carriers run. There is no equivalent for this element of the first claim of Brown's patent. The spaces in which the carriers run are not inclosed, and they are not supplemental chambers. Counsel for the complainant has argued that the supplemental chamber described in Brown's patent is a corridor, and that the space between the rows of upright steel columns and the slotted walls of the Holthoff-Wethey furnace is also a corridor, and therefore an equivalent for the element of a supplemental chamber of the Brown patent. I do not think the case can be aided at all by giving to the element which in the Brown patent is named "supplemental chamber" any different name. The fact remains that the open spaces in which the carriers of the Holthoff-Wethey furnace run are not identical with the inclosed chambers in which the carriers of the Brown patent do their work. If a person should attempt to prove that a house having only one room is in fact a two-room house by showing that the space within the walls constitutes one room, and that all of the outdoors constitutes the second room, because it is space separated by the walls of the house from the interior, the fallacy would not be greater than the contention that the Holthoff-Wethey furnace contains the element of a supplemental chamber similar to that described in the Brown patent, or any equivalent therefor.

In my examination of the authorities bearing upon the question at issue, I have found no case which more nearly resembles the one under consideration than *Bussey v. Manufacturing Co.*, 110 U. S. 131-146, 4 Sup. Ct. 38, 28 L. Ed. 95, which was a case involving improvements in reservoir cooking stoves. In that case the plaintiff's patented stove was described as a cooking stove having an oven; a culinary boiler or hot-water reservoir, arranged opposite to the rear upright side or end of the oven; and an exit flue extending from the central vertical flue of said stove at a point below the top of the oven under or across the bottom of the reservoir, and from thence up along the rear upright side of said boiler or reservoir to the draft

pipe. And the claims of the patent which were litigated were as follows:

"(1) A diving-flue cooking stove, with the exit flue so constructed as to inclose on the sides and bottom the culinary boiler or hot-water reservoir, B. (2) A diving-flue cooking stove, with the exit flue constructed across the bottom, and up the rear upright side of the culinary or hot-water reservoir, B. (3) A diving-flue cooking stove constructed with an exit passage, F, below the top of the oven, and an exit flue, E, E, in combination with an uncased reservoir, B, attached to the rear of the stove, and placed just above such exit passage, and so arranged that the gases of combustion, in passing through such exit flue, will impinge upon or come in direct contact with said reservoir, substantially as and for the purpose hereinbefore specified. (4) An exit passage, F, constructed in the rear of a diving-flue cooking stove, and below the top of the oven, in combination with an uncased reservoir, B, attached to the rear of the stove, the bottom of which reservoir is also below the top of the oven, and so arranged that the gases of combustion will come in contact with and heat such reservoir by a direct draft from the fire box to the smoke pipe. (5) In a cooking stove wherein the rear end vertical plate, or a portion of the same, has been removed for the purpose of heating a reservoir placed in the rear thereof, the shield plate, w, w, in combustion with the uncased reservoir, b, and the rear end vertical flues, K, L, and L', substantially as and for the purpose hereinbefore described and specified."

The defendant's stove is described in the opinion of the court as follows:

"The defendant's stove has three flues and an exit passage below the top of the oven, and a reservoir, the bottom of which is below the top of the oven; but no part of the rear end vertical plate is removed so as to allow the gases of combustion to come into direct contact with the front of the reservoir, nor is any of such plate employed as the plate, w, w, of the patent, but there is a dead air space between the rear plate of the flue and the front of the reservoir. The exit flue is not a narrow one, carried across the middle of the bottom of the reservoir, as in the patent, but the products of combustion, on leaving the flue space, pass into a chamber beneath the reservoir, the area of which is co-extensive with the entire surface of the bottom of the reservoir; and the vertical passage out of such chamber is not one outside of the rear of the reservoir, but is one in and through the body of the reservoir, and removable with it."

The differences between the rival stoves as described were not nearly so radical as the differences in the construction of the smelting furnaces which I have to compare with each other in this case, and yet the supreme court decided that the defendant's stove was not an infringement of the plaintiff's patent. In that case a narrow flue extending across the middle of the bottom of the reservoir was considered by the supreme court to be a substantial part of the plaintiff's patent, and that infringement was avoided by a construction in which the exit flue, instead of being narrow, was expanded to the full width of the bottom of the reservoir; and yet the expansion which in that case was sufficient to avoid infringement is not comparable with the expansion of the supplemental chambers described in Brown's patent by the different construction of the Holthoff-Wethey furnace. This construction introduces into the plan of the furnace new elements, a new combination, and a new result. *Electric Railroad Signal Co. v. Hall Railroad Signal Co.*, 114 U. S. 100, 5 Sup. Ct. 1069, 29 L. Ed. 96.

An argument is made upon the affidavit of Mr. Cornthwaite, in



which he states grounds for an inference that the third furnace in the defendant's smelter had been constructed with outside walls inclosing the spaces between the rows of upright steel columns and the slotted walls of the oven, and that brickwork filling the spaces between the columns has been removed. But this evidence is not material to be considered upon this application for an injunction. Infringements in the past may be the basis for claiming damages, but, if use of the unlawful construction has ceased, there is no ground for demanding preventive relief. I have given due consideration to the statements and arguments contained in the affidavits of experts, as well as the arguments of counsel and the adjudged cases, and it is my opinion that there is a very great preponderance in weight of argument in favor of the proposition that the Holthoff-Wethey furnace is not an infringement of the first claim of the plaintiff's patent, because the Holthoff-Wethey construction dispenses with the supplemental chamber, which is an essential part of the claim referred to. Upon the final hearing the complainant may be able to present reasons sufficient to change the opinion of the court, but, as at present advised, the court feels constrained to deny the plaintiff's application for an injunction to restrain the use by the defendant of the third furnace described in this opinion.

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CONTINENTAL GIN CO. v. F. H. LUMMUS SONS' CO.

(Circuit Court, N. D. Georgia, W. D. May 11, 1901.)

No. 47.

PATENTS—SUIT FOR INFRINGEMENT—MULTIFARIOUSNESS OF BILL.

A bill for the infringement of a number of separate patents, which alleges that the inventions of such patents are capable of conjoint use, and are conjointly used by defendant in the same connected machine, mechanism, or apparatus, will not be held multifarious, unless it appears from an inspection of the patents, of which profert is made, that the devices are of such independent character that the issues as to each are distinct, and must necessarily be tried separately.<sup>1</sup>

In Equity. Suit for infringement of patents. On demurrer to bill.

J. R. Beckworth and E. J. Smyer, for complainant.

Little & Burts and Goetchius & Chappell, for defendant.

NEWMAN, District Judge. This cause is heard at present on demurrer to the complainant's bill. There are several grounds of demurrer, but the only one insisted upon is that of multifariousness. The bill seeks to enjoin the defendant from infringing, and to recover profits for the infringement of, four patents, covered by four separate and distinct letters patent, and issued on four separate and distinct applications. Each device which is the subject-matter of the

<sup>1</sup>Pleading in infringement suits, see note to *Caldwell v. Powell*, 19 C. C. A. 595.

suit is a mechanism connected with and used in cotton ginning. The allegation in an amendment to the bill is that:

"Orator avers that the subject-matter of said letters patent 308,790, 308,787, 396,706, and 555,789, are capable of conjoint use, and are in fact conjointly used, in an outfit or apparatus for the handling and ginning of cotton, and defendant has conjointly used the same in making or causing to be made, selling and offering for sale, a machine, outfit, or apparatus for the handling and ginning of cotton."

Without going into the claims for each patent in full, the first in the order above stated, No. 308,790, is an apparatus for conveying seed cotton by means of a pneumatic conveyor from the wagon to the gin. The second, No. 308,787, is a mechanism for handling lint cotton, by means of a common flue, from several gins to a common condenser, and thence to a press or other receptacle. The third, No. 555,789, is a seed conveyor for a cotton gin, used for the purpose of carrying the seed from the gin to any desired point. The fourth, No. 396,706, is for a saw gin, so constructed as to economize space, avoid friction in running, and facilitate stopping and starting.

Counsel for defendant cite other authorities, but rely mainly on the case of Consolidated Electric Light Co. v. Brush-Swann Electric Light Co. (C. C.) 20 Fed. 502. The decision in that case by Judge Wheeler, in the circuit court for the Southern district of New York, is brief, and is as follows:

"This is an amended bill, brought upon five different patents,—one for an electric lighting system, one for an improved regulator for electric lights, one for an improvement in electric lamps, one for an improvement in carbons for electric lights, and one for an improvement in the treatment of carbons for electric lights,—and is demurred to for multifariousness. The bill alleges that the patented inventions are capable of being used conjointly; that the orator makes, uses, and sells conjointly, as parts of the same electric lighting system, each and all of said inventions, in some essential and material parts thereof; that the defendant is infringing each and all of these patents by making, selling, and using each and all of said inventions conjointly, in a system of electric lighting, the same, substantially, as that of orator. The titles of the patents, as well as the patents themselves, of which profert is made, show that these inventions may be used separately, and operate independently, with respect to each other. Any of them might be infringed without infringing any of the others. The trial of the validity of each, and of the infringement of each, must be separate from that of the others, upon distinct issues as to each. The facts may be proved by the same witnesses, but, if so, it will be on account of identity of persons in connection with the subject, rather than because of the sameness of the issues involved in the subject. That they are used in the same system does not change the nature of the issues to be tried. They are distinct parts of the system. Each patent is for a distinct machine, or process, or manufacture, and must stand or fall as such, and the infringement of each must or may be a separate trespass. The bill apparently covers as many cases as there are patents, when it should cover but one. *Hayes v. Dayton*, 18 Blatchf. 420, 8 Fed. 702. The demurrer is sustained, and the bill adjudged insufficient."

In the case of *Union Switch & Signal Co. v. Philadelphia & R. R. Co.* (C. C.) 68 Fed. 913, in the circuit court for the Eastern district of Pennsylvania, there were two decisions by Judge Dallas. The first decision can be gathered from the headnote, which is as follows:

"A bill which alleges infringement of five different patents, without showing that the inventions or improvements covered by them are conjointly used

by defendants, or all used in or upon the same machine, device, article, or apparatus, or are capable of such conjoint use, is bad for multifariousness. *Consolidated Electric Light Co. v. Brush-Swann Electric Light Co.* (C. C.) 20 Fed. 502, followed."

Subsequently an amendment was offered, which is embodied in the decision of the court. This latter decision is brief, and is as follows:

"When the demurrer to the bill in this case was originally argued, the impression was made upon my mind that it was conceded by complainants that the respective subjects-matter of the five patents sued on were not used in one mechanism, but upon different, though contiguous, parts of the same railroad. Upon this understanding I held the bill to be multifarious, and upon that ground sustained the demurrer. The complainants now move to vacate that order, and for leave to amend their bill by adding thereto the following: 'And your orators in this behalf further aver the fact to be that the conjoint use made by the defendants herein, as herein averred, includes a use of a material and substantial part of the subject-matter of each of the said recited patents in one and the same connected machine, mechanism, or apparatus.' This proposed amendment is accompanied by an affidavit that, to the best of the affiant's knowledge and belief, the facts therein stated are true; and upon the argument of the present motions, complainants' counsel has strenuously insisted that the statement it embodies is supported by the several patents themselves. Counsel for defendant has quite as earnestly contended, on the other hand, that a proper understanding of the patents requires the negation of the averment sought to be introduced by amendment. Waiving any doubts as to whether it would be permissible to now enter upon a discussion of the question thus raised, I decline to do so, because I deem it inexpedient to express any opinion respecting the patents sued upon at this stage of the case. For the present purpose, I assume the truth of the matter which the complainants ask leave to insert in their bill. The amendment is allowed. The order heretofore made is vacated, and the demurrer overruled."

I think the decisions in these two cases furnish the test as to whether, in a patent case like this, the bill is subject to the charge of multifariousness. In the case of *Consolidated Electric Light Co. v. Brush-Swann Electric Light Co.*, supra, it was apparent that the patents were so separate and distinct that, notwithstanding the averment in the bill that they were capable of conjoint use, and were being used conjointly, the court would ascertain from an inspection of the patents that they were of such character that there should be a separate suit as to the infringement of each. In the later case of *Union Switch & Signal Co. v. Philadelphia & R. R. Co.*, the fact seems not to have been so apparent, and, consequently, the court, on the filing of the amendment averring conjoint use in the same connective machine, mechanism, or apparatus, overruled the demurrer. In the present case the amendment is substantially the same as in the case last cited. The averment in this amendment is not, in my opinion, contradicted or affected by an examination of the patents of which profert is made. Indeed the patents themselves seem to indicate that they are intended to be used as part of a complete cotton-ginning apparatus. As I do not believe that the bill is subject to demurrer on the ground of multifariousness, and the other grounds were not insisted upon in argument, the demurrer will be overruled.

## GOODYEAR SHOE-MACHINERY CO. v. SPAULDING et al.

SAME v. COOK.

(Circuit Court of Appeals, First Circuit. July 16, 1901.)

Nos. 349, 350.

## 1. PATENTS—INFRINGEMENT—SHOE-SEWING MACHINES.

The French and Meyer patent, No. 412,704, for an improvement in shoe-sewing machines, consisting of a device which acts both as a "take-up" and a "pull-off," its function as a take-up, as explicitly described, being to complete the setting of the last stitch before the loop of the next stitch is drawn through the stock, thus relieving the needle of such work and avoiding the cutting of the material, is not infringed by a device which takes up only a small portion of the thread necessary to set the stitch, the remainder being taken up by the action of the needle, as in prior machines.

## 2. SAME.

The Fowler and Warren patent, No. 564,986, for an improvement in shoe-sewing machines, which consists of a device for pulling off from the tension sufficient thread for the next stitch, the stated object being to reduce to a minimum the rendering of the thread through the hook of the needle while under strain, shows, at most, only an improved construction of similar devices known in the prior art, and is entitled to only a narrow construction. As so construed, it is not infringed by a device which pulls off only a small portion of the length of thread required for the next stitch.

Appeals from the Circuit Court of the United States for the District of Massachusetts.

For opinion below, see 101 Fed. 990.

Elmer P. Howe and Benjamin Phillips, for appellant.

Frederick P. Fish and William K. Richardson, for appellees.

Before COLT and PUTNAM, Circuit Judges, and WEBB, District Judge

COLT, Circuit Judge. These cases relate to a shoe-sewing machine, which forms a chain stitch by means of a curved hooked needle. The machine is commonly known as the "welt and turn" sewing machine, because it is used for sewing the upper and welt to the insole of a welt shoe, and the upper to the insole of a turned shoe. The sole is prepared for sewing by making a channel around its outer surface at a little distance from the margin, and the lip of leather between the channel and the margin of the sole is known as the "between substance." In a turned shoe the needle passes through two layers of work,—the upper and the between substance of the sole. In a welt shoe the needle passes through three layers of work,—the welt, the upper, and the between substance of the sole. The needle pierces the work with a forward and upward movement, and a double line of thread is left outside the upper or welt, and a single line in the channel. In the simplest form of the machine, the parts which work with the needle in forming the stitches are a looper and a tension device. The hooked needle is first thrust through the leather, the thread is then laid into the throat of the hook by the looper, and the

needle is drawn back through the hole, pulling a loop of thread. The leather is then moved along the length of one stitch, and the needle is again thrust through the leather, again threaded, and again drawn back, pulling a second loop of thread through the leather and through the first loop, and this process is repeated for each stitch. The thread is drawn from a spool, and extends from the spool to the leather through the machine. The looper is usually a small finger or arm, with a hole or eye in its end, through which the thread always passes. The tension device is commonly a wheel with a grooved edge. The thread is wrapped around the groove of the wheel so that, as the thread is drawn from the spool, it will turn the wheel. By means of a spring and a screw, the operator can vary the extent to which the tension wheel will resist the pull of the needle. A tension device is necessary because, in pulling a loop of thread through the leather and through the last preceding loop, the needle must meet enough resistance in drawing the thread from the spool to make it draw the last loop tightly around the loop on which the needle is pulling.

For 10 years prior to 1890 the standard machine in this art was known as the "Dancel Machine," disclosed in letters patent No. 190,709, dated May 15, 1877. Machines adapted for this work must be run at a comparatively high tension. When the Dancel machine was run with insufficient tension the stitches would not be properly set, and when it was run with sufficient tension the thread would sometimes break, or cut the spongy between substance. These defects in the Dancel machine were caused by imposing too much work upon the needle. In the operation of the machine, the needle was forced to pull the thread for the next stitch against the strain of the tension; thereby causing the thread to render through the needle hook, which weakened the thread by chafing. Upon the needle also was imposed the duty of pulling the thread from the preceding loop through the needle hole and around the edges of the between substance, and setting the stitch by a downward pull, which tended to cut the between substance, and to pull apart the sole and upper which were being sewed together.

To remedy these defects in the Dancel machine, it became necessary to relieve the needle of a portion of its work by means of some auxiliary mechanism. This auxiliary mechanism is known as a "pull-off" and "take-up." A pull-off of this class, as generally understood, is a device for pulling off enough thread from the tension to form the next stitch, thereby preventing the rendering of the thread in the hook of the needle; and a take-up is a device for taking up the thread and setting the stitch, thereby preventing the cutting of the between substance by drawing the thread around its edges. A pull-off or take-up is commonly a wheel or truck, located between the looper and the tension wheel, which moves and presses against the thread. This truck, when it moves and engages the thread, operates as a pull-off when the thread is held at a greater tension strain on the side of the material than is exerted by the tension wheel, and operates as a take-up when the thread is held at a less tension strain on the side of the material than is exerted by the tension wheel.

Thus the same truck commonly acts both as a pull-off and take-up. It acts as a pull-off when the strain on the thread is sufficient to overcome the tension, because it then necessarily pulls off thread from the spool; it acts as a take-up when the strain on the thread is less than the tension, because it then necessarily takes up the thread. The terms "pull-off" and "take-up" are sometimes used interchangeably, for the reason that a so-called "pull-off" may have a take-up function, or a so-called "take-up" a pull-off function.

While theoretically and practically a pull-off and take-up of this class should, as far as possible, entirely relieve the needle of its old duty, by pulling off sufficient thread for the next stitch, and taking up sufficient thread to set the stitch, there may be pull-offs and take-ups whose operation is more limited, and which only in part free the needle of its former work. Such auxiliary mechanism, while it pulls off some thread, does not pull off a sufficient quantity for the next stitch, and, while it takes up some thread, it is not sufficient to set the stitch. In a case where a patented pull-off and take-up perform substantially the whole work required, and the alleged infringing pull-off and take-up only a portion of the work, the question of infringement must turn largely on the scope of the patent as determined by the prior state of the art and the language of the specification and claims. If the patented pull-off and take-up are merely improvements upon old devices for doing the same work, or if the patentee has imposed a limitation on his invention by express words in the specification and claims, it is manifest that the court would not be warranted in giving that breadth of construction to the patent which should be given in a case where the inventor was the first to devise a pull-off and take-up mechanism, or had not expressly restricted his invention by the terms of the specification and claims.

The auxiliary mechanism which may be added to the old Dancel machine may be a device which operates both as a pull-off and a take-up, or it may be a take-up which, with some additional mechanism, acts also as a pull-off, or it may be a device which operates simply as a pull-off.

The present suits relate to patents for this auxiliary mechanism. The Spaulding suit is brought on the French and Meyer patent, No. 412,704, dated October 8, 1889, and the Cook suit on the Fowler and Warren patent, No. 564,986, dated August 4, 1896.

Taking up, first, the Cook Case, we find that the Fowler and Warren patent is for a pull-off truck which pulls off a full supply of thread for the next stitch, and so reduces the rendering of the thread through the hook of the needle to a minimum. If this patent disclosed for the first time a pull-off mechanism of this kind, which prevented rendering, and so overcame one of the two chief objections to the old Dancel machine, it would be entitled to receive a liberal construction; and, if the language of the claim was sufficiently broad, it might fairly be held to cover a pull-off device which pulled off any appreciable quantity of thread, and thereby prevented, in any degree, the rendering of the thread through the hook of the needle. But this patent does not occupy any such position in the art. Not only at the time were there pull-off devices for doing this work, but

there existed also a device which acted both as a pull-off and take-up. This latter device cured both defects in the old Dancel machine, and proved of such utility and value that machines with this auxiliary mechanism fast supplanted the Dancel machine.

It is contended that the Fowler and Warren patent is a backward step in the art. This statement may be too strong. We think, however, that it is far from representing any marked advance in the art, because there were other practical devices then in use which combined both the functions of a pull-off and take-up, while this device is limited to a pull-off action. It also appears that the device has never gone into use except to a very limited extent, and its practical utility may at least be questioned.

The patent is simply for an improvement on old devices for doing the same work. It is for an improvement on the pull-off of the Fowler and Warren patent, No. 564,985, of the same date as the patent in suit, and the pull-off of the prior French and Meyer patent in suit.

In the first Fowler and Warren patent there was a thread brake which constituted a part of the pull-off device, and in the French and Meyer patent certain additional mechanism formed a necessary part of the pull-off device. The purpose of the Fowler and Warren patent in suit is to simplify the construction of the pull-off device by the omission of the thread brake in the first Fowler and Warren patent, and the additional mechanism in the French and Meyer patent.

This is accomplished by so timing the actuating mechanism of the machine that the action of the pull-off takes place when the thread is held under strain in the hook of the needle at the completion of its backward stroke; in other words, the machine is so organized that the needle does the work of the thread brake or other additional mechanism.

The specification, after declaring that the invention is for an improved device for doing the same work as the first Fowler and Warren patent, says: "Its main novelty being that the pull-off mechanism does its work after the needle has completed its loop-drawing stroke, and while the needle holds a loop of thread in its hook under the strain requisite to set the stitch, instead of relying upon a thread brake to hold the thread against the action of the pull-off truck, as described in our application above referred to." The specification also points out the two advantages of the patented device: First, "the substantive advantage of holding the thread in the hook of the needle," whereby "the construction is simplified by the omission of a thread brake or its equivalent"; and, second, "the advantage derived from holding the thread in the hook of the needle when the pull-off is operated, rather than holding such thread by the needle shank," as in the French and Meyer patent, which obviates the necessity of using the additional mechanism of that patent. In the French and Meyer patent the pull-off truck operates first as a take-up, drawing back the thread until the loop is tightened about the shank of the needle, "thereby necessitating the use of an additional mechanism to form a bight of thread between the stock and the throat of the needle," while in the Fowler and Warren patent "a

supply of thread for the loop about to be drawn is maintained in the preceding loop."

The Fowler and Warren patent in suit, like the first Fowler and Warren patent and the French and Meyer patent in suit, describes a pull-off device for pulling off the full length of thread for the next stitch, and so reduces the rendering of the thread in the hook of the needle to the least possible quantity. The machine is organized, says the specification, "to pull off thread from the thread supply, \* \* \* and thus supply slack thread for the next stitch." Again: "When the pull-off draws thread from the tension \* \* \* the full length of thread is drawn from the tension, and the rendering of the thread while under strain through the hook of the needle is reduced to the minimum."

The single claim of the patent is as follows:

"In a chain-stitch hook-needle sewing-machine, the combination of tension, looper, hook needle, a pull-off mechanism between the needle and the tension, and actuating mechanism timed to cause the pull-off mechanism to make its pulling stroke after the hook needle has completed its loop-drawing stroke, and while the loop is held under strain by the hook of the needle, substantially as described."

Reading this claim in connection with the specification, the "pull-off mechanism" and "its pulling stroke," "substantially as described," must be construed to mean a pull-off which operates to draw a substantially useful supply of thread for the next stitch. To construe the claim otherwise would be to hold that any pull-off device which operates to pull off any appreciable quantity of thread at the particular time, and in the way described, would come within the patent. If, by so timing the actuating mechanism of the machine that the pull-off truck operates in the manner described, the patentees had solved any problem, or the invention had proved to be an important advance in the art, it might be, notwithstanding the language of the specification, that this claim should be construed to cover any pull-off which acts to pull off any amount of thread at the time and in the manner described. But the state of the art, and the comparative unimportance of this improvement, forbid such a liberal interpretation of the claim; and, in our opinion, the court should not give a broader construction to the claim than to hold that it covers a pull-off truck which pulls off a substantially useful amount of thread for the next stitch, while the loop is held under strain in the hook of the needle at the completion of its backward stroke.

Turning now to the Spaulding Case, we find that the French and Meyer patent, which is involved in that suit, covers, as we have already observed, both a pull-off and take-up. It describes auxiliary mechanism for taking up and setting the last stitch, and for pulling off sufficient thread for the next stitch. It is for an ingenious and meritorious improvement upon the Dancel machine, in that it embraces the means for overcoming both the faults of that prior structure; and machines embodying this improvement have gone into extensive use, and, to a large extent, have displaced the Dancel machine.



The French and Meyer device comprises a movable truck and additional mechanism. The truck is operated in such order of time with relation to the needle that it first acts as a take-up, and "alone performs the duty of setting the stitch, thus relieving the needle of the duty of drawing up the previous loop to set the stitch." The take-up operation takes place "while the needle is in the stock, and while the loop of thread last drawn through the stock by the needle is yet on the shank of the needle." Each stitch is set before the loop of the next stitch is drawn through the stock. Continuing its backward stroke, the truck acts as a pull-off, pulling off "enough thread for the next stitch, and leaving it to be taken up and held or cared for by an auxiliary take-up, the latter giving up the thread so drawn off to the needle as the latter is being drawn back through the stock." Thus, the needle draws substantially slack thread while passing backward through the stock. After the needle has emerged from the stock, it gives "a sufficient pull to draw the thread of the loop being formed snugly back to the previous stitch, leaving it taut on the upper or lining." With the auxiliary take-up there is combined a thread-holder, the purpose of which is to act upon the thread between the stock and the thread guide, and to draw from the supply of thread held by the auxiliary take-up enough thread for the next stitch.

The charge of infringement is limited to the take-up feature of the French and Meyer patent, which is covered by the first three claims. The distinguishing characteristic of this take-up is that the stitch is set by a backward pull of the take-up instead of by a downward pull of the needle, as in the Dancel machine, and so avoids cutting the between substance.

Although the needle at its extreme backward stroke may, in some degree, help finally to tighten the stitch, there can be no doubt, upon reading the specification and first three claims of the patent, that the essential and fundamental function of the French and Meyer take-up is "to set the stitch" by drawing the loop of thread "taut about the shank of the needle then in the stock." It is to set the stitch while the needle is in the stock, and this setting consists in pulling the loop taut about the shank of the needle. The specification begins by describing the objections to prior machines in which "the needle was obliged to set the stitch." It then proceeds to declare that the patented take-up "alone performs the duty of setting the stitch." Again, it says, "each stitch being thus set before the loop of the next stitch is drawn through the stock"; and again it refers to the stitch as "having been fully taken up and set by the action of the take-up." Further, in speaking of the invention, just before coming to the claims, the specification says: "Prior to our invention herein described, a wax thread sewing machine using a hooked needle to make a chain stitch has never been provided with a take-up to set the stitch." In the same manner, the action of the take-up is specified in the first three claims, as follows: In the first claim, "the said take-up drawing the said loop about the shank of the needle, as described, to set the last stitch"; in the second claim, "the said take-up completing the setting of the stitch before the

said needle is withdrawn from the stock and out from the old loop upon its shank"; and, in the third claim, "the said main take-up to draw the thread about the shank of the needle and set the stitch while the needle is in the stock, and the loop of thread last drawn through the stock by it is yet on the shank of the needle."

It is possible that the French and Meyer patent might have been so worded as to include any take-up which operates in part to relieve the needle of the old duty of setting the stitch, by pulling up a portion of the thread in the manner described, but the patentees have seen fit, in explicit terms, to limit their patent to a take-up which has the function of drawing up the full amount of thread and setting the stitch, and it cannot, therefore, be said that a take-up which does not substantially do this work comes within the patent. To adopt such a construction would be to hold that a take-up which operates to pull up any appreciable quantity of thread, and which falls far short of setting the stitch, is an infringement of the patent. The express and oft-repeated language of the specification and claims forbids such a construction.

Having considered the nature and scope of the two patents in issue, we now come to the alleged infringing device.

The defendants' machine is the Dancel machine, with an added auxiliary mechanism, which is substantially described in the Bertrand patent, No. 589,403, dated September 7, 1897. While this auxiliary device acts (or may act) both as a pull-off and take-up, it admittedly neither pulls off the requisite supply of thread for the next stitch, nor takes up sufficient thread to set the last stitch, nor does it substantially do either of these things.

The defendants' machine is provided with a slide bar, upon which is slidably mounted a truck connected to the bar by means of a spring. When the slide bar moves to the left, it causes the truck to engage the thread between the needle and tension, and to press against it. After the truck has been brought into engagement with the thread, the slide bar, still continuing its movement towards the left, will have the effect of drawing thread from the tension after the resistance of the spring to expansion is sufficient to overcome the tension. The truck will then continue to draw thread from the tension until the slide bar has completed its movement to the left. After the slide bar has completed this movement, the needle, which during this movement has remained substantially stationary in its retracted position, advances towards the work, slackening the loop which is held in its hook. As soon as the loop is slackened, the spring, which has been expanded by the movement of the slide bar to the left, contracts, and thus acts to advance the truck further to the left, and to cause it to take up the slack of the loop. This action of the truck in pulling off thread from the tension constitutes its pull-off function, and its action in taking up thread from the loop constitutes its take-up function. So far as this device acts as a pull-off, such action must take place while the thread is held under the strain of the needle at the completion of its backward stroke, as in the Fowler and Warren patent in suit; and so far as it acts as a take-up it draws upon the loop about the

shank of the needle as in the French and Meyer patent in suit, but whether the needle is in the stock during the take-up action is a question upon which the experts differ.

It was assumed in the opinion of the court below, based upon the testimony of the experts, and it is assumed by complainant's counsel in their brief upon these appeals, that the defendants' device may operate as a pull-off to the extent of pulling off from one-quarter to three-eighths of an inch of thread, and may operate as a take-up to the extent of taking up from one-quarter to three-eighths of an inch of thread; and the question is whether a pull-off and take-up device, having this limited action, infringes either or both of the two patents in issue.

As the length of thread necessary for a stitch is about an inch and a half, it follows, from what we have already said, that a device which only operates to pull off from one-quarter to three-eighths of an inch of thread does not infringe the Fowler and Warren patent. Further, the purpose of the Fowler and Warren patent is to prevent the rendering of the thread in the hook of the needle, or, as the specification expresses it, "the rendering \* \* \* is reduced to the minimum." It is doubtful, at least, whether the defendants' pull-off reduces to any extent this rendering, for the reason that the quantity of thread drawn from the tension is so small that it is only sufficient to supply slack thread to the needle during the time it is drawing the loop through the material, at which time there is no rendering of the thread, owing to the bite of the material upon the throat of the needle. If this be true, it follows that the needle, after leaving the stock in the defendants' machine, performs the same duty as in the old Dancel machine, and is obliged to draw the thread against the strain of the tension, with the accompanying rendering.

Upon the assumption that the defendants' device does not prevent rendering, the complainant contends that the needle during its backward pull through the material subjects the thread to a double strain, namely, the strain caused by the bite of the material and the strain due to the tension, and that the supply of slack thread to the needle at this time at least relieves the needle from pulling the thread against the tension strain. It may be the defendants' pull-off in this way helps to relieve the needle of a portion of its work, but, if it does, it is a feature which is not referred to in the Fowler and Warren patent, and which cannot now be imported into that patent for the purpose of enlarging or changing its general meaning and scope as set out in the specification and claim.

With respect to the French and Meyer patent, we have seen that it describes a take-up which prevents the cutting of the between substance by pulling taut the loop of thread around the shank of the needle and setting the stitch, and that the patentees, by express language, have limited their invention to a device which has this function. As the amount of thread so taken up is about one inch, it is plain that the defendants' device, whose take-up action is limited to from one-quarter to three-eighths of an inch, and which does not operate either to draw the loop taut about the shank of the needle or to set the stitch, is no infringement of the patent.

In a sewing machine of this type, by reason of the number, smallness, and compactness of its parts, and the rapidity with which it runs, it is difficult to determine with accuracy the exact action of its several parts upon the thread during its operation. Consequently, a conclusion respecting infringement between two pull-off and take-up devices, where there is only a slight difference in the estimated amount of thread pulled off or taken up, might not be free from grave doubt; but that is not the situation we have to deal with. Here there are marked differences between the devices. The range of action of the complainant's pull-off and take-up mechanism is far greater, according to the evidence, than the range of action of the defendants' device. If some doubt exists as to the real character and purpose of the defendants' device, it can at least be said that the complainant has failed to make out a case of infringement. In other words, the proofs fall far short of establishing that the defendants' device comes within any legitimate construction of the complainant's patents. Nor does it necessarily follow, as the complainant contends, that, if the defendants' device does not infringe the patents in issue, it must be a useless appendage to the Dancel machine.

In determining the question of infringement in these cases, it would undoubtedly have been more satisfactory if the defendants had frankly and fully stated their object in attaching their device to the Dancel machine, and its effect, though we know of no rule which obliged them to make such disclosure. This course of the defendants naturally subjects them to unfavorable comment, and throws a certain suspicion upon the device, which it is impossible entirely to cast aside. But this circumstance cannot influence the judgment of the court. Its duty still remains to decide these cases simply upon the evidence presented.

Giving the defendants' device the full scope of action which the complainant's experts think it fairly possesses, it still remains true that infringement can be sustained in the Cook Case only upon the theory that the Fowler and Warren patent covers any pull-off device where the actuating mechanism of the machine is so timed that some pull-off action on the thread is exerted, however limited, when the needle has completed its backward stroke, and that it is immaterial whether the supply is sufficient for the next stitch, or whether there is any reduction of rendering in the hook of the needle; and that infringement can be sustained in the Spaulding Case only upon the theory that the French and Meyer patent covers any take-up which draws up some thread from the loop around the shank of the needle when in the stock, and that it is immaterial whether the amount is sufficient to draw the loop taut and to set the stitch. For the reasons already stated, we are unable to give such a broad construction to either patent, and it follows that the decrees of the circuit court dismissing the bills must be affirmed.

The decrees of the circuit court are affirmed, with costs.

## GOSS PRINTING-PRESS CO. v. SCOTT.

(Circuit Court of Appeals, Third Circuit. July 1, 1901.)

## PATENTS—ANTICIPATION—PRINTING PRESSES.

The Firm patent No. 415,321, for an improvement in rotary printing machines, reconsidered on the question of anticipation, and held not anticipated and valid.

On Petition for Rehearing. Denied.

For former opinion, see 108 Fed. 253.

Before DALLAS and GRAY, Circuit Judges, and BUFFINGTON, District Judge.

BUFFINGTON, District Judge. The petition for rehearing states: "We should not trouble the court with the motion for rehearing were we not convinced, from many careful readings of the opinion, that the court overlooked a certain press of whose existence there is no dispute, and certain earlier patents," etc. The press here referred to is the Cleveland Leader press. That press was not overlooked, and we are at some pains to call attention to the careful language used, which, while not mentioning such press by name, wholly differentiates it from Firm's device, and shows that it could not infringe, and did not anticipate, such device. It was not, therefore, specifically referred to in the opinion. Not only was particular attention called to the circumferential page-form heading in the Globe press: viz. "In the main press, a four-plate wide web was printed on both sides, four pages abreast, the column rules running around the cylinders; consequently the printed columns were parallel with the web sides;" but circumferential page-form heading was pointed out as one of the features of Firm's device. "It will be noted," says the opinion, "that in this device the page forms are all headed circumferentially, and in the same direction around the form cylinders; that the webs move in the same vertical plane along ultimately converging paths. The same vertical plane intersects the central longitudinal margin of all the webs on any line parallel therewith, from the time the webs leave their respective rolls to the point where they converge, printed and registered. It is this feature that gives such a type of press in the art the name 'straight line' or 'straight run,' as distinguished from 'angle bar,' or presses where the web is deflected and transferred to a different vertical plane." The "type of press" could only refer to one (and the language could have no other meaning), where, as noted, "the page forms are all headed circumferentially." Having thus noted that the feature of circumferential heading existed in the Globe Democrat, and was an element of Firm's claim, the opinion showed that the advance made by Firm was in eliminating the angle bars, not from every type of press, but from one having circumferential page-form heading. Thus the court says: "But Firm conceived the idea of printing his whole paper by the same simple, straight-ahead method, so followed by one of the Globe webs." Now the method followed in printing the web in the Globe

Press was by circumferential page-form heading, and that only, and the general expressions in the opinion, which counsel conceive apply to transverse page-form presses, should not be so read. Both by the context and the express language used, such general language should be understood as applying to those presses in which the page forms were circumferentially headed. The words used by the court in describing Firm's device, "The relative arrangement and relation of the forms on the several cylinders need not here be detailed," had no reference to the transverse or to the circumferential heading of the page form, but to the relative relation of the forms to each other, so as to secure the proper registering of the pages. So, also, were the Nicholls specifications not overlooked in the case. Indeed attention was called to them specially by the opinion of the court below:

"The Nicholls provisional specifications, filed in the British patent office July 14, 1870, and January 12, 1871, while strongly suggestive of the combinations of claim 7 of patent No. 415,321 and claim 6 of patent No. 410,271, cannot be held to have anticipated them, whatever may have been the effect of those specifications on the state of the prior art."

In our opinion we say:

"We are then brought to the question whether the combination here shown was novel, useful, and patentable. That it was novel, the court below found, and our research in the art leads us to the same conclusion."

It will thus be seen while they were not referred to by us by name, they were by reference. We may add, however, that in them only general language was used, and an intent announced by the patentee to occupy a general field. But such paper intent never materialized in plans or specifications. On the important element of form heading no light is thrown. Within the scope of the general language used, opposing experts have constructed widely different types of presses. If the light thrown by Nicholls' provisional specifications on the art 30 years ago met the test laid down by the court in reference to a prior foreign patent, that it must be "sufficient to enable those skilled in the art to understand the nature and operation of the invention, and to carry it into practical use," and "that it must be an account of a complete and operative invention, capable of being put into practical operation" (*Seymour v. Osborn*, 11 Wall. 516, 20 L. Ed. 33), it is inconceivable that the device suggested would not have been seized upon in the 20 odd years ensuing before Firm's patent, and embodied in a practical press. The fact that it did not so instruct press builders proves the disclosures were not sufficient to so instruct. "Whatever," says the court in *Seymour v. Osborn*, quoted above, "may be the particular circumstances under which the publication takes place, the account published, to be of any effect to support such a defense, must be an account of a complete and operative invention, capable of being put into practical operation." In closing we deem it proper to say that in view of the size to which oftentimes in patent cases the zeal of counsel and the ingenuity of experts unduly swell records and briefs, so called (in this case the record contained 2,200 pages and one of the briefs 484 pages), it is not to be expected that courts, and especially appellate ones, will follow the lead thus

set, and discuss every question raised. We consider the controlling features in this case have been sufficiently adverted to, and the petition for rehearing is refused.

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BACON v. ENNIS.

(District Court, E. D. Pennsylvania. June 29, 1901.)

No. 8.

1. SHIPPING—BREACH OF CHARTER—DAMAGES RECOVERABLE.

The owner is entitled to recover from a charterer the amount necessarily expended by the master in trimming a cargo after loading, made necessary by the fact that the ship was loaded at a place where she could not "always be afloat," as required by the charter.

2. SAME—DEAD FREIGHT.

Under a charter which required the ship to go to the port of loading, "or as near as she can safely go," and required the charterer to load a full cargo of ore, where the ship could not load a full cargo at the berth assigned her by the charterer, because of a bar in the harbor which she could not cross, it was the duty of the charterer to complete her load outside the bar, no custom to the contrary being shown, and his failure to do so renders him liable for dead freight.

8. SAME—DEMURRAGE.

Where a charter required the ship to receive cargo "from the charterer's shippers," and provided that lay days should not commence until she was "in every respect ready to load or discharge," such days for loading do not commence to count until she is not only ready to load, but is at the berth where the shipper's cargo is lying, where she is delayed in reaching such berth by the rules of the port, and without fault of the charterer.<sup>1</sup>

In Admiralty. Suit for damages for breach of charter.

Horace L. Cheyney, John F. Lewis, and Francis C. Adler, for libellant.

Alexander Simpson, Jr., and Ira J. Williams, for respondent.

J. B. McPHERSON, District Judge. If this case is to be decided in time for an appeal to the next term, the brief time at my command does not permit me to give my reasons at length. I may, however, indicate in a few words the conclusions I have reached.

There are three items in the libellant's claim: (1) A sum of \$81.46, paid by the master for trimming the vessel at Bilbao, the port of loading. This item does not seem to be contested, but in any event I think it should be allowed. The respondent, who was the charterer of the ship, loaded the vessel with iron ore, and partly owing to the wet condition of the ore, and partly to the fact that the vessel had to be loaded while she was aground at low tide,—this being in violation of a clause in the charter party, providing that her cargo was to be delivered "where she can always lie afloat,"—the cargo needed to be trimmed before it could be said to be properly stowed.

<sup>1</sup> Demurrage, see notes to *Randall v. Sprague*, 21 C. C. A. 337; *Hagerman v. Norton*, 46 C. C. A. 4.

(2) The second claim is for dead freight, and should, I think, be allowed, on the ground that the charterer undertook to load a "full and complete cargo of ore,"—which would be, say 3,300 tons,—whereas it was impossible to put on board at the loading berth assigned by the charterer more than 2,700 tons, because of the bar in the harbor of Bilbao, which the ship could not cross with a full cargo on board. The charter party required the ship to go to Bilbao, "or as near as she can safely go," and this clause contemplates that she is to go to a point at or near the port, from which she can get away loaded. The purpose of the voyage is to carry a cargo from the port named, and to accomplish this purpose safely she must be able to get to sea. It seems to me (no custom to the contrary having been shown), that the charterer was bound to furnish her in the river with as much as she could carry over the bar, and to complete the loading outside. Both parties may be presumed to have known of the conditions of the port; but, whether the contract was made with knowledge or in ignorance of these conditions, the charterer's obligation to furnish a full cargo is express, and nothing has been shown to excuse performance. (3) The remaining claim is for dispatch money, and this, I think, should not be allowed. The ship was not ready to receive cargo "from the charterer's shippers"—this being one clause of the contract—until she was at the ore tip, where the shippers' ore was lying; and the rules of the port of Bilbao did not permit her to get to the tip until the vessel that preceded her in turn had left the berth. The clause concerning lay days—"lay days not to commence to count until 12 o'clock noon after steamer is entered at custom house, and in every respect ready to load or discharge, and in free pratique, of which the captain is to give notice in writing to shippers or consignees"—should be read in connection with the clause first quoted,—*"from the charterer's shippers."* The negative form of the provision concerning lay days forbids me to read it as if it were positive, for this would be to put different words, with a different meaning, into the mouths of the contracting parties. If they had intended to provide directly that the lay days should begin at 12 o'clock noon, etc., no doubt they would have said so.

A decree may be drawn in accordance with this opinion; two-thirds of the costs to be paid by the respondent, and one-third by the libellant.

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DE FARCONNET et al. v. WESTERN INS. CO.

(District Court, S. D. New York. August 3, 1901.)

1. JUDGMENT—CONCLUSIVENESS.

Libelants shipped petroleum, covered by marine insurance, on board a bark which became disabled at sea. Salvage and other expenses were incurred, to pay which the ship and cargo were subsequently sold by the master. *Held*, in an action on the policy, that a judgment in an action on the master's bottomry draft, pledging ship and freight, in which the sale of the ship was held invalid, was not admissible in evidence, nor binding in any way, it being between different parties, and on different evidence.



**2. MARINE INSURANCE—LIMITATIONS OF ACTIONS—WAIVER.**

Any conduct of an insurer which tends to mislead the insured, and cause delay in prosecuting his claim beyond the time limited in the policy, amounts to a waiver of the condition.

**3. SAME.**

Subsequent dealings with the insured, in which the insurer recognizes the continued validity of the policy, and requires further action on the part of the insured, involving labor and expense, amount to a waiver of the condition in the policy limiting the time for prosecuting claims.

**4. SAME—FORMAL ABANDONMENT—WAIVER.**

Where the insured under a marine policy wrote the insurer, inquiring "whether we must make an abandonment by judicial act, or if our present letter, expressing an intent to abandon, will do?" the latter's answer, ignoring the informal tender, and denying any liability under the policy, excuses a delay in making the formal tender.

**5. SAME—RISKS COVERED—GENERAL AVERAGE.**

Libelants shipped petroleum, covered by marine insurance against sea perils, on board a bark which became disabled at sea. *Held*, that the general average charges assessable on the oil, and for which the insurer was liable under the policy, included the decree for salvage, with costs and expenses, inward pilotage, towage, ship's new material used up in the salvage work, etc.

**6. SAME—PETROLEUM AVERAGE.**

A certificate for marine insurance contained an exception of "particular average unless vessel be stranded," etc. The policy provided that the insurer should not be liable for leakage of liquids, unless occasioned by stranding. The vessel containing the petroleum became disabled at sea, and in being towed to the nearest harbor became stranded, and pounded for half an hour on a coral reef, causing excessive damage to the bottom. Its cargo on the first warehousing, pending the repairing of the vessel, appeared to be in good condition, and experienced witnesses testified that the damage was caused by contact with sea water, detention in a tropical climate, and frequent handling. *Held*, that the loss by leakage was caused by stranding, within the policy.

In Admiralty.

Butler, Notman, Joline & Mynderse, for libelants.  
Wing, Putnam & Burlingham, for respondent.

BROWN, District Judge. The libel in this case was filed on January 14, 1893, claiming a total loss, upon an abandonment, under a certificate of marine insurance issued by the respondent's agents at Baltimore, Md., on February 8, 1890, for \$5,600 upon 5,000 cases of refined petroleum, valued at that sum and shipped by libelants' agents on board the Italian bark *Sempre Avanti*, at and from New York to Marseilles. The libel alleges that the loss was by sea perils; that the ship became disabled at sea and was towed into St. Georges, Bermuda, in distress, whereby large salvage expenses were incurred, and port expenses in the repair of the bark for the purpose of prosecuting the voyage; that all efforts to obtain funds to pay the salvage charges and other expenses were unsuccessful and that ship and cargo were thereupon sold by the master, as authorized by the Italian consul, and the proceeds applied in payment of said charges, less £89-15-5 remitted to the owners of the ship; that the cargo became a total loss, and that the libelants had made due abandonment to the insurers. An amendment alleged the stranding of the bark for about half an hour, through sea perils, in entering St. Georges, and

particular average damage to the cases of oil varying from about 25 to 40 per cent. of its value, through the severe weather, stranding, the leaking of the vessel, and through handling, discharge and storage at Bermuda.

The answer, beside general denials, alleged that the loss was not covered by the policy; that no decree for salvage had been made; that none of the Bermuda expenses were general average; that the abandonment was insufficient; and that the suit was barred by the failure of the libelants to prosecute, as required by the policy, within one year after the loss.

The evidence sustains all the most material averments of the libel. The bark was of about 400 tons, staunch and seaworthy. She sailed from New York on March 5, 1890. When three days out she met severe weather, which continued until March 10th, when her rudder was broken by heavy seas and the bark became unmanageable. On the 12th she began to leak, through the pounding of broken pieces of the rudder which were then thrown overboard. A temporary spar-rudder was then rigged up, which gave poor service until the 17th, when it became necessary to cut it adrift. On the 22d the steamer Cathay, in response to the bark's signals of distress, took her in tow, and with considerable difficulty brought her on March 24th within three miles of St. Georges, whence she was taken by two tugs into the harbor. While crossing the bar, however, she grounded upon a coral reef, apparently without negligence in the tugs, but in consequence of her unmanageable condition. She lay there pounding for about half an hour in a strong wind and high sea before she could be hauled off. The stranding caused much additional damage, and increased leaking to the extent of six inches per hour until checked by divers. On surveys the keel was found much chafed, the scarph open a half inch, the keel splintered under the mainmast, and started at the stern post about three-fourths of an inch and the copper off on both sides, requiring about 600 sheets to be replaced.

The value of the bark in her existing condition on arrival at St. Georges was appraised at £300. The estimated cost of repair including dockage and replacing ship's new material used up in salvage amounting to £165-16-7, was £1,223-11-5. For the purpose of continuing the voyage, the vessel three days afterwards was docked, and the repairs expeditiously made, at an expense, according to the vouchers returned, of about £1,280 for actual repairs, including docking, though there were other incidental charges. The most important items of repair were for calking and for remetaling. Meantime on March 24th, the very day of arrival, a libel for salvage in behalf of the Cathay was filed in the vice admiralty court against the bark, her cargo and freight, which on the 28th were released on bond for £3,000. After a trial, a decree was entered on May 26, 1890, for £2,027, salvage, with £67-14-9 costs, to which are to be added charges for sureties and counsel, making a total aggregate for salvage expenses of £2,337.

The award of salvage for two days' service seems excessive, being about 42 per cent. of the total value of ship and cargo; and this large award was no doubt one of the causes of the subsequent inability to obtain bottomry, resulting in the breaking up of the voyage.

The repairs were completed by the 26th of May, on which day the master obtained the consul's permission to reload the cargo for the purpose of continuing the voyage. The reloading was completed by June 4th. The master in the meantime had been endeavoring to obtain the funds necessary to pay the charges for salvage, repairs and other Bermuda expenses, first from the ship owners and then by bottomry. For the latter purpose he came twice with the consul's permission to New York, where he employed competent counsel and Mr. Seagur, a shipping expert, to assist in obtaining the money. Correspondence and communication were had with the national board of marine underwriters, of which the respondent was a member, and both had full notice at the time of all the master's proceedings in this regard, as well as of the subsequent sale of ship and cargo. An application to them for the loan was entertained, but on consideration declined. Due advertisement was made for the bottomry loan both in Bermuda and New York, and when all these efforts were found to be unavailing, the master by his counsel sent a circular letter to the marine board and to all the underwriters, agents and shippers, informing them of the fact, and that the master would return to Bermuda and sell so much of the cargo as might be necessary for the purpose of raising funds. The master returned to Bermuda on June 19th. He was accompanied on the same steamer by Capt. Cann, a surveyor in the employ of the marine board, who was appointed by the respondent to examine into the circumstances at Bermuda and report, and he was apparently authorized by the respondent to buy in the oil at certain figures given him by the respondent, as recommended by the marine board.

On June 23, 1900, the master applied to the consul for leave to sell vessel and cargo, so far as necessary to pay the charges and expenses, reciting the facts, and in concluding the application he says:

"I hereby give notice to this consulate of my abandonment of said cargo and vessel aforesaid."

On June 24th, the consul's leave to sell was granted and the sale was advertised for July 8th. On June 26th Captain Cann left Bermuda, and on the 30th of June, after arrival in New York, reported that the oil was to be sold on July 8th; that it was likely to bring three shillings a case, a fair price, and that the "figures given him" would not probably buy it. On July 8th, the sale was made; the oil brought an average of about three shillings per case, amounting in all to £732-5-0 gross; or £676-16-8 net. The rest of the cargo brought £4,117-3-6 gross. The vessel brought £1,100-0-0 gross, or net £1,017-10-0. The net receipts from the entire cargo were £4,541-3-5. Total net receipts £5,558-13-5. This was £89-8-9 only in excess of the salvage and Bermuda expenses, and this excess was remitted by the master to the owners at Naples "to be paid to the interested parties."

On July 21, 1890, the libelants informed the respondent's agents of the loss, of the failure of the master's attempts to obtain bottomry, of the sale, and of their desire to abandon. The respondent answered denying any liability, and on November 6, 1890, the libelants made a formal abandonment to the respondent and to the other insurers of particular average losses.

The result, ruinous as it was, was apparently foreseen by the marine board, and its advice to the respondent, one of its members, to buy in the oil, was seemingly given in expectation of some such outcome.

The charges against the ship and owners for general average, approximately reckoned according to the local English rule, and for repairs, docking, commissions, wharfage, wages, provisions and other ship's expenses and port charges not included in general average under the English rule, were apparently not less than £1,900, or about \$4,300 more than was realized from the sale of the vessel after she was repaired. To this extent at least the cargo was applied directly to pay the debts of the ship and owners, for which the latter would remain answerable to the cargo owners and their insurers.

The respondent argues that the proceedings for the sale of the ship and cargo were collusive and fraudulent. But no such charge is made in the answer. The answer alleges, however, that the sale of the cargo was unauthorized and void, and refers to a subsequent adjudication in Bermuda in an action on the master's bottomry draft pledging ship and freight, in which the sale of the ship was held invalid, as appears by the exhibits here offered, on the ground partly of insufficient proof of proper communication with the owner of the bark. The proceedings in that cause, however, being between different parties and on different evidence, are not admissible as evidence in this case, nor is the judgment in any way binding here; it is the same also as respects the suit on the other policies in the French court.

But the question whether the sale of the ship was collusive and fraudulent, or the sale of the entire cargo unauthorized, or the disposition of the proceeds, lawful or not, is not material in this action between the assured and their insurers. If the master's sale of the ship was fraudulent it was barratry, which, so far as that affected the cargo, was expressly covered by this policy. As respects the sale of the oil, there can be no question on the evidence, as it seems to me, that diligent efforts were made to obtain funds on bottomry and respondentia without success; and that after those efforts, and after the respondent also, on information of the facts, had declined to make the loan, the sale of the oil at Bermuda was for the best interest of all concerned; that the respondent, after the examination and report by its agent, acquiesced in the proposed sale, and that the sale itself was at fair and satisfactory prices, considering that the cases in which the oil was contained had become liable to immediate leakage (with some leakage already suffered and 20 cases empty) from the tropical climate, from repeated handling, and some rust through contact with sea water arising from sea perils.

1. Time limit. Upon the above facts the libelants are entitled to at least some recovery, unless their rights have been lost through failure to "prosecute within a year after the loss."

The policy provides that "all claims under it shall be void unless prosecuted within one year from the date of the loss."

If the word "prosecute" be here construed in its literal, primary or general sense of following up, pursuing (Webst. Dict.) i. e. endeavor-

oring to collect the claim, that has certainly been done from the very first, and with reasonable diligence, considering the difficulties of the case; and if construed in the technical, legal sense of prosecuting by suit against the respondent (*Carraway v. Insurance Co.*, 26 La. Ann. 298; *Allen v. Insurance Co.*, 15 Can. Sup. Ct. 488, 493), still the defense is, I think, not available here, since in several ways the evidence seems to show clearly a waiver by the respondent of this condition.

Any conduct of the insurers which tends to mislead the assured and cause delay beyond the time limited, is always to be construed as a waiver of that condition. The requirements of good faith estop the insurer from taking advantage of delay thus induced. The same construction is also given to subsequent conduct and dealings with the assured in which the insurer recognizes the continued validity of the policy, and requires of the assured further action involving him in trouble and expense. *Thompson v. Insurance Co.*, 136 U. S. 299, 10 Sup. Ct. 1019, 34 L. Ed. 408; *Titus v. Insurance Co.*, 81 N. Y. 410; *Roby v. Insurance Co.*, 120 N. Y. 510, 24 N. E. 808; *Weed v. Insurance Co.*, 133 N. Y. 394, 407, 408, 31 N. E. 231; *Brink v. Insurance Co.*, 80 N. Y. 108, 112. On both grounds this defense should here be overruled.

Again, after the decision in the Bermuda court in September, 1890, that the sale of the ship was null and void, the libelants seem to have thought a suit against the bark desirable, and with that view on March 10, 1891, cabled to the respondent in reference thereto. On March 17, 1901, before the year had expired, the respondent replied saying:

"Your cable not understood by us. We will say, however, that we have no objection to your suing the *Sempre Avanti* and that your doing so will not prejudice any claim you may have against us."

Suit in rem was thereupon brought by the libelants in the French court at Oran, Algiers. If successful, it would have inured pro tanto to the respondent's benefit. But the decision (August 28, 1891) was in favor of the vessel and her owners, holding, contrary to the decision in Bermuda, that the sale of the vessel was valid.

It could not have been the expectation of either party that, during the pendency of that suit, any action should be instituted against the respondent. Both must have understood the contrary; and the provision that such suit should be "without prejudice" to any claim against the respondent, must have been understood as a waiver of the time limit, since no determination of that suit could possibly have been anticipated within the remaining period of one year from the loss. The decision in August, 1891, was in fact considerably after the year had expired.

Three months later in December, 1891, a formal demand of payment was made on the respondent by the libelants' present attorneys, and the respondent in reply (December 28, 1891) requested them to communicate with Walker & Hughes, in whose hands, it was stated, the matter was placed. The demand, it was stated, had received "careful attention"; yet there was no intimation that the claim was barred by the time limit in the policy, and the only defense indicated

was that "so far as we are aware there was no loss to cargo under the conditions of the policy."

During nearly all of 1892 these negotiations were pending; there were many and frequent interviews and communications with Walker & Hughes, the respondent's representatives; numerous documents were supplied to them on their call, proofs of loss served on August 4, 1892, and further new documents procured at their request and with difficulty and expense, in the endeavor to procure a settlement. It was not until October 19, 1892, that the claim was definitely rejected; and neither then nor at any time, so far as the evidence shows, was any reference made to the time condition of the policy, until it was finally set up for the first time in the answer in this cause. Upon these several grounds I must hold that this defense has been waived, within the authorities above cited.

Upon the merits but little evidence has been introduced by the defense. The libelants' claim is not for a loss occasioned by the master's sale of the oil in order to raise funds; but for actual damage to the 5,000 cases of oil occasioned by sea perils, in the form of general average charges, and also of particular average and special charges thereon, exceeding in all 50 per cent. of its value, and therefore a constructive total loss under the policy. The only question is, how much loss by perils within the policy have the libelants established? If they have shown a loss above 50 per cent. of the value of the oil at Bermuda, they are entitled to a full recovery of \$5,600, the value insured, as for a constructive total loss, upon due abandonment. I think both the loss and the abandonment are sufficiently established by the proofs.

2. Abandonment. The intent to abandon was notified to the respondent apparently as soon as the intelligence of the loss was received. This intention was stated in the libelants' letter of July 21, 1890, as above stated, and inquiry was made

"Whether we must make an abandonment by judicial way, or if our present letter will do?"

The respondent's agents in answer say:

"We are instructed to advise you that the Western company do not admit any liability for the goods in consequence of the sale to raise funds; these being the circumstances under which your goods failed to reach their destination, we do not see that we can do any more than pass on this information to you."

The libelants' letter was a distinct tender of abandonment, with a request for an answer whether a more formal notice was desired. The company's answer ignores the informal tender, and in effect, by its silence, says, "abandonment is immaterial; we reject your claim altogether." This certainly sufficiently excuses any more formal tender at that time. On November 6, 1890, as above stated, formal abandonment was made for the benefit of all the underwriters, and this was confirmed by the libelants' cablegram of November 28th to the respondent, with notice that "the bark was at New York and that the respondent might take any measures it might deem best in its behalf." This was sufficient; it gave to the respondent every right that the assured possessed either of property, or right of property in

rem or right of action in personam against ship or owners. Nothing had been lost by any change in the situation since the informal tender on July 21st, nor had the respondent in any way been prejudiced in the meantime.

3. Amount of loss. The bark being disabled through severe weather and sea perils, was necessarily towed into St. Georges, a port of distress, where in order to be repaired for the purpose of continuing the voyage, she had to be put on the dry dock; and for that purpose her cargo had to be unloaded and warehoused, and afterwards reloaded for the voyage. The cost of the actual repairs but slightly exceeded the estimates; and so far I do not see any evidence of unfair dealings.

With a cargo apparently worth at least \$30,000, to repair the ship in order to continue the voyage, was in the ordinary course of the master's right and duty. When this was determined on, the salvage suit had not been decided, and it could not have been anticipated that bottomry for the necessary funds could not be obtained. The cargo at that time was apparently in fair condition and fit for re-shipment. Up to the time when the efforts to obtain bottomry failed, about June 16th, I see no grounds in the evidence for doubting the propriety and the entire good faith of the master's proceedings.

From this it follows that the respondent upon the general terms of its policy insuring against sea perils, is directly answerable to the libelants for all general average charges assessable upon the oil. *Dickenson v. Jardine*, L. R. 3 C. P. 639; *International Nav. Co. v. Atlantic Mut. Ins. Co.* (D. C.) 100 Fed. 304. The general average charges include the decree for salvage with its attendant costs and charges, inward pilotage, towage, ship's new material used up in the salvage work and in rigging up the temporary steering gear, light dues, pumping, discharge of cargo, surveys, agents' expenses, brokerage and commissions, amounting in all to about £2,900, of which the bark's proportion is about \$1,900.

The defendant is further answerable under the policy for the special charges, and for the particular average charges against the oil incurred in good faith in the port of distress, as a consequence of the sea perils undergone, and which had compelled the vessel to put in there, except in so far as such charges are excepted in the certificate issued under the policy.

4. Leakage. It is claimed that loss by leakage, as particular average, is excepted by the policy. The certificate by which the libelants were insured, issued under the standing policy No. 1,236 to Maury & Donnelly for whom it might concern, contained the following clauses:

"(a) Claims to be adjusted according to the usages of Lloyds, and the special conditions of this insurance."

"(b) Free of particular average unless vessel be stranded, sunk, burned or in collision with another vessel."

"(c) Insured under policy No. 1,236. \* \* \* It is understood and agreed that this certificate represents and takes the place of the policy, and conveys all the rights of the original policy holder for the purpose of collecting any loss or claim, as fully as if covered by a special policy direct to the holder of this certificate."

Policy No. 1,236 contained no exception of particular average except the following:

"(d) Not liable for leakage of molasses or other liquids, unless occasioned by stranding."

The vessel having stranded and thereby suffered considerable damage, clause (b) of the certificate no longer affects the case. 2 Pars. Ins. 629; *London Assur. Co. v. Companhia De Moagens Do Barreiro*, 167 U. S. 149, 17 Sup. Ct. 785, 42 L. Ed. 113. But the respondent contends that clause (d) of the policy still remains applicable. If clauses (b) and (d) covered the same subject only, I should think that under the provisions of the above clause (c), clause (b) of the certificate superseded the earlier clause (d) of the policy. But clause (b) is a general one, covering particular average losses of all kinds, and is quite different in its purpose from that of the special clause (d), which refers to leakage only. I think the latter clause, therefore, remains in force, and that any loss by leakage alone, not due to stranding, must, therefore, be excluded. This clause, as I understand it, excludes not only leakage from ordinary or unknown causes, but also leakage arising as a consequence of severe weather, rolling or pitching of the vessel, or any other sea peril, except stranding alone. *Indemnity Mut. Marine Assur. Co. of London v. United Oil Co. (D. C.)* 88 Fed. 315, 316.

But the evidence indicates, I think, that whatever the loss from mere leakage, it was mainly, if not wholly "occasioned by stranding." In entering St. Georges, the vessel through her unmanageability, was stranded and pounded for half an hour in a strong wind and high seas on a coral reef. This naturally damaged her rudder post, opened seams, produced leaks letting water into the hold, and tore off her metaling, and thereby evidently caused the greater part of the expense and delay in repairing at St. Georges. But for the stranding, the delay would have been comparatively short, and the unloading of the oil and docking would apparently have been unnecessary. The master in his application to the consul on March 29th for permission to unload cargo and dock the ship, states the necessity for this as arising entirely from her stranding. He says:

"The bark having struck the reef and by reason of damage to the bottom sustained at sea on this voyage causing her to leak, and requiring extensive repairs to bottom, it has become necessary to effect repairs on dry dock to discharge cargo, as recommended by official survey."

According to the uncontradicted testimony of many experienced witnesses, moreover, including Captain Cann, the surveyor of the marine board, the damage arose from contact with sea water, detention in a tropical climate and frequent handling; and those causes were mainly, if not wholly, "occasioned" by the stranding; because it was the stranding that caused the chief damage and the chief delay for repairs. This is further confirmed by the testimony that on arrival at St. Georges and on first warehousing the cargo, it appeared to be in good condition. The leakage, whatever it was, and the subsequent bad condition of the cases, was therefore not due to any original defects in the cases or insufficiency for ordinary transportation, nor to the loss of the rudder; but to the leaks, the ship's long



delay and the frequent handling through unloading and reloading, which were all caused chiefly by the stranding.

The libelants contend that there was comparatively little actual loss of oil from leakage, and that the chief element of damage consisted in such "deterioration of the packages as to threaten total early destruction, and to necessitate immediate and costly reconditioning and repacking." The evidence leaves no doubt of this condition of the cases at the time of the sale on July 8th, and that the oil could not then have been transported to Europe without very large loss; so that the sale of the oil in Bermuda had at that time become best, as above stated, for all concerned. But the testimony of the witnesses, with one exception, so far as I can discover, does not distinguish between this element of damage and the actual loss of oil by leakage. The damage to the various lots sold is stated in gross, ranging from 20 to 40 per cent., and embraces both elements without distinction.

The witness Forster, however, who bought 1,000 cases at 3-3, states that the oil if in sound condition would have been worth from five to six shillings per case, and that in his lot the loss from lack of quantity in the cases was about 25 per cent., as he estimates. If the oil was worth in marketable condition \$1.37 per case, there was a loss in condition, after deducting 25 per cent. for leakage, of 28 cents per case on his lot, and a larger loss, aside from leakage, on the rest; making in all over \$1,500 loss besides that from leakage.

The loss in value due to depreciation in the packages or marketable condition, caused by previous contact with sea water, repeated handling, and the necessary delay while repairing the ship's damages arising from sea perils in a port of distress, whether treated as particular average or general, is covered by the policy. This loss together with leakage, if that be included, was considerably above \$2,000, adopting the prices realized at the sale as the fair value of the oil in its condition at that time; and for the reasons above stated, there is no injustice in adopting those prices as the fair value. The respondent had abundant opportunity to protect itself, and the oil actually brought more than it was apparently willing to give.

The special charges under the English rule for storage, reloading, colonial tax and charges incident to the sale, amounted to about \$600, and the above three elements of loss would amount in all to a loss of over \$4,500, or much more than 50 per cent. of the sound value of the oil. If loss by actual leakage be deemed wholly excluded by the policy, contrary to the view above expressed, and that loss be reckoned at 25 per cent., according to Forster's testimony, the loss from unmarketable condition would still be upwards of \$1,500; and this with the other two items would make an aggregate of over \$4,000,—considerably exceeding 50 per cent. of the sound value.

If the proofs presented to the court left any reasonable doubt whether the oil's share of the general average expenses, together with its own particular average and the special charges that are undoubtedly covered by the policy, amounted to 50 per cent. of its value, the proper course would be to send this matter to a referee for careful adjustment by an expert. But there seems to me no doubt

that the loss on the oil, even with all the limitations that can be admitted as reasonably possible, are in excess of 50 per cent. The adjustment of general and particular average is, moreover, a work of great detail, and would involve so much further expense and delay, that without reasonable grounds for requiring it, no such reference should I think be ordered, but a decree entered for the libelants as for a constructive total loss, with interest and costs.

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THE NEW ENGLAND.

(District Court, D. Massachusetts. July 15, 1901.)

No. 1,154.

**1. CARRIERS OF PASSENGERS—LOSS OF BAGGAGE—EVIDENCE.**

Where a passenger's trunk, which when delivered by her to a steamship company contained her wearing apparel, could not be found at the end of the voyage, and when afterwards forwarded to her was empty, and the company refused to give any explanation, and when sued for the loss introduced no evidence as to its care or treatment of the trunk while in its possession, the court is justified in finding that it was broken open and rifled by the company's servants.

**2. SAME—LAW GOVERNING CONTRACT—STIPULATION FOR EXEMPTION FROM LIABILITY FOR NEGLIGENCE.**

A provision in a ticket, issued by an English steamship company to a passenger in the United States, for passage from an American to an English port, that the contract shall be governed by the English law, is ineffectual to render valid a stipulation exempting the company from liability for the negligence of its servants in respect to the passenger's baggage, which is contrary to the public policy of the United States.

**3. SAME—LIABILITY FOR LOSS OF BAGGAGE—VALIDITY OF LIMITATION.**

Conceding the right of a carrier to stipulate for a reasonable restriction of its liability for loss of a passenger's baggage, a provision limiting such liability to \$50, in a ticket for first-cabin passage across the Atlantic, in a first-class steamship, is not reasonable, and will not be enforced, especially where the provision was not called to the attention of the passenger, and the loss resulted from theft or conversion by the carrier's servants.

In Admiralty. Action by passenger to recover for loss of baggage.

Walter C. Cogswell, for libellant.

Thomas J. Gargan and Sewell C. Brackett, for claimant.

LOWELL, District Judge. In this case, the libellant, a passenger, delivered to the Dominion Steamship Company, at its dock in Boston, alongside the steamship *New England*, a trunk containing suitable wearing apparel for herself only. When she arrived at Liverpool the trunk was not to be found, but several days later was forwarded to the address she had left with the company's agent at Liverpool. At the time she received the trunk its lock had been tampered with, and when that was forced the trunk was found empty. The steamship company, though pressed in correspondence by the libellant, and though challenged in open court, failed to explain the delay in delivery, or to introduce any evidence concerning the treatment of the trunk while detained in its hands. This failure of the

libelee to introduce evidence within its sole possession justifies the court in finding that the trunk was broken open and rifled by the company's servants, and that this fact became known to the managers. Whether the conversion occurred in Boston, at sea, or in the British dominions does not appear. The inference regarding the conversion is strengthened by the discourteous letters written by the company's managers in Liverpool to the libelant, a woman traveling alone, when she pressed them with inconvenient questions.

The passenger ticket stated on its face, and above the signature of the company's agent:

"The company will use all reasonable means to insure the ship being sent to sea in a seaworthy state and well found, but is not otherwise liable for loss of, or injury to, the passenger or his luggage, or delay in the voyage, whether arising from act of God, queen's enemies, perils of the sea, rivers, or navigation, barratry or negligence of the company's servants (whether on board the steamer or on shore), defect in the steamer, her machinery, gear, or fittings, or from any other cause of whatsoever nature. The passenger shall not be liable, in respect of his luggage or personal effects, to pay, or to be entitled to receive, any general average contribution. It is further agreed that the company shall not be held liable in excess of fifty dollars for loss or injury to specie, money, jewelry, bullion, precious stones, or other valuables (unless they are given to the purser, and a special receipt given therefor), or loss of or injury to baggage, unless the value of the same be declared before shipment, and freight paid accordingly. It is further agreed that passengers shall see that baggage required during the voyage shall be distinctly labeled, and, in the event of neglecting so to do, the company shall in no manner be held liable for its loss or delay in delivery. It is further agreed that all questions arising on this contract shall be decided according to English law."

According to the English law, common carriers may exempt themselves by express contract from responsibility for losses occasioned by the negligence of their servants. By the law of this country, as laid down in the opinions of the supreme court, such an express contract is contrary to public policy, and consequently void. "It may therefore be assumed that the stipulation now in question [a stipulation similar to that contained in the clause of the ticket first above quoted], though invalid by our law, would be valid according to the law of Great Britain." *Liverpool & G. W. S. Co. v. Phenix Ins. Co.*, 129 U. S. 397, 447, 9 Sup. Ct. 469, 474, 32 L. Ed. 788, 794.

This court has therefore first to determine whether the question of public policy is to be answered according to English opinion or that prevalent in the federal courts. In spite of the clause of the ticket last quoted, Judge Nelson held in this district that the English law did not govern, and that the attempt to exempt the company from liability for the negligence of its servants had failed. *The Iowa*, 50 Fed. (D. C.) 561. The matter has not been determined by the supreme court, though discussed by that court more than once. In *Liverpool & G. W. S. Co. v. Phenix Ins. Co.*, 129 U. S. 397, 9 Sup. Ct. 469, 32 L. Ed. 788, much stress was laid upon the intention of the parties in determining what law was to govern; but on page 462, 129 U. S., page 479, 9 Sup. Ct., and page 799, 32 L. Ed., it was expressly stated that "the present case does not require us to determine what effect the courts of the United States should give to this contract if it had expressly provided that any question arising under it should

be governed by the law of England." In *Compania de Navigacion la Flecha v. Brauer*, 168 U. S. 104, 118, 18 Sup. Ct. 12, 42 L. Ed. 398, the supreme court again expressly declined to pass on the question, while citing several cases which support Judge Nelson's decision in *The Iowa*. In *Knott v. Worsted Botany Mills*, 179 U. S. 69, 21 Sup. Ct. 30, 45 L. Ed. 90, a stipulation that the law of England should govern was held ineffective against the provisions of the Harter act; and in *Calderon v. Steamship Co.*, 170 U. S. 272, 18 Sup. Ct. 588, 42 L. Ed. 1033, the public policy of this country expressed in the Harter act was likened to the general public policy which prevents a carrier from exempting himself from liability for his servant's negligence. In the inferior federal courts the weight of authority is with Judge Nelson. The Iowa was expressly approved in *Worsted Mills v. Knott*, 27 C. C. A. 326, 82 Fed. 471, by the circuit court of appeals for the Second circuit. A like provision inserted in a passenger's ticket between Belgium and New York, the steamer being American, was held void by the same court in *The Kensington*, 36 C. C. A. 533, 94 Fed. 885. See, also, *The Energia* (D. C.) 56 Fed. 124; *Lewisohn v. Steamship Co.* (D. C.) 56 Fed. 602; *The Hugo* (D. C.) 57 Fed. 403; *The Glenmavis* (D. C.) 69 Fed. 472. The authority of these cases outweighs that of *The Oranmore* (D. C.) 24 Fed. 922, which was affirmed in the circuit court, without any statement of reasons, by Judge Bond. 92 Fed. 396. The opinion of Judge Morris in the last-mentioned case treats the matter as one to be determined by the intention of the parties; but, as was said by Judge Butler in *The Glenmavis*:

"The intent of the parties in this regard as thus expressed is therefore immaterial. In every instance where the courts have declared such stipulations void, it has, of course, been against the express agreement of the parties. We have determined that such contracts are harmful and wrong; that they tend to encourage negligence, and justify oppression; that they affect injuriously, not only the immediate parties, but the public at large; and that they are therefore unlawful." 69 Fed. 476.

It is true that in *The Majestic*, 9 C. C. A. 161, 60 Fed. 624, it was held that where the steamer was English, and the contract made in England, the English law governed, and was enforceable in the federal courts, in spite of the public policy of the United States; and this even in the absence of a clause expressly providing for the application of the English law. The supreme court, in reversing the decision of the circuit court of appeals for the Second circuit, treated the question as an open one by holding that the English and American law was the same when applied to the facts of the particular case. *The Majestic*, 166 U. S. 375, 17 Sup. Ct. 597, 41 L. Ed. 1039. The supreme court has not decided that the English law ever can be made to govern in an action brought in a federal court, so as to exempt a carrier from liability for his servant's negligence. And it has implied the contrary in *The Queen of the Pacific*, 180 U. S. 49, 56, 57, 21 Sup. Ct. 278, 45 L. Ed. 419. The circuit court of appeals for the Second circuit, which decided *Knott v. Botany Mills* and *The Kensington* after deciding *The Majestic*, did not determine in the earlier case that, if the contract be made in this country, it

is possible to override the public policy of this country by a stipulation that the contract shall be governed by the law of England. The court merely agreed with the remark of Judge Brown: "It is no part of the law or policy of this country to invalidate the contracts of parties lawfully made abroad, so far as respects performance there, the acts being neither criminal by our law nor mala in se." *The Trinacria* (D. C.) 42 Fed. 863, 864. Upon the whole, the weight, both of authority and of sound reasoning, renders ineffectual the stipulation referred to, and the United States law governs this case. Following *The Rosedale* (D. C.) 88 Fed. 324, affirmed 92 Fed. 1021, and *The Kensington*, 94 Fed. 887, the court holds that the Harter act is inapplicable to this case.

In *The Kensington*, above cited, it was held that, while a steamship company could not by any device exempt itself from liability for the negligence of its servants, yet it might, without offending the public policy of this country, limit the extent of that liability for injury to the baggage of a second-class passenger by the following clause:

"The shipowner or agent shall not, under any circumstances, be liable for any loss or delay of, or injury to, passengers' baggage carried under this ticket beyond the sum of 250 francs, at which such baggage is hereby valued, unless a bill of lading or receipt be given therefor, and freight paid in advance on the excess value at the rate of one per cent. or its equivalent." 94 Fed. 886.

The court of appeals held that this limitation of 250 francs was reasonable, even by the law of this country. It should be noticed that the clause in *The Kensington* contained an express valuation of the baggage at 250 francs, while no valuation is expressly stated in the ticket here in question. A valuation agreed on by both parties is in some cases taken as a reason for permitting the carrier to limit his liability. "The plaintiffs having represented and agreed that the goods are of a specified value, and having thus obtained the benefit of a diminished rate of transportation, are now estopped to claim, in contradiction of their representation and agreement, that the goods are of a greater value." *Graves v. Railroad Co.*, 137 Mass. 33, 34, 50 Am. Rep. 282, 283. "There is no justice in allowing the shipper to be paid a large value for an article which he has induced the carrier to take at a low rate of freight on the assertion and agreement that its value is a less sum than that claimed after a loss." *Hart v. Railroad Co.*, 112 U. S. 331, 340, 5 Sup. Ct. 151, 155, 28 L. Ed. 717, 721. From the opinion of the circuit court of appeals in *The Majestic*, however, it appears that the court did not consider a formal valuation to be a necessary element of the carrier's limited liability. To make a case turn on the presence or absence of the formal words, "at which the baggage is hereby valued," is to sacrifice substance to form. Let it be assumed, therefore, that in the case at bar the libelee might have reasonably limited its liability for its servants' negligence, though it could not have escaped from that liability altogether.

The clause in the case at bar provides, in substance, that a recovery shall be limited to \$50, unless extra freight is paid. To be valid, this must be a "reasonable" stipulation. *Hart v. Railroad Co.*; *The Majestic*, above cited; *Railroad Co. v. Fraloff*, 100 U. S. 24,

25 L. Ed. 531. The word "reasonable" implies a relation to some condition or requirement. It was argued that the stipulation<sup>1</sup> was reasonable, because the passenger could recover the total value of the baggage lost by declaring that value and paying extra freight. While forbidding a shipper to exempt himself from all liability for his servants' negligence, a court might yet hold that public policy did not forbid him to exempt himself from such liability where the value of the property had not been expressly declared and extra freight paid thereon. In *Calderon v. Steamship Co.*, above cited, it was decided, however, that even this limited exemption from liability is against public policy. If, then, a carrier may not exempt himself from all liability for damage to baggage, even where extra freight has not been paid thereon, and may yet limit that liability to a reasonable sum, what is the condition or requirement regarding which the attribute "reasonable" is to be predicated? It appears to me clear, both from common sense and from the cases, that a reasonable limit must be that limit which a passenger may reasonably be expected to observe,—the limit of the value of the baggage ordinarily carried by a passenger under the circumstances supposed. "If the value thus disclosed exceeds that which the passenger may reasonably demand to be transported as baggage without extra compensation, the carrier, at its option, can make such additional charge as the risk fairly justifies." "To the extent, therefore, that the articles carried by the passenger for his personal use exceed in quantity and value such as are ordinarily or usually carried by passengers of like station and pursuing like journeys, they are not baggage for which the carrier, by general law, is responsible as insurer." *Railroad Co. v. Fraloff*, 100 U. S. 24, 27, 29, 25 L. Ed. 531, 534.

In *The Majestic*, 166 U. S. 375, 17 Sup. Ct. 597, 41 L. Ed. 1039, the supreme court expressed a doubt if a limitation of \$50 was reasonable in the case of a first-cabin passenger crossing the Atlantic in a first-class steamer. In *The Kensington*, above cited, it was held that a limit of \$50 was reasonable in the case of a second-cabin passenger crossing the Atlantic in a steamer of a somewhat inferior grade. I believe that 19 adult first-cabin passengers out of 20 who cross the Atlantic by a steamer like the *New England* carry personal effects of a value greater than \$50. Therefore the limit of \$50 appears to me unreasonable. That a \$100 limit is reasonable in the case of a passenger on a Fall River steamboat, as decided by Judge Brown in *The Priscilla* (D. C.) 106 Fed. 739, appears to me plain. I hold, therefore, that the contract in the case at bar is governed by the law of the United States, and that by the United States law the exemption from all liability is excluded, and the limitation of liability to \$50 is unreasonable. It should be added that in *The Majestic*, 166 U. S. 375, 17 Sup. Ct. 597, 41 L. Ed. 1039, at page 386, 166 U. S., page 602, 17 Sup. Ct., and page 1043, 41 L. Ed., the supreme court declared its agreement with the following statement made in *Henderson v. Stevenson*, L. R. 2 H. L. Sc. 470: "When a company desires to impose special and most stringent terms upon its customers, in exoneration of its own liability, there is nothing unreasonable in requiring that those terms shall be distinctly declared and deliberately

accepted." If this statement be literally correct, The Kensington was decided erroneously, for no "deliberate acceptance" of the limitation was there shown. In the case at bar the ticket was not delivered to the husband of the libellant at the time he paid the passage money, but was received by him from the company two days later, inclosed in an envelope. Neither the libellant nor her husband ever examined the ticket or ever "deliberately accepted" its terms. It should be added, further, that it is doubtful if any limitation which seeks to protect a company, not from the negligence, but from the theft or conversion of its servants, is consonant with public policy. Interlocutory decree for the libellant, damages to be assessed in accordance with the opinion.

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**NORD-DEUTSCHER LLOYD v. PRESIDENT, ETC., OF INSURANCE CO.  
OF NORTH AMERICA.**

(Circuit Court of Appeals, Fourth Circuit. July 6, 1901.)

No. 408.

**1. SHIPPING—LOSS OF CARGO—UNSEAWORTHINESS OF LIGHTER.**

A lighter, so constructed that the presence of any water in the hold rendered it unstable when loaded, which overturned shortly after being loaded, when the weather was clear, the wind light, and the water smooth except from a slight swell caused by a passing steamer, by reason of water entering her hold through seams which were insufficiently calked, must be held unseaworthy when loaded.

**2. SAME—DUE DILIGENCE—HARTER ACT.**

Due diligence to make a vessel seaworthy at the commencement of her voyage, which will entitle the carrier to the exemptions given by section 3 of the Harter act, must be exercised in the work itself, and not merely in the selection of agents to do the work, and must be adequate to accomplish the result intended; except as to latent defects not discoverable by the utmost diligence. Due diligence was not exercised to make a lighter seaworthy and fit for the business in which it was employed, where the seams were so improperly calked that they opened and admitted water into the hold when the boat was rocked by a slight swell from a passing steamer; the defect being one which could have been discovered by examination.

**3. SAME—ACTION FOR LOSS OF CARGO—RIGHT OF INSURER TO MAINTAIN.**

Where a marine insurer recognizes the validity of an oral agreement with the holder of an open policy that it should be held to cover all grain shipped by the insured, whether reported before or after loading, and pays a loss arising from the sinking of a lighter employed by a ship in loading grain of the insured, it is subrogated to the shipper's right of action against the carrier to recover for the loss, and it is no defense to such action that it had not been notified of the risk nor received the premium therefor at the time of the loss, and might have successfully resisted payment under the terms of its policy.

Appeal from the District Court of the United States for the District of Maryland.

Parr & Son, merchants in Baltimore, arranged with Schumacher & Co., agents of the Nord-Deutscher Lloyd, a steamship company organized under the laws of the empire of Germany, for the carriage of 6,000 quarters of corn from Baltimore to Bremen, and it was verbally agreed that the steamship company would transport said corn for a certain freight, from port to port, subject, in all respects, to the terms and conditions of the

bill of lading, which had theretofore been adopted and was then in use between the steamship company and the grain shippers of Baltimore. By the custom of the port grain was loaded into ships either at the elevator, or transported from the elevator to the wharves, where ships might lie, in lighters, at the expense of the ships. This grain was delivered at the Canton elevator to lighters selected by the steamship company, and at its expense, to be carried across the bay to the steamship H. H. Meier. 6,148 bushels of corn, of the value of \$2,290.47, was delivered on the morning of July 29th, and loaded upon lighter No. 154, and the testimony shows that it was properly loaded. The lighter, with others of the same class, was to have been towed across the bay by a tug. While awaiting the loading of the other lighters, and in being pulled away from the pier, the lines slipped off the bits, and the lighter drifted out into the stream some 200 or 300 feet from the end of the pier, at which point it began to rock, and the lighterman aboard testified that he grabbed his shovel and tried to trim it, but could not get it up. He then grabbed his pump, and commenced pumping. About this time the captain of one of the company's tugs, seeing that there was some trouble, went to the assistance of the lighter, jumped aboard, and looked down the hold, saying that there was no use to pump, that it had sprung a leak, and water was pouring in, and told the lighterman to get off, shortly after which the lighter turned over and sank. The captain of the tug Walter, owned by the same company which owned the lighter, testified that when he first saw it "she was taking a kind of roll"; that he went aboard, saw that it had a great deal of water in it and was listing, and the grain was piled up against the side of the house, and that it was too far gone for him to do anything to save it. There was testimony that the steamship Louise, a side-wheel excursion steamer, had passed near the end of the dock, and had gone to a pier just below, shortly before the disaster, though many witnesses who were in position to see had not noticed her, and the men aboard the lighter testified that the "wobbling" of the lighter had been caused by the swell from the passing steamer. It is probable that there was some swell, but it is not likely to have been very considerable; for the steamer must have passed this point at a slow rate of speed, as she entered a dock but one below the elevator, and the most credible witness testified that she was lying at the dock when the lighter turned over. It was a bright summer day, and there was but a light wind. The finding of the court below, which is fully sustained by the testimony, is that this disaster was not caused by "any unusual occurrence, or anything that could in any sense be called a danger of the sea, and the result follows that it must have happened either because the lighter was unfit for the duty undertaken to be performed by it, or was leaking while she was at the elevator wharf, or had such a defect in her that the slight roll caused by the swell brought some defective portion of her under the water, and the water leaked in through the defect. There is no other explanation that suggests itself as possible. The ordinary swell from a passing steamboat is one of the most common things that lighters in the harbor have to encounter, and certainly a lighter which was not sufficient to withstand for a few minutes such a swell as was created on this morning, judging from the testimony of all witnesses as to its extent, was unfit, for some reason or other, to perform the service of taking a load of corn across the harbor."

The lighter was 72 ft. 6 in. long, 22 ft. 6 in. wide, and 6 ft. 6 in. deep. Unloaded, it would draw about 14 or 15 inches of water; when fully loaded, it would have about 18 inches free board. There was a house built on it, with hatches, into which the grain was run, all of the grain being on the main deck, and a shallow hold underneath, in which no cargo was carried. It was flat-bottomed, and in construction similar to the scows and lighters which were in common use in the harbor of Baltimore. It was built in 1893, and, the testimony shows, had been kept in good order; had been injured in November, 1898, by being crushed against a pier in a gale of wind, and was then thoroughly repaired; and, the testimony shows, had been inspected in May, 1899, by a marine superintendent of one of the largest ship merchants and brokers, and also by an inspector of under-



writers and another marine surveyor. They testified that it was in good, sound condition, and fit for the traffic for which it was used. These witnesses did not testify that they had made a critical examination of her calking. The general manager of the lighterage company testified that when it was repaired, in May, 1899, it was not calked. Several experts who were examined testified that in lighters of this description any water in the hold would tend to make them unstable; that a slight list would cause the water to flow to one side, and give a cant, and with a deck cargo of grain in bulk this tendency would naturally be aggravated. Their opinion was that the overturning was due to water in the hold. The men in the lighter testified that they examined the hold before it left the dock, and that there was no water in it. All of the testimony shows that water was pouring in just below the fender streak, after it began to rock, while out in the stream. After this disaster it was repaired by the Spedden Marine Railway Company, and their bill for repairs, amounting to \$200, is in evidence, from which it appears that the greater part of this bill was for calking. Parr & Son testified that this corn was insured under an open policy with the Insurance Company of North America, and that by agreement of said company, both verbally and in writing, all grain shipped by them in vessels loading either general cargoes or full grain cargoes was insured by that company, whether the same was reported before commencing to load or after finishing. The original policy of insurance was dated in 1877, and the same had been mislaid, but what purported to be a copy of it was in evidence, and the letter of the manager and general agent of the insurance company, containing the agreement above set forth, was offered in evidence. They presented a bill for the loss to the insurance company, and received payment therefor, giving a written receipt and a subrogation of the rights of insured. The decree was entered in the court below in favor of the insurance company for the full amount claimed.

The appellant claims exemption from liability under the following clauses in the bill of lading: "It is mutually agreed that the carrier shall have liberty to convey goods in lighters to and from the ship, and to discharge into lighters, at the risk of the owners of the goods." "It is also mutually agreed that this shipment is subject to all terms and provisions of, and all exemptions from liability contained in, act of congress of United States approved Feb. 13, 1893." 27 Stat. 445. "It is also mutually agreed that the ship is warranted seaworthy only to the extent that the owners shall exercise due diligence to make it so." All of these defenses were presented in the court below, which, in a well-considered opinion (106 Fed. 973), overruled the same. The appellant also relies upon the ground that the insurance company has no standing in court, as it claims that the testimony failed to show that the corn was insured, and the payment of the money by the insurance company was a mere purchase of the claim, which, under the law of the state of its creation, it had no right to make. This defense was also presented in the court below, but evidently was not considered of much merit, as the opinion falls to notice it.

A. H. Taylor and John P. Bruns (E. P. Keech, Jr., on the brief), for appellants.

Arthur D. Foster and Francis S. Laws, for appellee.

Before SIMONTON, Circuit Judge, and BRAWLEY and BOYD, District Judges.

BRAWLEY, District Judge, after stating the case, delivered the opinion of the court.

The case will be considered as if the corn had been delivered to the ship from the time it was placed on board the lighter, and that the carrier is entitled to all benefits, and is subject to all requirements, of the contract, as stipulated in the bill of lading, although the appellee

contends that, under the facts presented, the corn not having reached the steamship H. H. Meier, the appellant is held to that high degree of diligence for custody, care, and proper delivery which is imposed by section 1 of the Harter act, that forbids any agreement whereby he may be relieved from liability for loss or damage arising from negligence, fault, or failure. The appellee also contends that the stipulation in the bill of lading that "the carrier shall have liberty to convey goods in lighters to and from the ship, and to discharge into lighters at the risk of the owners of the goods," is severable, and that the latter clause applies only to the port of Bremen, where the discharge was to have been made, and where the testimony shows it was the custom to discharge into lighters at the port of Bremerhaven on account of the light draft of water, and inability of the ship to proceed directly to Bremen. It is unnecessary to determine these points, because, looking at the case from the point of view most favorable to the appellant, we cannot see how it can escape liability; for it cannot be claimed that the obligation to provide a seaworthy lighter is any less than the duty to provide a seaworthy ship. Prior to the Harter act, the duty of shipowners to provide seaworthy vessels was absolute and unqualified. Their warranty "did not depend on their knowledge or ignorance, their care or negligence." There is an obvious distinction between the duty of providing a seaworthy vessel which is subject to the inspection of the owner before she starts on a voyage, and the duty of navigation, which must necessarily be left to the discretion of agents at sea and in foreign ports. Hence grew up the custom which allowed shipowners, by express agreement, to exonerate themselves from liability for the negligence of their agents, by inserting in bills of lading such clauses of exemption, the validity of which was sustained in courts of Great Britain, France, and Germany and in some of the states of this country; but, after long contention, the supreme court of the United States held that it was against public policy to allow carriers to exonerate themselves from liability for the negligence of their agents. Such was the state of the law at the time of the passage of the Harter act, the main purpose of which was to relieve American shipowners of the disadvantage suffered in competition with foreign shipowners, who could, by contract, exempt themselves from liability for the negligence of their agents and employés. It was within the competence of congress to remove this disadvantage and to make a change in the standard of duty. The bill now known as the "Harter Act" was introduced in the house of representatives, and, as it passed that body, made no change in the obligations imposed by then existing law, that the vessel should be in all respects seaworthy. As amended in the senate and passed into law, if the owner shall "exercise due diligence to make the said vessel in all respects seaworthy," etc., he is relieved of responsibility for damage or loss resulting from faults or errors in navigation and in the management of said vessel. As it now stands, the law permits the owner to relieve himself from the rigidity of the warranty of seaworthiness, but there is nothing which lessens his obligation to exercise due diligence in all respects at the inception of the voyage.

One of the earliest cases in the supreme court of the United States, wherein the question of seaworthiness is considered in connection with the Harter act, is *The Carib Prince*, 170 U. S. 655, 18 Sup. Ct. 753, 42 L. Ed. 1181. In this case, which was first heard in the district court (63 Fed. 266), it appears that the vessel was a new British steamship, built by builders of the highest class, and the bill of lading, signed in a port governed by English laws, exonerated the ship from liability for injuries arising from latent defects in hull, tackle, boilers, and machinery. The damage was due to a latent defect in a rivet, arising from the fact that the quality of the iron had been injured by too much hammering at the time it was annealed. After the construction the tank had been tested by hammer and by water pressure, and it was found to be tight, and strong enough to sustain the weight of water when not in motion; but when in motion the rivet proved insufficient, and gave way, causing the damage sued for. No external examination would have discovered the defect. The court below held that the damage arose from a latent defect within the exception in the bill of lading, and the libel was dismissed. When the case went to the circuit court of appeals the effect of the Harter act was considered by Judge Shipman, who delivered the opinion, and affirmed the decree of the court below. In the supreme court the decrees of the lower courts were reversed; Justice White, who delivered the opinion, holding that the exceptions in the bill of lading exempting the shipowner from loss or damage from latent defects did not operate to relieve him from damages caused by a state of unseaworthiness existing at the inception of the voyage and at the time the bill of lading was signed, and that that had been settled by the decision in *The Caledonia*, 150 U. S. 124, 15 Sup. Ct. 537, 39 L. Ed. 644, which held that the clause in question operated prospectively only, and did not relate to the condition of seaworthiness existing at the commencement of a voyage. The principle upon which that ruling rested, said he, "was that clauses exempting the owner from a general obligation of furnishing a seaworthy vessel must be confined within strict limits, and were not to be extended by latitudinarian construction or forced implication, so as to comprehend a state of unseaworthiness, whether patent or latent, existing at the commencement of a voyage."

In *The Silvia*, 171 U. S. 463, 19 Sup. Ct. 7, 43 L. Ed. 241, the damage was from water which came through one of the portholes. When she began her voyage, the weather being fair, the glass covers only were shut, the iron ones being left open for the purpose of lighting the compartment. The iron shutters could easily be got at and closed when occasion required, but it appears that shortly after sailing the ship encountered heavy weather, and the glass cover of one of the ports was broken. The court held that the owners were entitled to the benefits of the third section of the Harter act, because the neglect to close the iron covers of the ports was a fault or error in the management of the ship; that the owners had not only exercised due diligence to make her seaworthy, but that she was actually seaworthy when she began her voyage. Justice Gray, who delivered the opinion, uses this language: "It was adjudged by this court at

the last term that the act of congress of February 13, 1893, known as the 'Harter Act,' has not relieved the owners of the ship from the duty of making her seaworthy at the beginning of her voyage,"—citing *The Carib Prince*, supra.

In *The Indiana*, 39 C. C. A. 197, 98 Fed. 637, the damage to the cargo was also from water coming through the portholes, the port being only 2 or 3 feet above the water line. The facts, though similar to those in *The Silvia*, are not precisely the same, and the court of appeals held that the ship was unseaworthy, and therefore liable for the damages claimed. Upon appeal to the supreme court of the United States (not yet officially reported) 21 Sup. Ct. 591, this decree was affirmed, and the court uses this language:

"If the unseaworthiness is not a result of error or fault in management, the third section does not apply; and, even if it were, the exemption still cannot obtain, unless it appears the owner used due diligence to make the vessel seaworthy. And it is said that the owner does exercise such diligence by providing a vessel properly constructed and equipped, and, while he is responsible for the misuse or nonuse of the structure or equipment by his shore agents, he exercises due diligence by a selection of competent sea agents, and that he is not responsible for the action of the latter, although they produce unseaworthiness before the commencement of a voyage. We cannot accede to a view which so completely destroys the general rule that seaworthiness at the commencement of a voyage is a condition precedent, and that fault in management is no defense when there is lack of due diligence before the vessel breaks ground. We do not think the shipowner exercises due diligence, within the meaning of the act, by merely furnishing proper structure and equipment; that the diligence required is diligence to make the ship in all respects seaworthy, and that, in our judgment, means due diligence on the part of all the owner's servants in the use of the equipment before the commencement of the voyage and until it is actually commenced."

*The Irrawaddy*, 171 U. S. 192, 18 Sup. Ct. 831, 43 L. Ed. 130, did not turn upon the question of seaworthiness, but this expression from the opinion of Justice Shiras doubtless expresses the view of the supreme court as to the general purposes of the Harter act:

"Plainly, the main purposes of the act were to relieve the shipowner from liability for latent defects not discoverable by the utmost care and diligence, and, in event that he has exercised due diligence to make his vessel seaworthy, it exempts him and the ship from responsibility for damage or loss resulting from faults or errors in navigation or management."

And, so far as we can gather from the few cases which have been before that tribunal wherein the question of seaworthiness was the main question involved, we do not find that the rule requiring the highest degree of care in providing a seaworthy vessel has been relaxed. The ship must be really fit to undergo the perils of the sea and other incidental risks to which she may be exposed. The obligation of due diligence to make the ship seaworthy is in all respects the same as before the Harter act, which does not establish any new rule of diligence. The shipowner cannot now, any more than before, rely upon external appearances in place of known tests, nor can the mere selection of competent persons to inspect satisfy the requirement of due diligence. Proper repairs, equipment, and inspection must be exercised in fact.

In *The Phœnicia* (D. C.) 90 Fed. 117, the damage was due to a

leak in one of the ordinary ports on the starboard side a little above the water line. In the bill of lading it was provided that the owner should not be liable for any latent defect, nor for any accident of navigation occasioned by any negligence or fault of any of the servants of the ship. Being a German ship, these stipulations were valid under the German law. Judge Brown held that the evidence did not show the actual cause of the leak with requisite or reasonable certainty. The brass ring that held the window of the port did not close tightly in the rubber bed against which it shut. She was a new steamship, on her first voyage, and great pains had been taken to make her in every respect a first-class ship. Whether this frame had been sprung by contact with the stone gateways at Havre, or arose from sea peril, or was due to a misfitting blind, was not clear. It being shown that the only inspection and test applied at Hamburg was to try the outer blind to see if it would go in and out, and screw up tight against the glass door and inner cover, and inasmuch as other tests, such as the water test and chalk test, if applied, would have disclosed whether or not the defect existed before the ship sailed, it was held that the burden of proof was upon the ship to show that the faulty conditions of the port, and consequent leak, arose on the voyage; citing *The Edwin I. Morrison*, 153 U. S. 199, 14 Sup. Ct. 823, 38 L. Ed. 688, where the Chief Justice, delivering the opinion, repeatedly states that it is for the owners to show affirmatively the safety and sufficiency of the ship's condition when she sails, by making all ordinary and reasonable tests. If the determination of the question of the ship's sufficiency is left in doubt, that doubt must be resolved against the owners; the burden is upon them.

In *The Alvena*, 25 C. C. A. 261, 79 Fed. 974, a cargo of sugar was damaged by water coming through the bottom of the ship. This hole was caused by the corrosive action of the sugar drainage upon the iron plate of the steamer. This corrosive action being well known, iron steamers intending to carry sugar cargoes ought to have, as the *Alvena* had in this case, a layer of Portland cement covering the entire bottom where the sugar is expected to be stored, which layer of cement should be kept solid and free from cracks. The accepted explanation was that through some crack in the cement the sugar drainage had worked down so as to corrode the plate beneath. The bill of lading stipulated against any liability, loss, or unseaworthiness of the ship, provided all reasonable means had been taken to make her seaworthy. The sugar acid had eaten out a small hole about five inches in length by about three in breadth, and, except in that small space, was found to be in good condition. It was contended in behalf of the ship that the cement had been broken by some blow upon the outside. The court held that that rested upon conjecture only, without such evidence of actual facts as was necessary to sustain it, and that did not dispense with proof of such inspection of the ship before commencement of the voyage as the nature of the case admitted and required. The proof of inspection of the cement bottom before the commencement of the voyage was only of a general character. Full inspection was not impracticable, but inconvenient, in that part of the ship. It was therefore decided that the acci-

dent arose from a lack of necessary repair at the time the crack occurred or of the requisite inspection afterwards. "For such fault the Harter act, even upon the broadest construction of it, affords no exemption of liability, even though the corrosive action of sugar drainage was one of its 'inherent qualities.' The ship was bound to the exercise of due diligence before the commencement of the voyage to prevent the access of drainage to the iron plates." The decree of the district judge held the ship liable for the damage, and was sustained by the circuit court of appeals.

Lighters, fit for the business in which they are employed, ought to have sufficient seaworthy stability to stand up, except under extraordinary circumstances. The weight of the evidence does not indicate any phenomenal cause for the capsizing. The weather was clear, the wind light, and the water smooth, except from a slight swell caused by a passing steamer, such as was to be expected always in the harbor. The testimony shows that the lighter was of construction such as was ordinarily in use in Baltimore, but it cannot be claimed that any custom could validate the use of an unstable lighter. We are bound to conclude that the lighter was unseaworthy, and the only question that remains is whether due diligence was used to make her seaworthy. By the third section of the Harter act, and by the special stipulation in the bill of lading that the ship was "warranted seaworthy to the extent that the owner shall exercise due diligence to make her so," the shipowner is relieved from the warranty of absolute seaworthiness to which he was bound prior to the Harter act. The difference is important because it relieves the shipowner from responsibility for latent and undiscoverable defects, but the warranty of diligence remains. "Diligence" and "negligence" are relative terms, and depend on varying circumstances. Due diligence requires such watchful caution and foresight as the circumstances of the particular service demand. It must be adequate to the occasion. It must be due diligence in the work itself, and not merely in the selection of agents to do the work; otherwise, shipowners might escape all responsibility merely by selecting agents of good reputation, and would be relieved whether such agents exercised due care or not to make their vessel seaworthy, and any responsibility would be frittered away. We do not believe such was the intention of the act, and while it is in the power of congress to make a new standard of duty, in this regard, and the courts ought to conform their decisions to a standard thus made, we are of opinion that the Harter act was not intended to relieve shipowners of responsibility for the furnishing of seaworthy ships, but was intended to provide that if they did furnish seaworthy ships they should then be relieved of responsibility for errors and faults of management when the ships were at sea, and beyond the eye and control of their owners. No construction should be given to the act which would relieve them of the duty of that vigilant anxiety and solicitude which is required to make their vessels seaworthy. Due diligence on the part of the owner to make the vessel seaworthy is a preliminary condition to the relief from faults or errors in management which are provided in section 3, and any failure of duty in that regard by any of the owner's agents or

servants must be legally attributed to him. The testimony in the case makes it reasonably certain that the rocking of the lighter caused it to leak, and that water poured in through seams below the deck. The master of the tug, who went aboard of it, testified that the water was pouring in underneath the fender streaks. The testimony also shows that, when repairs were made in the May preceding the disaster, the lighter was not calked; and the bill for repairs, made within two weeks after she was sunk and lifted, shows that the greater part of the bill for repairs was for calking. The experts testified that in lighters of this construction any water in the hold would render them unstable. This was so obvious that such testimony was hardly needed.

It is contended by the appellant that, inasmuch as the lighter was allowed to get adrift by reason of negligence in allowing the lines to slip off the bitts, that was a fault or error in navigation which relieves the owner for losses arising from "dangers of the sea or other navigable waters," under the third section of the Harter act. That the lighter might have been saved from disaster, if in tow of the tug, is a matter of conjecture, supported by some testimony; but the phrase "dangers of the sea" has a settled meaning, and cannot be held to include a danger caused by a slight swell in the harbor caused by passing steamers, which was one of the ordinary occurrences in such waters, nor can it include a danger which would have been avoided or escaped if due diligence had been used in providing a seaworthy vessel. It is obvious that the lighter was not properly calked, and, if due diligence had been exercised in examining it, that defect would have been discovered. The slight rocking caused the seams to open, and the water pouring into the hold rendered it unstable. Our examination of numerous cases has not enabled us to find one where leaking from such a cause has been held to be a latent and undiscoverable defect, and we are bound, therefore, to conclude that the appellant did not exercise due diligence in making its vessel seaworthy, and therefore has not brought itself within the terms of the Harter act, or of the special clause of its bill of lading which relieves it of liability.

The other ground of defense is that no policy of insurance upon this grain was ever issued, no premium paid before the loss, and therefore that the insurance company was a mere volunteer, and that the purchase of the claim was ultra vires. Parr & Son had an open policy of insurance dated February 28, 1877 (No. 144,835). The original policy had been lost, but what purports to have been a copy was in evidence. The letter from the manager of the insurance company was also in evidence, wherein, confirming a conversation with one of the firm, he says: "I beg to say that all grain being shipped by you in vessels loading either general cargoes or full grain cargoes is insured in the Insurance Company of North America, whether reported to me before commencing to load or after finishing." Undoubtedly Parr & Son believed that the grain was insured, and, under the arrangement with the manager and agent of the insurance company, the company believed that this grain was covered by the open policy. Experience does not show that insurance companies

are swift to acknowledge obligations that are without legal foundation, and it is not to be lightly assumed that it would have paid the claim if it did not feel itself bound to do so. The claim for loss was presented to the insurance company, which paid the same, and took an assignment of the rights of the insured. Preliminary arrangements as to the amount and conditions of insurance are necessarily, in nearly all cases, made by agents, and such agents are, as the court says in *Insurance Co. v. Colt*, 20 Wall. 560, 22 L. Ed. 423, "by general usage authorized to allow credit for the premium; its allowance does not impair the validity of the preliminary contract to insure." Whether the premium was actually paid before the loss is immaterial if, under arrangement with the agents and the general course of business, the formal document was to be issued and premium paid after the corn was aboard ship and reported. That there was such understanding and custom the testimony abundantly established, and a contract of this nature could have been enforced in a court of equity against the company. The ground upon which an insurance company is entitled to be subrogated to the rights of the assured is thus stated in *Wager v. Insurance Co.*, 150 U. S. 99, 14 Sup. Ct. 55, 37 L. Ed. 1013:

"It is too well settled by the authorities to admit of question that as between the common carrier of goods and an underwriter upon them the liability to the owner for their loss or destruction is primarily upon the carrier, while the liability of the insurer is only secondary. The contract of the carrier may not be first in order of time, but it is first and principal in ultimate liability. In respect to the ownership of the goods and the will incident thereto the owner and the insurer are considered but one person, having together the beneficial right to the indemnity due from the carrier for a breach of his contract or for nonperformance of his legal duty. Standing thus, as the insurer does, practically in the position of a surety stipulating that the goods shall not be lost or injured in consequence of the peril insured against, whenever he has indemnified the owner for the loss he is entitled to all the means of indemnity which the satisfied owner held against the party primarily liable. His right rests upon the familiar principles of equity."

The case does not require us to go into possible defenses that the insurance company might have made. It cannot be material to the carrier with whom it litigates the question of negligence. In *Sun Mut. Ins. Co. v. Mississippi Val. Transp. Co.* (C. C.) 17 Fed. 919, the court said:

"I hold that, since the insurance company in this case saw fit to waive the objection and treat the loss as within the policy by paying it, the carrier cannot be heard to object, for the reason that its liability to the shipper is clear, and it is in no wise injured by being called upon to make payment to the insurer. Such was the conclusion reached by Woods, circuit judge, in *Insurance Co. v. The C. D., Jr.*, 1 Woods, 72, Fed. Cas. No. 7,051, and the doctrine seems to be entirely consonant with justice and equity. It would be contrary to the spirit of admiralty law, which proceeds upon the principles of the broadest equity, to permit the carrier, who is shown to be clearly liable to the shipper, to avail himself of all the defenses which might have been interposed by the insurance company, if sued in an action at law upon the policy."

In the case cited from 1 Woods, Woods, circuit judge, said:

"Respondents further claim that having shown by the testimony, as they allege, that the insurance company was not legally bound to indemnify the



insured for the loss the latter sustained by the collision, therefore the libelants have no cause of action against the respondents, although they have paid the loss; but I am of opinion that the authorities are adverse to this claim, and adopt the conclusion of the district judge, and refer to the case of *The Monticello v. Mollison*, 17 How. 152, 15 L. Ed. 68."

Numerous cases might be cited to show the power of agents of insurance companies to bind their companies by oral contracts to waive payment of premiums and other conditions and forfeitures. Those questions do not arise. The insurance company, having acknowledged its obligation and paid the claim, is subrogated to all rights of the insured. *The Sidney* (D. C.) 23 Fed. 89; *Pearse v. Steamship Co.* (D. C.) 24 Fed. 285. The decree of the district court is affirmed.

### THE EUDORA.

(District Court, E. D. Pennsylvania. June 22, 1901.)

#### No. 25.

#### 1. SEAMEN—ACT FOR PROTECTION OF AMERICAN SEAMEN—CONSTRUCTION AND SCOPE.

Section 24 of the act of December 21, 1898, "to amend the laws relating to American seamen, for the protection of such seamen, and promote commerce" (30 Stat. 763), which forbids the payment of a seaman's wages in advance to himself or to any other person, notwithstanding its further provision that "this section shall apply as well to foreign vessels as to vessels of the United States, \* \* \* provided that treaties in force between the United States and foreign nations do not conflict," does not apply to seamen, although American by birth or naturalization, who regularly ship upon a British vessel, and thereby become, for the time being, British seamen.

#### 2. SAME—POWER OF CONGRESS—CREWS OF FOREIGN SHIPS.

A foreign vessel is a part of the territory of the country to which she belongs, and, although she is subject to the laws of the United States in certain respects while in our ports, congress has no power to control her domestic affairs, such as the terms on which she ships her crew, or the time or manner of the payment of their wages, which are matters that properly concern the ship and crew alone, subject to the law of her flag.

In Admiralty. Suit by seamen to recover wages.

Jos. Hill Brinton, for libelants.

Horace L. Cheyney and John F. Lewis, for respondents.

J. B. McPHERSON, District Judge. The parties to this suit have agreed upon the following facts:

"It is stipulated that at the argument of the above case the following facts shall be admitted with the same effect as if proved by depositions taken in accordance with the provisions of the Revised Statutes or the rules of this court:

"(1) That the bark *Eudora* at the time hereinafter mentioned was a British vessel duly registered under the laws of Great Britain, and hailing from the port of Halifax, Nova Scotia.

"(2) That on January 22, 1900, the said bark was in the port of New York, and, being about to proceed to sea, B. M. Patterson, Edward Jansen, Sven Freeman, E. Thompson, Simon Anderson, and Carl Stevenson, the libelants, one or more of whom were American citizens, shipped as seamen thereon,

signing the written shipping articles required by the British law, for 'a voyage from Portland, Maine, to Rio, and for any ports or places within the limits of 65 degrees north and 70 degrees south latitude, trading to and fro as required, not to exceed twelve calendar months, final port of discharge to be in the United States of America or Canada,' at the rate of 'one shilling for 45 days, and twenty dollars per month thereafter.'

"(3) That at the time said shipping articles were signed the sum of twenty dollars was paid on account of each of the libelants, and with the consent of each of them, to the shipping agent through whom they had been employed by the master of said bark. Said payments were made on account of indebtedness due by the said libelants to the shipping agent for board and for goods sold to them by him.

"(4) That, as required by the laws of Great Britain, the said seamen were engaged in the presence of the British vice consul at the port of New York, and said contract was made with his sanction.

"(5) That thereafter said vessel proceeded upon a voyage to Turk's Island, and thence to Philadelphia, when and where said voyage was completed and the said libelants were discharged; that during the whole time the libelants were in the service of said vessel they performed their duties as seamen; that at the time of the arrival of said ship at Philadelphia, and at the time they were discharged, no wages were due to the libelants by the terms of the contract contained in said shipping articles.

"(6) That the libelants each claim to recover the sum of \$26.66%, being wages at the rate of \$20 per month from the time of shipment on January 22, 1900, until the date of their discharge on March 3, 1900.

"(7) That Karl Svenson, one of the libelants, designated in the libel as Carl Stevenson, has signed the shipping articles at the British consulate, in Philadelphia, acknowledging the receipt of all wages due him for said voyage, and freeing the bark from all liability therefor.

"(8) That proof of the law of Great Britain is waived, and it is agreed that the law thereof as contained in the printed reports, statutes, and text-books shall be received with the same effect as if regularly proved, subject, however, to the right of the libelants to object thereto upon any other ground than the mere formality of proof.

"(9) The contract specified in said shipping articles, and the payment of said sum of twenty dollars to the said shipping agent, were not contrary to or prohibited by the laws of Great Britain; but it is admitted, for the purposes of this case, that said payment is contrary to the act of congress of December 21, 1898, if that act is properly applicable to the contract in this case."

The purpose of the suit is to obtain a decision upon the scope of section 24 of the act of December 21, 1898 (30 Stat. 763), which forbids the payment of a seaman's wages in advance to himself or to any other person, and especially to obtain a decision upon the scope of clause "f" of that section, which declares "that this section shall apply as well to foreign vessels as to vessels of the United States; and any master, owner, consignee or agent of any foreign vessel, who has violated its provisions, shall be liable to the same penalty that the master, owner or agent of a vessel of the United States would be for a similar violation, provided that treaties in force between the United States and foreign nations do not conflict."

There is no formal treaty between Great Britain and the United States upon this subject, and the question must be determined by the application of general legal principles. In my opinion, the suit cannot be maintained, for at least two of the reasons urged at the argument by counsel for the ship, namely: First, because the act of 1898 does not apply to the libelants; and, second, because it is

not within the power of congress to regulate the internal affairs of a vessel sailing under a foreign flag. I regard both these propositions as established by the supreme court of the United States in *Ross v. McIntyre*, 140 U. S. 453, 11 Sup. Ct. 897, 35 L. Ed. 581, and for that reason I shall not discuss them. It is enough, I think, merely to say in support of the first proposition that the act of 1898 does not apply to the libelants, because the statute, as its title declares, is intended to "amend the laws relating to American seamen, for the protection of such seamen, and promote commerce"; and it cannot, therefore, apply to seamen, even if they are American by birth or naturalization, that have regularly shipped upon a British vessel, and have thereby become British seamen for the time being. In support of the second proposition, it may be added that a foreign vessel is a part of the territory of the country to which she belongs, and that congress has no inherent power to control or prescribe rules for her domestic affairs, such as the terms upon which she ships her crew, or the wages she agrees to pay. In certain respects, a foreign ship in our ports is, no doubt, subject to the laws of the United States; but the government and payment and treatment of the crew are matters that are properly held to concern the ship and the crew alone, subject to the law of the flag.

The libel must be dismissed, but without costs.

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#### THE KESTOR.

(District Court, D. Delaware. August 7, 1901.)

No. 616.

#### SEAMEN—PREPAYMENT OF SEAMEN—CONSTITUTIONAL LAW.

Section 24 of the act of congress of December 21, 1898, entitled "An act to amend the laws relating to American seamen, for the protection of such seamen, and to promote commerce" (30 Stat. 755), in prohibiting the prepayment of the wages of seamen, is a constitutional enactment, applying to the prepayment on American soil or in American waters of the wages of seamen, who are British subjects, shipping in American ports on British merchant vessels; there being no treaty between the United States and Great Britain inconsistent with such application. (Syllabus by the Court.)

In Admiralty.

Robert Penington and Joseph Hill Brinton, for libellant.

Charles M. Curtis, for respondent.

BRADFORD, District Judge. The libel in this case was filed by William Chambers against the steamship *Kestor* for the recovery of seaman's wages. On September 2, 1899, that vessel, being destined on a voyage from Baltimore to Mexico, Cuba and Philadelphia, and thereafter on another voyage from Philadelphia to Cuba and to some port in the United States north of Cape Hatteras, the libellant signed shipping articles to serve on her as fireman. The wages he was to receive were stated in the articles as "one shilling for the first twenty days and thirty dollars per month afterwards."

On the day next following that on which he signed the articles he entered on his employment and continued to serve in the capacity of fireman until he was discharged in Philadelphia November 19, 1899, having served two months and seventeen days. At the time he was employed the Kestor was a British merchant vessel sailing under the British flag, and the libelant was a British subject. It is admitted that the libelant received on account of his wages for the two voyages money and supplies amounting to \$20.82. The claimant contends that the balance due to the libelant, after deducting the above amount, was at the time of his discharge \$36.18. At the time of his discharge the latter amount was tendered or offered to the libelant in full satisfaction of his claim; but he refused to accept the same, alleging that he was entitled to receive \$20 more than the sum so tendered or offered. It is admitted that the sum so tendered or offered and refused was deposited with the British consul at Philadelphia November 21, 1899, subject to the order of the libelant, prior to the filing of the libel in this cause, and that "subsequently the British consul forwarded the same to the London Board of Trade pursuant to the British Shipping Act to the credit of said libelant." The basis on which the claimant arrives at the amount admitted by him to be due to the libelant is that the latter was entitled to receive only \$10 during the first month, \$30 during the second month and \$17 for the remaining seventeen days, amounting in the aggregate to \$57, which, after deducting the credit of \$20.82, leaves a balance of \$36.18. The libelant claims that, notwithstanding the language of the shipping articles, he was entitled to receive wages at the rate of \$30 a month during the whole period of his service, and that allowing for the above credit there was due to him at the time of his discharge \$56.18. For the recovery of the latter amount with interest he filed his libel.

By section 24 of the act of congress of December 21, 1898, entitled "An act to amend the laws relating to American seamen, for the protection of such seamen, and to promote commerce" (30 Stat. 755), section 10 of the act of June 26, 1884, entitled "An act to remove certain burdens on the American merchant marine and encourage the American foreign carrying trade and for other purposes" (23 Stat. 53), as amended by section 3 of the act of June 19, 1886, entitled "An act to abolish certain fees for official services to American vessels, and to amend the laws relating to shipping commissioners, seamen, and owners of vessels, and for other purposes" (24 Stat. 79), was further amended so as to read, so far as material to be considered in connection with this case, as follows:

"Sec. 10. (a) That it shall be, and is hereby, made unlawful in any case to pay any seaman wages in advance of the time when he has actually earned the same, or to pay such advance wages to any other person. Any person paying such advance wages shall be deemed guilty of a misdemeanor, and upon conviction shall be punished by a fine not less than four times the amount of the wages so advanced, and may also be imprisoned for a period not exceeding six months, at the discretion of the court. The payment of such advance wages shall in no case, excepting as herein provided, absolve the vessel or the master or owner thereof from full payment of wages after the same shall have been actually earned, and shall be no defense to a libel, suit, or action for the recovery of such wages. If any per-

son shall demand or receive, either directly or indirectly, from any seaman or other person seeking employment as seaman, or from any person on his behalf, any remuneration whatever for providing him with employment, he shall for every such offense be liable to a penalty of not more than one hundred dollars. \* \* \* (f) That this section shall apply as well to foreign vessels as to vessels of the United States; and any master, owner, consignee, or agent of any foreign vessel who has violated its provisions shall be liable to the same penalty that the master, owner, or agent of a vessel of the United States would be for a similar violation: Provided, That treaties in force between the United States and foreign nations do not conflict."

This section, subject to certain exceptions and provisos not pertinent in this connection, makes it "unlawful in any case to pay any seaman wages in advance of the time when he has actually earned the same, or to pay such advance wages to any other person," and provides that such payment "shall in no case \* \* \* absolve the vessel or the master or owner thereof from full payment of wages after the same shall have been actually earned, and shall be no defense to a libel, suit, or action for the recovery of such wages." The libelant contends that the provisions of the above section are applicable to the prepayment of the wages of a British seaman employed to serve on a British merchant vessel; that he was entitled to wages at the rate of \$30 a month from the commencement of his service; and that \$20 of his wages for the first month were paid by the master in violation of the statute. The claimant, on the other hand, contends that the statute was not intended to apply to the prepayment of the wages of a British seaman serving on a British vessel; that, if it was intended to have such application, it was to that extent beyond the power of congress to enact; and that, on the assumption that the statute is operative in such a case, all the wages to which the libelant was entitled were specified in the shipping articles and consequently there was no violation of the statute. According to a literal construction of the shipping articles the wages of the libelant were fixed at "one shilling for the first twenty days and thirty dollars per month afterwards." But this circumstance is not necessarily decisive of the case. A provision in a contract designed and calculated to secure or facilitate the doing of what by statute is declared unlawful and made a misdemeanor punishable by fine and imprisonment is a nullity. Whatever may be the form of such provision and however innocent on its face, it merits and receives the condemnation of the law. If the stipulation of "one shilling for the first twenty days" was intended as a cover for the unlawful prepayment of any portion of the libelant's wages "to any other person," it was unlawful and void. It could derive no vitality from the fact that the libelant when signing the articles was of full age and sound mind. He could not validly contract for the prepayment of his wages to himself or to another. Such prepayment was denounced by the statute, on the assumption that it is operative in the case of British seamen shipping in American ports on British vessels. If prior to the signing by the libelant of the shipping articles the parties regarded thirty dollars a month during the period of service as only a fair, reasonable and just measure of compensation by way of wages,

and the libelant was induced by the master or by any other representative of the vessel to forego the receipt or consent to a relinquishment of his right to a portion of such compensation by submitting to a stipulation that he should receive for the first twenty days only one shilling, and if he was so induced with intent on the part of the master or such representative to prepay within the limits of the United States the amount so sought to be relinquished or foregone to any person or persons other than the libelant, whether by way of bonus or commission for the furnishing of the libelant to the vessel, or by way of the settlement in whole or in part of any indebtedness contracted by the libelant, such intent was unlawful and the amount so intended to be prepaid was "wages" within the true intent and meaning of the statute. For in such case it must be assumed that, were it not for such bonus, commission or indebtedness, the master would have undertaken to pay the libelant as wages what was regarded as the proper measure of compensation during the whole period of his employment, and no stipulation of one shilling for the first twenty days would have been inserted in the articles. And in such case it is immaterial, in my opinion, whether the libelant was aware or ignorant of such unlawful intent on the part of the master or other representative of the vessel. In either event the prepayment, in accomplishment of that unlawful purpose, of a portion of the wages to which he was primarily entitled, was within the mischief at which the statute was aimed, if it be operative in the case of British subjects employed in American ports to serve as seamen on British merchant vessels, was a violation of its provisions, without legal effect as a payment, and cannot serve to relieve the vessel or master from liability to the libelant for the amount of wages so wrongfully applied. Those who attempt fraudulently to evade the provisions of a penal statute usually resort to indirection, secrecy and concealment, and in most instances it is necessary mainly, if not wholly, to rely on circumstances attending the transaction to shed light on its real nature. Direct evidence of the fraud is obtainable in comparatively few cases. There is no evidence showing or tending to show that \$30 were in excess of just compensation to the libelant for a month's service, or that he was taken on trial for the first twenty days and his wages during that period accordingly fixed at one shilling; nor that he was incompetent. The libelant testifies that he was employed at \$30 a month, and that rate after the first twenty days was in fact provided for in the articles irrespective of the length of the service, and there is nothing, consistent with an innocent intent, to show any reason why the libelant's wages for the first twenty days should have been specified in the articles as one shilling. It is wholly unreasonable that such a discrimination between the rate of compensation for the first twenty days and the rate of compensation thereafter should have been arbitrarily made bona fide. Such a provision on its face requires a satisfactory explanation, but none has been given. On the contrary, the circumstances of the transaction negative the claim that the full amount of compensation which should become due to the libelant was specified in the articles. It is evident that

the master did not regard one shilling as the real wages of the libelant for the first twenty days; for that amount has not been paid to him nor was it included in the sum offered or tendered to him at the time of his discharge. The idea that the libelant whose services were worth \$30 a month was expected by the master to serve for the first twenty days without earning any compensation, either to be paid to him as wages, or otherwise to be applied in connection with his employment, is inadmissible. It does not accord with the known rules of human conduct. The libelant is an illiterate man who can neither read nor write. Although he signed the articles with knowledge that there was a stipulation that he should receive one shilling for the first twenty days, it abundantly appears that he protested against the withholding of the \$20 representing that period, and regarded it as a wrongful deduction from his wages. A portion of his testimony is as follows:

"Q. Where were you paid off? A. I ain't paid off yet, sir. Q. Did you demand your money? A. I asked the captain when I left Cuba and he wanted to pay me off \$20 short, but I refused to take the money because he give it to a boarding master. Q. Where was that refusal made? A. In Philadelphia, sir. Q. Before whom? A. British consul. Q. How much money was offered to you? A. \$36.18. Q. How much money was coming to you? A. \$56.18. \* \* \* Q. Did you or not at that time demand the payment of the sum of \$56.18? A. I told him I wanted \$56.18, and he would not give it and I took my account of wages and went off. \* \* \* Q. Did you have any further conversation with the consul? A. No, sir. He said, 'You've been in a boarding-house before and you know right well what you are signing for. You are one of those boarding house kickers. Get out;' and I went out. \* \* \* Q. Where did the dispute come in, fireman, between you and the master about this twenty dollars? A. He wanted to deduct it from me. Q. Why did he claim the right to deduct it? A. That is what I want to know. Q. Did he not give you any reason? A. No, sir. He said I signed for a shilling for the first twenty days. Q. Well, did you not? A. Yes, sir. Q. Well then, if you signed for a shilling for the first twenty days why did you want \$20.18 additional to a shilling? A. I want to know where that money went, if he paid that money for me he had no right to. Q. Now you say you signed for a shilling and you want \$20.18 additional notwithstanding that? A. He reduced it \$20. I want the \$20, and not the eighteen cents at all. \* \* \* Q. You say that you were told by the British consul in Baltimore that you were to get a shilling for the first twenty days? A. Yes, sir."

A portion of the testimony of the master, who was the only other witness than the libelant, is as follows:

"Q. 29. Where was he discharged; before what? A. At Philadelphia. Q. 30. Before the British consul in Philadelphia? A. Yes, sir. Q. 31. Did he get his money? A. It was offered to him. Q. 32. How much? A. Thirty six dollars and eighteen cents. Q. 33. Did he accept it? A. No, sir. Q. 34. What did he say as to accepting it? A. He said it was wrong. He said his account of wages was wrong. \* \* \* Q. 57. What did he state to you as the error in the account? A. While in the consul's office, with the other men that appeared there, he was not sober. He seemed to be excited and spoke about his account being wrong; that his account of wages was wrong and something about advances, and that he had not had all the money. But the consul ordered him out of the office as he was not civil and did not conduct himself with courtesy."

Not only does it appear from the above testimony that the libelant regarded the refusal to pay him for the first twenty days as a wrongful withholding from him of just compensation, but the testimony of

the master on cross examination strongly tends to show a violation of the statute. He testifies, in part, as follows:

"X. 160. Who brought you into contact with the libellant in Baltimore? A. In what way do you mean? X. 161. Any way you please? (Objected to.) A. By an agent. X. 162. Who? A. You mean the name? X. 163. Yes? A. A representative of the firm of Goodhues— X. 164. And Tarley? A. I forget the other name. X. 165. Who are they? (Objected to.) A. People engaged in the shipping business. \* \* \* X. 168. What is their business? A. His business is to assist in getting a crew. X. 169. And he assisted you, I suppose, in getting the libellant as a member of your crew? A. Yes, sir. X. 170. Under what agreement? (Objected to.) A. Private terms. X. 171. What are those private terms? A. Commission. X. 172. What is the commission? A. I decline to state. X. 173. I insist upon an answer unless you are willing to swear that it will incriminate you? A. My answer is that my business with other people has nothing whatever to do with the plaintiff in this case. Mr. Brinton: Mr. Vandegrift, I ask that you instruct the witness to answer the question. Mr. Vandegrift: I would sustain the witness in the position he has taken. \* \* \* X. 174. What was your agreement with the agent of Goodhues and Company with reference to the shipping of Chambers, the libellant, in this case, as a member of your crew, in Baltimore, on September second, 1899? Mr. Vandegrift: If you see fit to let me advise privately with the witness he may be willing to answer that question. Mr. Brinton: I have every confidence, of course, in you, but I do not think it is quite the fair thing to do. Mr. Vandegrift: I thought we might overcome the difficulty, that is all, if he could tell me what his position in the matter was. A. I decline to give any one other than my owners any knowledge of my business, except what was officially done in the consul's office in Baltimore on that occasion. X. 175. I insist upon an answer? A. I must decline to give an answer.

Further, the claimant has not produced as a witness the consul at Baltimore, the consul at Philadelphia, or the shipping-master or agent, nor has he attempted to account for his failure to do so, although two, if not all of them, it fairly may be assumed, would from their connection with the transaction have been important witnesses for him if his present contention were founded on fact. On the whole I am satisfied that the insertion of the stipulation of one shilling for the first twenty days was a mere cover for an attempted evasion of the statute, and that the master violated its provisions by paying in the port of Baltimore a portion of the libellant's wages in advance of the time when he actually earned the same to a person or persons other than the libellant.

I now come to the question whether the statute was intended to apply to the case of British subjects shipping in the United States on British vessels, in the absence of any treaty between the United States and Great Britain inconsistent with such application. In *U. S. v. Nelson* (D. C.) 100 Fed. 125, decided in the district court for the southern district of Alabama, Judge Toulmin, with reference to the section in question, said:

"That the statute applies to American seamen,—Americans whose avocation is that of mariner,—only, is, I think, clear."

This is all that was said on the subject and seems to have been obiter; as nothing appears in the case, as reported, from which it can be inferred that the question of the application of the statute to foreign seamen shipping on vessels in American ports was involved. In *The Eudora*, 110 Fed. 430, in the district court for the Eastern



district of Pennsylvania, however, the point under discussion was directly decided. Judge McPherson said:

"The act of 1898 does not apply to the libelants because the statute, as its title declares, is intended to 'amend the laws relating to American seamen, for the protection of such seamen, and promote commerce.'"

These are the only cases, so far as I am aware, in which it has been decided or said that the statute applies to American seamen only, and in both of them the court evidently relied on its title in reaching that conclusion. It is well settled that the title of a statute may sometimes be resorted to as tending to throw light upon the legislative intent as to its scope and operation. *U. S. v. Fisher*, 2 Cranch, 358, 386, 2 L. Ed. 304; *Holy Trinity Church v. U. S.*, 143 U. S. 457, 462, 12 Sup. Ct. 511, 36 L. Ed. 226; *Coosaw Min. Co. v. South Carolina*, 144 U. S. 550, 563, 12 Sup. Ct. 689, 36 L. Ed. 537; *Knowlton v. Moore*, 178 U. S. 41, 65, 20 Sup. Ct. 747, 44 L. Ed. 969. But to warrant such a course, its language must be ambiguous or otherwise doubtful, or being plain, a literal construction would lead to such absurdity, hardship or injustice, as to render it irrational to impute to the legislature an intent to produce or permit such a result. In *U. S. v. Fisher*, supra, the court through Chief Justice Marshall said:

"Neither party contends that the title of an act can control plain words in the body of the statute; and neither denies that, taken with other parts, it may assist in removing ambiguities. Where the intent is plain, nothing is left to construction. Where the mind labors to discover the design of the legislature it seizes everything from which aid can be derived; and in such case the title claims a degree of notice, and will have its due share of consideration."

The language of the section under consideration is plain and wholly free from ambiguity or other uncertainty. Except as therein provided, it is declared unlawful "in any case to pay any seaman wages in advance of the time when he has actually earned the same, or to pay such advance wages to any other person," and provides that "any person paying such advance wages," shall be guilty of a misdemeanor. The words "any seaman" in the absence of restriction apply as well to a foreign as to an American seaman. No such restriction is expressed in the statute. Nor would the enforcement of the provision according to its terms in the case of a foreign seaman work any hardship or injustice. Protection to seamen is one of the beneficent purposes of the act, and the extension to foreign seamen shipping in American ports of the same protection as is accorded to American seamen involves no hardship or injustice to the former. In *U. S. v. Fisher*, it was held that section 5 of the act of March 3, 1797, giving a preference to the United States in cases of insolvency was not confined to persons accountable for public money, but extended to debtors of the United States generally. Yet the title of the act was "An act to provide more effectually for the settlement of accounts between the United States and receivers of public money," and Chief Justice Marshall said:

"The title of the act is unquestionably limited to 'receivers of public money'; a term which undoubtedly excludes the defendant in the present case."

But the language of the section applied to "any revenue officer, or other person, hereafter becoming indebted to the United States by bond or otherwise" who should become insolvent or whose assets after his death should be insufficient to pay all debts due from the deceased. The court in discussing the section said:

"That these words, taken in their natural and usual sense, would embrace the case before the court, seems not to be controverted. 'Any revenue officer, or other person, hereafter becoming indebted to the United States by bond or otherwise,' is a description of persons, which, if neither explained or restricted by other words or circumstances, would comprehend every debtor of the public, however his debt might have been contracted."

In the present case a fortiori the title should not be held to control the plain language of the section and restrict the words "any seaman" to "any American seaman." In *U. S. v. Fisher*, the title was "unquestionably limited to 'receivers of public money.'" Here the title is "An act to amend the laws relating to American seamen, for the protection of such seamen, and to promote commerce." The act contains twenty six sections, most of which beyond controversy apply to foreign as well as American seamen employed on American vessels. Those sections in which no discrimination is made between foreign and American seamen clearly are in harmony with the title of the act and were intended "to promote commerce," and, as will presently be shown, were in their application to foreign as well as American seamen principally intended "for the protection" of the latter. The section under consideration admittedly was intended to apply to the prepayment of the wages of an American seaman shipping in an American port on an American merchant vessel; and no reason is perceived why the words "any seaman" as employed in the section should be so wrested from their "natural and usual sense" as to exclude a foreign seaman shipping here on such an American vessel, or why the application of its provisions in such case would not be quite as much in harmony with the title of the act as are many of the other sections which do not discriminate between foreign and American seamen employed on American vessels. The case before the court is one in which a British seaman shipped in an American port on a British vessel. It is expressly provided that the section shall apply "as well to foreign vessels as to vessels of the United States" provided "that treaties in force between the United States and foreign nations do not conflict." There is, so far as I am aware, no conflicting treaty between the United States and Great Britain. It is not controverted that the section was intended to apply to the case of an American seaman shipping in an American port on a British vessel; but it is claimed that it was not intended to apply to a British seaman shipping here on such a vessel. Certainly the language of the section is broad enough to cover such a case, and if, as hereafter appears, its application to such cases would operate for the protection of American seamen, it would accord not only with the title of the act, but with the plain terms of the section, so to apply it. A review of the legislation on the subject affords very persuasive evidence that the words "any seaman" as used in the section were the deliberate and well considered ex-

pression of congress, intended to have their usual and natural effect and consequently to apply to seamen regardless of their nationality. Section 10 of the act of June 26, 1884, entitled "An act to remove certain burdens on the American merchant marine and encourage the American foreign carrying trade and for other purposes" (23 Stat. 53), subject to certain exceptions and provisos, not pertinent to this case, provided among other things as follows:

"Sec. 10. That it shall be, and is hereby, made unlawful in any case to pay any seaman wages before leaving the port at which such seaman may be engaged in advance of the time when he has actually earned the same, or to pay such advance wages to any other person, or to pay any person, other than an officer authorized by act of congress to collect fees for such services, any remuneration for the shipment of seamen. Any person paying such advance wages or such remuneration shall be deemed guilty of a misdemeanor, and, upon conviction, shall be punished by a fine not less than four times the amount of the wages so advanced or remuneration so paid, and may be also imprisoned for a period not exceeding six months, at the discretion of the court. The payment of such advance wages or remuneration shall in no case, except as herein provided, absolve the vessel, or the master or owner thereof, from full payment of wages after the same shall have been actually earned, and shall be no defense to a libel, suit, or action for the recovery of such wages. \* \* \* This section shall apply as well to foreign vessels as to vessels of the United States; and any foreign vessel, the master, owner, consignee or agent of which has violated this section, or induced or connived at its violation, shall be refused a clearance from any port of the United States."

Thus at the inception of the legislation on the subject congress by one act not only prohibited the prepayment except as therein provided, of the wages of "any seaman", but provided that the section containing the prohibition "shall apply as well to foreign vessels as to vessels of the United States". Had congress intended that the words "any seaman" should not have their natural effect and apply to a foreigner shipping in an American port on a foreign vessel, or had congress not intended that those words should have such application, it is somewhat remarkable, especially in view of the fact that the same section in which those words occur contains the declaration that foreign vessels should be subject to its provisions, that no proviso was added to the concluding clause or elsewhere inserted to the effect that the section should not apply to foreign seamen shipping on foreign vessels. There was nothing ambiguous or doubtful in the language of the section and its application to seamen of whatever nationality shipping in American ports on foreign merchant vessels would have been in strict accord with its terms and would not have been inconsistent with its title, including, as it did, the words "and for other purposes". By section 3 of the act of June 19, 1886, entitled "An act to abolish certain fees for official services to American vessels, and to amend the laws relating to shipping commissioners, seamen, and owners of vessels, and for other purposes" (24 Stat. 79), the last clause of section 10 above quoted was amended so as to read as follows:

"This section shall apply as well to foreign vessels as to vessels of the United States; and any master, owner, consignee, or agent of any foreign vessel who has violated this section shall be liable to the same penalty that a master, owner, or agent of a vessel of the United States would be for a similar violation."

It is evident from this amendatory act that the provisions of section 10 of the original act were carefully considered and revised. Changes of an important character were made, and, among others, the clause relating to the applicability of the section to foreign vessels received attention and amendment. But it was not provided that the section should not apply to foreign seamen shipping on foreign vessels. The words "any seaman" were left wholly unqualified and unrestricted in the same section which declared that its provisions were applicable to foreign vessels. Nor was the title of the amendatory act repugnant to the idea that those words were employed in their usual and broad sense. Thus stood the law on the subject at the time of the enactment of section 24 of the act of December 21, 1898, on which the libellant relies. This section amended in important particulars section 10 of the original act as amended by section 3 of the act of June 19, 1886. The original section as theretofore amended was re-arranged, new provisions were added, and to the clause applying it to foreign vessels was attached the proviso, "that treaties in force between the United States and foreign nations do not conflict." This proviso, it is obvious, is quite as appropriate where foreign seamen ship in American ports on foreign vessels, if the statute applies to that case, as where American seamen ship here on foreign vessels. In the statute as it now stands, as in the enactments theretofore in force, there is nothing to negative the universality of the words "any seaman" as inclusive of seamen of all nationalities. The section in its present form is the result of repeated consideration and deliberation on the part of the legislative power, its language is free from ambiguity and its purpose is beneficent, whether applied to foreign seamen and vessels or to American seamen and vessels. To hold that it was not intended to apply to the case of foreign seamen shipping here on foreign merchant vessels, would, in my opinion, impute to congress such oversight or incompetency in the formulation of the enactment as this court cannot assume to have existed. Not only does the section according to its plain terms apply to the case in hand, but there are obvious reasons why it should have such application. The broad purposes of the section, undoubtedly, were the protection of American seamen and the promotion of the welfare of the American merchant marine. The prepayment of seamen's wages, either to them, or to others by way of bonus or commission for supplying them to vessels or on account of indebtedness contracted by them, was found injurious to seamen and detrimental to the merchant service. These were the evils the legislation in question was intended to correct. In *The Eclipse* (D. C.) 53 Fed. 273, Judge Morrow well said:

"The payment of advance wages to seamen has been one of the great evils of the merchant marine service. It has been one of the methods employed to defraud the seaman out of a large share of his wages, and, prior to congressional legislation upon the subject, courts of admiralty were continually called upon to interpose their power and authority for the protection of the seamen from this method of imposition. The reports are full of cases declaring in the strongest terms against the many schemes that have been devised to obtain possession of the seamen's wages, even under the form of law."

It was necessary to the most effectual or, indeed, to any substantial accomplishment of the purposes of the section, that a uniform rule should be applied alike to all seamen of whatever nationality shipping in American ports on vessels whether American or foreign. To apply the rule to American seamen shipping on American or foreign vessels, and to foreign seamen shipping on American vessels, but to deny its application to foreign seamen shipping on foreign vessels, would open wide the door to fraudulent evasions of the law, produce uncertainty and embarrassment in its enforcement and largely defeat its purpose. It would lead in many instances to misrepresentation of their nationality by American seamen shipping on foreign vessels, resulting in the prepayment of their wages contrary to the provisions of the section, and to the fraudulent violation of such provisions by masters and agents of foreign vessels through the prepayment of the wages of American seamen on the pretense that they were foreigners. American seamen would thus be deprived of the protection which it is the purpose of the statute, as indicated by its title, to accord them. Further, such a narrow construction of the section would on the prosecution of "any master, owner, consignee, or agent of any foreign vessel who has violated its provisions" necessitate proof on the part of the government of the scienter as to the nationality of the seamen, and such proof frequently would be difficult, if not impossible, to furnish. But if the section be held to apply uniformly to all seamen of whatever nationality shipping in American ports on merchant vessels whether American or foreign, the difficulties, evasions and frauds, induced by or resulting from the narrower construction contended for, are removed and the law will serve as a much more efficient instrument for the accomplishment of the broad purposes for which it was intended. A discrimination between American citizens and the citizens or subjects of friendly foreign powers with respect to the measure of protection to be accorded to them while on our soil for lawful purposes or in the pursuit of their lawful avocations, also seems repugnant to the genius of the American people and to the spirit of equality pervading our laws. For the reasons given I am satisfied that the provisions of the section were intended to apply to the case of foreign seamen shipping in American ports on foreign merchant vessels.

The next question relates to the constitutionality of the section in its application to such a case. In *Patterson v. The Eudora*, already referred to, it appears that a majority of the libelants were of foreign nationality and the rest American citizens. They shipped as seamen on a British vessel in the port of New York, a portion of their wages being prepaid to the shipping agent through whom the master employed them. The prepayment was made on account of their indebtedness to the shipping agent for board and goods furnished by him to them. They filed their libel to recover wages without deduction of the amount prepaid. The libel was dismissed. The court held that the section was intended to apply only to American seamen; that it has no application to seamen "even if they are American by birth or naturalization, that have regularly shipped

upon a British vessel, and have thereby become British seamen for the time being"; and that, therefore, all of the libelants were outside of its provisions. It was further held that it was not in the power of congress to apply the provisions of the section to any of the libelants. On this point it was said:

"In support of the second proposition, it may be added, that a foreign vessel is a part of the territory of the country to which she belongs, and that congress has no inherent power to control or prescribe rules for her domestic affairs, such as the terms upon which she ships her crew, or the wages she agrees to pay. In certain respects, a foreign ship in our ports is no doubt subject to the laws of the United States, but the government and payment and treatment of the crew are matters that are properly held to concern the ship and crew alone subject to the law of the flag."

Reliance was had on *Ross v. McIntyre*, 140 U. S. 453, 11 Sup. Ct. 897, 35 L. Ed. 581, as supporting the conclusions reached by the learned district judge. On the other hand, in *U. S. v. Nelson* (D. C.) 100 Fed. 125, already referred to, the court, while stating obiter that the section was intended to apply only to American seamen, said:

"To construe the statute as applying to those persons only who ship or engage to ship on American vessels, it seems to me, would give too narrow a construction to it, too small a field for its operation, and make the statute inconsistent with itself and inharmonious as a whole. The statute is designed to protect the seaman from imposition by any person by providing that no portion of his wages shall be paid in advance, and be thereafter deducted from his wages when actually earned, except he stipulates in his shipping agreement for an allotment of an amount to be fixed, and not to exceed one month's wages, out of which allotment any sum justly due to an original creditor for board and clothing, which he may have contracted for prior to his engagement, shall be paid. \* \* \* The statute declares that it is applicable to foreign vessels, and it provides that any master, owner, agent, or consignee who violates its provisions shall be liable to the same penalty that the master, etc., of a vessel of the United States would be, provided that treaties in force between the United States and foreign nations do not conflict. The penalty there referred to is the penalty for paying wages in advance to the seaman, or paying advance wages to any other person unlawfully; and the master, owner, or agent of a foreign vessel is liable to this penalty unless there is a treaty between the United States and the nation to which the vessel belongs in conflict with the statute."

Here is a clear recognition that in the absence of a treaty to the contrary the section applies with full force and effect to the prepayment of the wages of American seamen shipping in an American port on a British merchant vessel. If the section be constitutional as applied to such a case, it is difficult to perceive why congress had not the power to apply the section to the prepayment of the wages of British seamen shipping in American ports on British merchant vessels; for its application to the latter case would not more than its application to the former "regulate the internal affairs of a vessel sailing under a foreign flag." The power, discipline and control possessed by the master of a British vessel as such over her crew, unless otherwise provided by British law, is not affected by the nationality of its members, and the seamen while employed on her, whether citizens of the United States, subjects of Great Britain or citizens or subjects of other foreign powers, are British seamen for the time being and equally subject to his authority. In *The State*

of Maine (D. C.) 22 Fed. 734, Judge Brown held that section 10 of the act of June 26, 1884, forbidding the advance of seamen's wages, was not applicable to the shipment of seamen in foreign ports. He discussed the power of congress in connection with its provisions, clearly recognizing the existence of such power in the case of the shipment of seamen on foreign vessels in American ports. He said:

"Statutes have no extraterritorial force. The shipment of seamen in a foreign port, and the payment either of advance wages or of bills previously incurred, as in this case, as an advance of wages, are acts done and completed wholly upon foreign soil; and therefore wholly beyond the jurisdiction of this country. If American vessels be treated as a part of the territory of the United States, and within its jurisdiction, though in foreign ports, still, acts like the present, that are not done upon shipboard, but, as I have said, are completed upon land prior to the seaman's coming aboard, and as a means of procuring them to do so, would not be done within the territorial jurisdiction of this country. Every presumption is against the supposition that congress had any intention to legislate in reference to acts done and completed wholly beyond its jurisdiction. \* \* \* The general purpose of this act is indicated by its title. Its various provisions, as well as the well-known circumstances which led to its passage, show that it was passed in order to correct certain practices and to reform certain abuses to which seamen were subject in the ports of this country. \* \* \* The final clause of section 10, which declares that 'this section shall apply as well to foreign vessels as to vessels of the United States', and that in case of violation a clearance shall be refused them, furnishes a specific indication that congress did not in this section refer to the shipment of seamen in foreign ports, but had in view acts done in this country alone. For it is manifest that, as against foreign vessels in foreign ports, not only would this whole section be mere brutum fulmen, but the specific provision just referred to would be wholly inapplicable. Its only possible legal application to foreign vessels would be as regards their acts while within the ports of this country. And as the intent of the section is clear to make no discrimination between foreign vessels and domestic vessels, and as the section as to foreign vessels cannot possibly be applied as regards their acts done in foreign ports, it follows that the whole section must be deemed intended to apply to the ports of this country only."

An act of congress should not be declared void unless its invalidity clearly appears. Where its language is so general as to apply to cases not within the legislative power it must if possible be so construed as to restrict such generality to subjects and objects within that power. Congress has no authority to declare unlawful or provide for the punishment of acts or offences wholly done or committed beyond the territory and jurisdiction of the United States. But with respect to subjects committed to it by the constitution it has full power to declare unlawful and provide for the punishment of acts and offences done or committed within the territory or jurisdiction of the United States. The shipping interests of the country are peculiarly within the province of congress and it has full control over the American merchant marine. That congress had authority to enact a uniform law declaring unlawful and providing penalties for the prepayment on the soil or in the ports of the United States of the wages of seamen of whatever nationality shipping in such ports on vessels of whatever nationality, as detrimental, for the reasons already given, to seamen and the American merchant marine, there can be little or no doubt. I do not regard *In re Ross*, 140 U. S. 453, 11 Sup. Ct. 897, 35 L. Ed. 581, either in the

points decided or in the language employed by the court, in the least inconsistent with the views now expressed. There, Ross, a British subject, who had shipped as seaman on an American merchant vessel, committed the crime of murder while on board of her in the harbor of Yokohama, he being one of the crew at the time. He was tried, convicted and sentenced to death before the consul general of the United States at Kanagawa, Japan. Two of the questions arising in the case were whether under the treaties of the United States with Japan, and the acts of congress passed in pursuance thereof, the consular court had jurisdiction, and whether the crime was committed within the territorial jurisdiction of the consular court, having been perpetrated on an American vessel, though lying in a Japanese harbor. The power and right of Japan as a sovereign nation to inflict punishment for a crime against its laws committed in its waters were not the subject of controversy. The court, through Mr. Justice Field, among other things, said:

"We do not adopt the limitation stated by counsel to the jurisdiction of the consular tribunal, that it extends only to offences committed on land. Neither the treaty nor the revised statutes to carry them into effect contain any such limitation. The latter speak of offences committed in the country of Japan—meaning within the territorial jurisdiction of that country—which includes its ports and navigable waters as well as its lands. The position that the petitioner, being a subject of Great Britain, was not within the jurisdiction of the consular court, is more plausible, but admits, we think, of a sufficient answer. The national character of the petitioner, for all the purposes of the consular jurisdiction, was determinable by his enlistment as one of the crew of the American ship *Bullion*. By such enlistment he becomes an American seaman—one of an American crew on board of an American vessel—and as such entitled to the protection and benefits of all the laws passed by congress on behalf of American seamen, and subject to all their obligations and liabilities. Although his relations to the British government are not so changed that, after the expiration of his enlistment on board of the American ship, that government may not enforce his obligation of allegiance, and he on the other hand may not be entitled to invoke its protection as a British subject, that relation was changed during his service of seaman on board of the American ship under his enlistment. He could then insist upon treatment as an American seaman, and invoke for his protection all the power of the United States which could be called into exercise for the protection of seamen who were native born. He owes for that time to the country to which the ship on which he is serving belongs, a temporary allegiance, and must be held to all its responsibilities. The question has been treated more as a political one for diplomatic adjustment, than as a legal one to be determined by the judicial tribunals, and has been the subject of correspondence between our government and that of Great Britain. The position taken by our government is expressed in a communication from the Secretary of State, to the British government, under date of June 16, 1881. It was the assertion of a principle which the Secretary insisted 'is in entire conformity with the principles of English law as applied to a mercantile service almost identical with our own in its organization and regulation. That principle is that, when a foreigner enters the mercantile marine of any nation and becomes one of the crew of a vessel having undoubtedly a national character, he assumes a temporary allegiance to the flag under which he serves, and in return for the protection afforded him becomes subject to the laws by which that nation in the exercise of an unquestioned authority governs its vessels and seamen. If, therefore,' he continued, 'the government of the United States has by treaty stipulation with Japan acquired the privilege of administering its own laws upon its own vessels and in relation to its own seamen in Japanese territory, then every American vessel and every seaman of its crew are sub-



ject to the jurisdiction which by such treaty has been transferred to the government of the United States.' If Ross had been a passenger on board of the *Bullion*, or, if, residing in Yokohama, he had come on board temporarily and had then committed the murder, the question of jurisdiction would have been very different. But, as it was, he was part of the crew, a duly enrolled seaman under American laws, enjoying the protection of this government to such an extent that he could have been protected from arrest by the British authorities; and his subjection to the laws of the United States cannot be avoided just at the moment that it suits his convenience to allege foreign citizenship. The law which he violated was the law made by the United States for the government of United States vessels; the person murdered was one of his own superior officers whom he had bound himself to respect and obey, and it is difficult to see by what authority the British government can assume the duty or claim the right to vindicate that law or protect that officer. The mercantile service is certainly a national service, although not quite in the sense in which that term would be applied to the national navy. It is an organized service, governed by a special and complex system of law, administered by national officers, such as collectors, harbor masters, shipping masters and consuls, appointed by national authority. This system of law attaches to the vessel and crew when they leave a national port and accompanies them around the globe regulating their lives, protecting their persons and punishing their offences. The sailor, like the soldier during his enlistment, knows no other allegiance than to the country under whose flag he serves. This law may be suspended while he is in the ports of a foreign nation, but where such foreign nation grants to the country which he serves the power to administer its own laws in such foreign territory, then the law under which he enlisted again becomes supreme. \* \* \* We are satisfied that the true rule of construction in the present case was adopted by the Department of State in the correspondence with the English government, and that the action of the consular tribunal in taking jurisdiction of the prisoner Ross, though an English subject, for the offence committed, was authorized. While he was an enlisted seaman on the American vessel, which floated the American flag, he was, within the meaning of the statute and the treaty, an American, under the protection and subject to the laws of the United States equally with the seaman who was native born. As an American seaman he could have demanded a trial before the consular court as a matter of right, and must therefore be made subject to it as a matter of obligation."

I can discover nothing in the above quotation or in any other part of the opinion countenancing the idea that it was beyond the power of congress to prohibit under a penalty the prepayment on American soil or in American ports of the wages of seamen shipping in such ports on foreign vessels. Certainly if such prohibition were beyond the legislative authority in the case of foreign seamen, it would be equally so in the case of American seamen, for under the doctrine of temporary allegiance, so clearly enunciated by the supreme court, the same argument would apply with equal force to both cases. The court held that "the territorial jurisdiction" of a nation "includes its ports and navigable waters as well as its lands"; and that the "system of law" governing the mercantile service "attaches to the vessel and crew when they leave a national port and accompanies them round the globe, regulating their lives, protecting their persons and punishing their offences"; but recognized that "this law may be suspended while he is in the ports of a foreign nation, but where such foreign nation grants to the country which he serves the power to administer its own laws in such foreign territory, then the law under which he enlisted again becomes supreme." But the court did

not hold or state that the system of law which accompanies a vessel when it leaves a port of the country to which she belongs would, while she is in a port of a foreign nation, exclude the application of the law of that nation, passed for the protection of its shipping interests, declaring unlawful and providing punishment for acts done in the latter port by or on behalf of the master or agent of the vessel. If the prepayment of the libellant's wages had not been directly or indirectly made until after the Kestor left the port of Baltimore and was on the high seas, and then was not made on the soil or in the waters of the United States, the case would have presented a totally different aspect. But the prepayment was made in the port of Baltimore and consequently within the territorial jurisdiction of the United States. To hold that it was beyond the power of congress to apply the section to such a case would involve a clear departure from settled doctrine repeatedly recognized by the supreme court. In *The Exchange v. McFaddon*, 7 Cranch, 116, Chief Justice Marshall, delivering the opinion of the court, said:

"The jurisdiction of courts is a branch of that which is possessed by the nation as an independent sovereign power. The jurisdiction of the nation within its own territory is necessarily exclusive and absolute. It is susceptible of no limitation not imposed by itself. Any restriction upon it, deriving validity from an external source, would imply a diminution of its sovereignty to the extent of the restriction, and an investment of that sovereignty to the same extent in that power which could impose such restriction. All exceptions, therefore, to the full and complete power of a nation within its own territories, must be traced up to the consent of the nation itself. They can flow from no other legitimate source. \* \* \* When private individuals of one nation spread themselves through another as business or caprice may direct, mingling indiscriminately with the inhabitants of that other, or when merchant vessels enter for the purposes of trade, it would be obviously inconvenient and dangerous to society, and would subject the laws to continual infraction, and the government to degradation, if such individuals or merchants did not owe temporary and local allegiance, and were not amenable to the jurisdiction of the country."

In *U. S. v. Dieckelman*, 92 U. S. 520, 23 L. Ed. 742, Chief Justice Waite, delivering the opinion of the court, said:

"The merchant vessels of one country visiting the ports of another for the purposes of trade subject themselves to the laws which govern the port they visit, so long as they remain; and this as well in war as in peace, unless it is otherwise provided by treaty."

So in *Wildenhus' Case*, 120 U. S. 1, 7 Sup. Ct. 385, 30 L. Ed. 565, Chief Justice Waite, delivering the opinion of the court, said:

"It is part of the law of civilized nations that when a merchant vessel of one country enters the ports of another for the purposes of trade, it subjects itself to the law of the place to which it goes, unless by treaty or otherwise the two countries have come to some different understanding or agreement; for, as was said by Chief Justice Marshall in *The Exchange*, 7 Cranch, 116, 144, 3 L. Ed. 287, 296, 'it would be obviously inconvenient and dangerous to society and would subject the laws to continual infraction and the government to degradation, if such \* \* \* merchants did not owe temporary and local allegiance, and were not amenable to the jurisdiction of the country.' \* \* \* And the English judges have uniformly recognized the rights of the courts of the country of which the port is part to punish crimes committed by one foreigner on another in a foreign merchant ship. \* \* \* As the owner has voluntarily taken his vessel for his own private purposes to a place within the

dominion of a government other than his own, and from which he seeks protection during his stay, he owes that government such allegiance for the time being as is due for the protection to which he becomes entitled."

Treaty stipulations between the United States and foreign nations are not restrictive of the constitutional power of congress. They have the force of law; but, like statutes, are superseded in American courts by subsequent acts of congress conflicting with them. *Head Money Cases*, 112 U. S. 580, 5 Sup. Ct. 247, 28 L. Ed. 798; *Whitney v. Robertson*, 124 U. S. 190, 8 Sup. Ct. 456, 31 L. Ed. 386; *The Chinese Exclusion Case*, 130 U. S. 581, 9 Sup. Ct. 623, 32 L. Ed. 1068; *Horner v. U. S.*, 143 U. S. 570, 12 Sup. Ct. 522, 36 L. Ed. 266; *Fong Yee Ting v. U. S.*, 149 U. S. 698, 13 Sup. Ct. 1016, 37 L. Ed. 905. It goes without saying that mere international comity not incorporated in any convention between the United States and a foreign power must yield to a statute with which it is in conflict. The section in question, it is true, contains the proviso that treaties in force between the United States and foreign countries do not conflict. There is, as before stated, no treaty between the United States and Great Britain inconsistent with the application of the section to British vessels. The proviso has reference to treaties, and not to international comity not embodied in a treaty. Full effect must, therefore, be given to the provision that "this section shall apply as well to foreign vessels as to vessels of the United States", as a constitutional enactment applying to the prepayment on our soil or in our waters of the wages of seamen who are British subjects shipping in American ports on British vessels.

It is not controverted that, if the section is constitutional and applicable to such a case, a libel may properly be filed in a court of admiralty for the recovery of the wages unlawfully prepaid. The section provides not only that such prepayment "shall be no defense to a libel, suit, or action for the recovery of such wages", but that it "shall in no case, excepting as herein provided, absolve the vessel or the master or owner thereof from full payment of wages after the same shall have been actually earned." To "absolve" the vessel evidently presupposes the existence of a lien thereon for wages enforceable, not by the resident consul of a foreign power, but by appropriate proceedings in a court of admiralty here or elsewhere. That this court has, and properly can entertain, jurisdiction of this case seems to me to be clear. In *Ex parte Newman*, 14 Wall. 152, 20 L. Ed. 877, Mr. Justice Clifford, in speaking of a libel for wages filed by foreigners against a foreign vessel of the same nationality, said:

"Admiralty courts, it is said, will not take jurisdiction in such a case except where it is manifestly necessary to do so to prevent a failure of justice, but the better opinion is that, independent of treaty stipulation, there is no constitutional or legal impediment to the exercise of jurisdiction in such a case. Such courts may, if they see fit, take jurisdiction in such a case, but they will not do so as a general rule without the consent of the representative of the country to which the vessel belongs, where it is practicable that the representative should be consulted. His consent, however, is not a condition of jurisdiction, but is regarded as a material fact to aid the court in determining the question of discretion, whether jurisdiction in the case ought or ought not to be exercised."

In *The Belgenland*, 114 U. S. 355, 5 Sup. Ct. 860, 29 L. Ed. 152, Mr. Justice Bradley, delivering the opinion of the court, said:

"Circumstances often exist which render it expedient for the court to take jurisdiction of controversies between foreigners in cases not arising in the country of the forum; as, where they are governed by the laws of the country to which the parties belong, and there is no difficulty in a resort to its courts; or where they have agreed to resort to no other tribunals. The cases of foreign seamen suing for wages, or because of ill-treatment, are often in this category; and the consent of their consul, or minister, is frequently required before the court will proceed to entertain jurisdiction; not on the ground that it has not jurisdiction; but that, from motives of convenience or international comity, it will use its discretion whether to exercise jurisdiction or not; and where the voyage is ended, or the seamen have been dismissed or treated with great cruelty, it will entertain jurisdiction even against the protest of the consul. \* \* \* Of course, if any treaty stipulations exist between the United States and the country to which a foreign ship belongs, with regard to the right of the consul of that country to adjudge controversies arising between the master and crew, or other matters occurring on the ship exclusively subject to the foreign law, such stipulation should be fairly and faithfully observed. \* \* \* In the absence of such treaty stipulations, however, the case of foreign seamen is undoubtedly a special one, when they sue for wages under a contract which is generally strict in its character, and framed according to the laws of the country to which the ship belongs; framed also with a view to secure, in accordance with those laws, the rights and interests of the ship-owners as well as those of master and crew, as well when the ship is abroad as when she is at home. Nor is this special character of the case entirely absent when foreign seamen sue the master of their ship for ill-treatment. On general principles of comity, admiralty courts of other countries will not interfere between the parties in such cases unless there is special reason for doing so, and will require the foreign consul to be notified, and, though not absolutely bound by, will always pay due respect to, his wishes as to taking jurisdiction. Not alone, however, in cases of complaints made by foreign seamen, but in other cases also, where the subjects of a particular nation invoke the aid of our tribunals to adjudicate between them and their fellow-subjects, as to matters of contract or tort solely affecting themselves and determinable by their own laws, such tribunals will exercise their discretion whether to take cognizance of such matters or not. \* \* \* But, although the courts will use a discretion about assuming jurisdiction of controversies between foreigners in cases arising beyond the territorial jurisdiction of the country to which the courts belong, yet where such controversies are *communis juris*, that is, where they arise under the common law of nations, special grounds should appear to induce the court to deny its aid to a foreign suitor when it has jurisdiction of the ship or party charged. The existence of jurisdiction in all such cases is beyond dispute; the only question will be, whether it is expedient to exercise it."

In *The Topsy* (D. C.) 44 Fed. 631, the district court for the district of South Carolina, against the written request of the British consul, entertained jurisdiction of a libel for wages against a British vessel. Judge Simonton, after referring to the case of *The Belgenland* and other authorities, said:

"When, therefore, upon examination it appears that the construction and enforcement of the laws of a foreign state are involved in a question arising between parties owing allegiance to, and contracting with reference to, such laws, and that the tribunals of their own country are open and accessible to them, the court withholds its hand, remitting the parties to their own courts, in which their own laws are better understood, and the means of enforcing them possibly more complete. And this is especially observed in the matter of seamen's wages, the contract of which is local in its character, and is made the subject of special legislation in all maritime coun-

tries. But when the circumstances of the case are such as demand immediate investigation, or when the seaman discharged from the ship would be put at disadvantage were she suffered to depart, or when she has departed he would be compelled to search the world for her, the court will proceed and decide the case against the wish and, at times, against the protest, of the foreign consul."

The controversy involved in this case is one "arising in the country of the forum". With respect to the unlawful act which has given birth to the controversy, the libelant and claimant are not "governed by the laws of the country to which the parties belong". Foreign subjects have not invoked the aid of this court "to adjudicate between them and their fellow-subjects, as to matters of contract or tort solely affecting themselves and determinable by their own laws". It is not a case "arising beyond the territorial jurisdiction of the country to which the courts belong". The parties have not "agreed to resort to no other tribunals" than British courts. The "construction and enforcement of the laws of a foreign state" are not here involved. The prepayment of wages was made in an American port in violation of a statute of the United States. The forbidden act was inoperative to deprive the libelant of the right to any portion of the wages to which he was entitled and which presumably, had it not been for that act, he would have received. In that respect it was an absolute nullity. He has filed his bill in an American court relying on an American statute designed to apply to his case and shield him from injustice. No question of the violation of British law arises in this connection. It does not appear that the British consul judicially or in any other manner determined the questions involved, nor has he protested against or objected to the exercise by this court of jurisdiction in the premises. No objection of the kind has been raised by the pleadings. The "voyage is ended", the libelant has been discharged, and the Kestor has proceeded elsewhere. His home is in Ontario. To decline jurisdiction would expose him to hardship and practically prevent him from recovering the wages to which he is entitled. Both reason and authority, under the circumstances, require that jurisdiction over the case should be exercised by this court. The sum of \$36.18 which was offered to and refused by the libelant was not paid into court. The master paid it to the British consul in Philadelphia and it was forwarded to the London Board of Trade. The master so paid it at his peril, and any inconvenience which may attend its collection should not be visited on the libelant. I have grave doubt whether irrespective of the statute the stipulation in the shipping articles of "one shilling for the first twenty days" should, under the circumstances, be sustained by a court of admiralty against the libelant who is an illiterate seaman; but in view of the conclusion reached as to the effect of the statute, it is unnecessary to decide the point. The libelant is entitled to recover the balance of his wages without deducting the \$20 wrongfully prepaid, namely, \$56.18, with interest from the day of his discharge, November 19, 1899; the costs of the case to be paid by the claimant.

Let a decree be prepared accordingly.

## THE BELLE.

## THE TRANSFER NO. 5.

(District Court, E. D. New York. June 5, 1901.)

**TOWAGE—LIABILITY OF TUG FOR INJURY OF TOW—STRIKING DRAWBRIDGE.**

A tug held in fault and liable for an injury to a schooner by striking against the abutment of a bridge while the tug was towing her through the draw.

In Admiralty. Suit against tug for injury to tow.

Hyland & Zabriskie, for libellant.

Alexander & Ash (Peter Alexander, of counsel), for the Belle.

Strong & Cadwalader (Henry W. Taft, of counsel), for Transfer No. 5.

THOMAS, District Judge. About 9:30 o'clock on the morning of July 6, 1900, the tug Belle attempted to tow the three-masted schooner John R. Fell, whose length and breadth were, respectively, 131 and 34 feet, at about high water, in clear and quiet weather, through a draw of the Willis Avenue Bridge. The schooner had lain headed upstream alongside of the bulkhead on the easterly side of the Harlem river, about midway between the Second Avenue and the Willis Avenue Bridges. From this position she was carried forward and upstream by the Belle, made fast on her starboard side, so that the schooner projected some 60 or 70 feet ahead of the bow of the tug, until the schooner's stern cleared two outlying boats, the schooner Hasbrouck and steam tug Transfer No. 5, when the tug swung the schooner's stern into the river, towed her stern first, and, as she claims, and respondents dispute, soon straightened her down in such a manner that she would have passed safely through the easterly draw, had it not been for the fact that when within 50 feet of the upper end of the abutment the tow took a sudden sheer to starboard, and came in collision with the abutment, doing the damage for which this libel is filed. Upon the facts thus stated, the Belle is liable. But, upon her application, Tug No. 5, which was taking coal at the coal pocket on the easterly side of the river, was brought in upon an allegation that the sudden sheer was caused by the quick water made by No. 5. The evidence most favorable to the Belle is that No. 5 was at the time of the sheer headed up the river, with her stern about 10 feet off from the dock, although it is the contention and evidence of No. 5 that she was then headed down the river, but that shortly before she had been heading up the river, and had changed sides for the purpose of loading. In any case the deflection of the schooner did not occur when No. 5 was winding around from the first to the second position. After hearing the evidence wherein it was stated by the witnesses of the Belle that the No. 5's quick water did cause the sheer, and by the witnesses of No. 5 that it did not and could not, the court directed a practical test to be made. The reports of the test as observed by the different parties are conflicting, but the burden is upon the Belle to show that the negligence of No. 5 was the cause of the accident. The evidence does not show preponderatingly that the quick water

could or did extend effectively the distance of at least 125 feet, the distance between the port side of the tug and the stern of No. 5, so as to strike the tug or tow with such force as to sheer the schooner to the westward a distance of 50 feet or over while going forward about the same distance. Even this assumes that the No. 5 was heading upstream at the time, and the distances and position are most favorable to the Belle. The wheel of the Belle was in charge of an unlicensed deckhand, of a few years' experience as deckhand and cook, who was at the time of the trial only 21 years old, and whose knowledge of navigation appeared somewhat confused. He was acting under the directions of the pilot, who was on the stern of the schooner, 70 or 80 feet away. It is stated in behalf of the Belle that she blew alarm signals to No. 5 when 100 feet from the abutment, and although the steward hailed No. 5 when the sheer began, and it was observed that no one on No. 5 looked towards the Belle, and the action of No. 5 continued, the wheel of the Belle was not even starboarded to guard against the quick water until it struck the tow 50 feet off the abutment, nor was anything whatever done to guard against the danger now alleged to have been threatened by No. 5. This indicates either that those in charge of the Belle did not regard the quick water as a serious disturbance of the waterway, or were negligent in guarding against it, and that those on No. 5 were unconscious of any act on their part injurious to navigation. After reading the evidence taken on the trial, and the evidence respecting the test since had, the conclusion is reached that the collision was due to a culpable miscalculation by those in charge of the Belle, and not to any negligent act of No. 5. The libelant should have a decree against the Belle alone, and the libel is dismissed as to Transfer No. 5, with costs against the Belle.

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MASON et al. v. MARINE INS. CO. et al.  
(Circuit Court of Appeals, Sixth Circuit. July 2, 1901.)  
No. 903.

**1. ADMIRALTY—APPEAL—QUESTIONS REVIEWABLE.**

Where a decree disposes of a number of distinct claims, an appeal by one party from an adverse decision as to one of such claims does not bring up for review the other portions of the decree.

**2. SAME—INTERVENTION.**

Marine insurers, who, by payment of a loss resulting from the injury of a vessel in collision, have become entitled by subrogation to a portion of the fund recovered by the owners from the vessel in fault, may intervene, and set up their claim thereto after a decree has been rendered in favor of such owners on a mandate from the appellate court, the issues raised by such intervention relating solely to the distribution of the fund recovered.

**3. MARINE INSURANCE—EFFECT OF ABANDONMENT TO INSURER—RIGHT TO DAMAGES RECOVERED FOR COLLISION.**

The effect of the abandonment to the insurers of a vessel sunk in collision is to vest in the insurers not only the title to the property abandoned, or its proceeds, but also the right to whatever may be afterwards recovered or received as a compensation for the loss; and damages recovered from the vessel in fault for the collision, for the loss of prospective earnings of the vessel sunk, belong to the insurers, and not to the insured.

**4. SAME.**

The abandonment of a ship to the insurers for a constructive total loss vests the insurers with the entire ownership, together with all its incidents, notwithstanding the insurance may not have been for its full value.

Appeal from the District Court of the United States for the Eastern District of Michigan.

This case came here on a former appeal from a decree of the district court finding the steamers the Ohio, the Siberia, and the Samuel Mather all at fault for a collision which resulted in the sinking of the Ohio. 33 C. C. A. 667, 91 Fed. 547. The decree of the district court was reversed by this court as to the alleged fault of the Ohio upon the ground that no negligence on her part was shown, and directions were given in the mandate to enter a decree against the Siberia and the Samuel Mather for the damages sustained by the Ohio. Upon the reception of the mandate, a decree was entered in favor of the libelants and against the claimants and sureties for the Siberia and the Samuel Mather for the sum of \$71,409.74, with interest and costs. The amount of this decree was duly paid into the registry of the court, and on a subsequent date, upon stipulation of the parties concerned, a considerable portion of the sum was distributed. At the time of the loss the Ohio was insured in the following insurance companies, viz.: The Marine Insurance Company, the Reliance Marine Insurance Company, the Mannheim Insurance Company, the Commercial Mutual Insurance Company, and the Commercial Union Assurance Company, Limited, to the amount, in all, of \$51,175 upon a valuation, stated in the policies, of \$58,500. Promptly after the collision and damage occurred, which was on the 19th day of May, 1890, the owners of the Ohio gave due notice to the insurance companies of their abandonment of the vessel as for a total loss. The formal abandonment, with proofs of loss, were delivered to the insurers on May 30, 1890. On October 8, 1890, the full amount of insurance was paid, and a conveyance of the Ohio was delivered to the insurance companies. The insurance companies having these policies on the Ohio at the time of her loss, and which insurance they had severally paid to the owners, filed their petition in the district court, praying that there be ordered paid to the petitioners the sum of \$7,879.20, the amount alleged to have been recovered in the decree against the Siberia and the Samuel Mather, and claimed in the original libel as damages in the nature of demurrage, or the probable value of the use of the vessel for a time subsequent to the collision, and while she was detained for repairs; also for the sum of \$1,719.55, being the probable net earnings of the Ohio on her voyage in which the collision occurred; also the sum of \$233.75 for the loss of fuel then on board the Ohio. The owners of the Ohio contested this petition, and upon the hearing the court decreed that the petitioners were entitled to the first of the above-mentioned sums, namely, \$7,879.20, which had been recovered as the probable net earnings of the Ohio after the collision, but denied the claim for loss of freight and for loss of fuel, which latter were considered to belong to the owner of the vessel. A decree was entered in conformity with these views, and thereupon the owners of the Ohio appealed to this court. The petitioners have not appealed.

John C. Shaw, George W. Weadock, and Byron S. Waite, for appellants.

Harvey D. Goulder and C. E. Kremer, for appellees.

Before LURTON and SEVERENS, Circuit Judges, and THOMPSON, District Judge.

SEVERENS, Circuit Judge, having made the foregoing statement, delivered the opinion of the court.

The supposed errors of which the appellants complain may properly be considered under the following heads: First. That the petitioners are not entitled to any recovery by these proceedings,



because they lost their opportunity to intervene, and slept upon their rights in that regard until after the entry of the final decree entered upon presentment of the mandate from this court; and, if they are entitled to recover any of these moneys from the owners of the Ohio, it must be done in another court and case. Second. They claim that all moneys recovered against the Siberia and the Samuel Mather for loss of probable earnings after the collision belonged to the owners of the Ohio. Third. They claim that, if the insurers are entitled to the prospective probable earnings of the Ohio, they, the owners, are entitled to share with the underwriters by reason of the fact that the vessel was only insured by all the several policies to an amount considerably less than her valuation in the policies, and that as to this difference the owners carried the risk. The right to the damages recovered for loss of freight on the voyage, and also the sum recovered for loss of fuel, were allowed to the appellants by decree of the district court, and, of course, they have no ground for complaint here, so far as those matters are concerned. But counsel for the appellees contend that the court below erred in refusing to allow these last-mentioned claims to the petitioners, and in answer to a doubt expressed by the court here whether, not having appealed, they were entitled to now make this contention, they say that those items were a part of the things disposed of by the decree, and that the appeal of the owners of the Ohio brought up the whole matter of the decree, and that, therefore, the whole subject was before the court. But we are quite clearly of the opinion that this contention cannot be maintained. It is doubtless true that, where the decree awards a balance which is the result of an adjustment of mutual accounts between the parties, an appeal from such decree might open the case for the consideration of an objection to the particular items which make up the general balance, provided the proper steps had been taken to bring those matters under the cognizance and power of the court. But this is not such case. The claims pursued are several and distinct grounds of recovery, and there is nothing in the nature of a mutual account.

Recurring, therefore, to the questions which are before us, we observe, first, that, in our opinion, the objection that the petition of the insurance companies was not seasonably presented is not well founded. It was not necessary that they should have intervened in the case prior to the entry of the decree of the district court under the order of this court, when the cause was remanded. There was nothing in the order of the mandate directing what decree should be entered, which prevented a subsequent application for a distribution of the fund recovered. There had been no issue in the case upon any such matter when it came here upon appeal, and, of course, there was nothing decided here which had any relation whatever to that subject. What we determined was the liability of the Siberia and the Samuel Mather for the damages suffered by the Ohio, and the fixing of the amount for which the respondents were liable. There was no question before the court relating to the ultimate destination of the funds, though it did undoubtedly establish the right of recovery between the then parties to the suit; but it de-

terminated nothing more. When the money was paid into court, all the purposes of the decree, so far as the parties to the suit were concerned, were accomplished. The insurance companies had not been parties to the suit, and it was entirely competent for them, at any time before the final distribution of the fund was made, to intervene for the purpose of presenting their claim to an interest in the fund, and for its establishment by the decree of the court. *Central Trust Co. v. Richmond, N. I. & B. R. Co.* (C. C. A.) 105 Fed. 803-808 (a case decided by this court in December last); *In re Howard*, 9 Wall. 175, 19 L. Ed. 634; *Williams v. Gibbes*, 17 How. 239, 15 L. Ed. 135; *The Elmbank* (D. C.) 72 Fed. 610. The question which we are required to determine upon the merits is whether that part of the damages recovered for the prospective earnings of the Ohio, and resulting from the collision, belong to the owners of the ship or to the underwriters. When the case was here on the former appeal, this court, in considering a question of pleading, referred briefly to this question, but as, in the then state of the case, it was not necessary to determine it, it was expressly passed over without expressing any definite opinion upon it. The question turns upon the effect under the maritime law of an abandonment of the ship by the owner to the underwriters as for a constructive total loss. The rule upon this subject is, as we think, correctly stated in 1 Am. & Eng. Enc. Law (2d Ed.) p. 36, as follows:

"An abandonment devests the property of the thing abandoned out of the insured, and vests it in the insurer, together with all the rights of property and rights of action incident thereto, and all the burdens and liabilities in respect thereof, from the moment of the casualty to which the abandonment refers."

This rule was accepted by the supreme court of the United States at an early day, and has been steadily adhered to. In the case of *Insurance Co. v. Stark*, 6 Cranch, 268, 3 L. Ed. 220, there was an insurance of goods on board ship and in charge of the supercargo, Parker. The ship and goods were captured by a privateer, one of the perils insured against. Notice of abandonment was given to the insurance company. Parker, the supercargo, afterwards effected an arrangement with the owner of the privateer by which the vessel was released. The ship and goods were taken to the port of destination, where the latter was sold. Suit was brought upon the policy. It was held that no deed of cession was necessary, the notice of abandonment being sufficient, and that thereupon the title to the goods vested immediately in the underwriters. With respect to the effect of the abandonment, Chief Justice Marshall said:

"If the abandonment was legal, it put the underwriters completely in the place of the assured, and Parker became their agent. When he contracts on behalf of the owners of the goods, he contracts on behalf of the underwriters, who have become owners, not on behalf of Starr, who has ceased to be one."

There was a question whether the notice of abandonment was seasonably given, and the judgment in favor of the plaintiff was reversed, and a new trial ordered, but upon that ground only. That was a case of insurance upon the cargo, but the rule is essentially the same as in the case of insurance upon the ship, so far as con-

cerns the consequences of an abandonment. In the case of *Comegys v. Vasse*, 1 Pet. 193, 7 L. Ed. 108, which has always been considered a leading one, this subject was fully considered and elaborately discussed in an opinion by Mr. Justice Story. The object of the suit was to determine the ownership of a certain fund which had been distributed by the commissioners appointed by the United States in fulfillment of its stipulation in the treaty with Spain in 1819 to make satisfaction of the claims of our citizens upon the latter country for captures and losses enumerated in the treaty. Vasse had underwritten policies on several vessels and cargoes, which had been captured and taken into Spanish ports. The vessels had been abandoned to him, and he had paid the losses to owners, long before the date of the treaty. A material question in the case was whether the money distributed by the commissioners to satisfy the claim for these losses belonged to the owners of the captured vessels or to Vasse, the underwriter. This depended on the effect of the abandonment. And it was held that by that act the right to every sort of indemnity which might thereafter be awarded on account of the loss by reason of which the abandonment was made passed from the insured to the underwriter; and the doctrine of text writers was cited and approved, to the effect that the rights which pass are not limited to the specific property abandoned, or its proceeds, but include also "whatever may be afterwards recovered or received, whether in the course of judicial proceedings or otherwise, as a compensation for the loss." Almost contemporaneously with that decision the same rule, in substance, was laid down by Chancellor Kent in the third volume of his Commentaries, at page 319, where he says, in speaking of abandonment:

"In such cases the insurer stands in the place of the insured, and takes the subject to himself with all the chances of recovery and indemnity. A valid abandonment has a retrospective effect, and does of itself, and without any deed of cession, and prior to the actual payment of the loss, transfer the right of property to the insurer to the extent of the insurance; and if, after an abandonment, duly made and accepted, the ship should be recovered, and proceed and make a prosperous voyage, the insurer, as owner, would reap the profits."

And in the note to this passage:

"The benefit of the *spes recuperandi* passes, and all that may be collateral or incidental to the ownership."

It will be noticed that the chancellor uses the comprehensive expression "chances of recovery and indemnity" in describing the things which pass. Obviously, from that and the context, he intended to include every species of indemnity, and among these would be the obligation of the wrongdoer to make atonement to the owner of the vessel to the full extent of his loss. There have been many decisions in the federal courts since that time involving collateral points, and sometimes the rule itself, but that has always been considered as having been settled by the early authorities. It would not be profitable at this day to undertake particular discussion of them in detail. Some of the cases are these: *The Monticello v. Mollison*, 17 How. 152, 15 L. Ed. 68; *The Potomac*, 105 U. S. 635, 26 L. Ed. 1194; *Railway Co. v. Jurey*, 111 U. S. 584, 4 Sup. Ct. 566,

28 L. Ed. 527; *Phoenix Ins. Co. v. Erie & W. Transp. Co.*, 117 U. S. 312, 6 Sup. Ct. 750, 1176, 29 L. Ed. 873; *St. Louis, I. M. & S. R. Co. v. Commercial Union Ins. Co.*, 139 U. S. 235, 11 Sup. Ct. 554, 35 L. Ed. 154; *The Brig Ann C. Pratt*, 1 Curtis, 343, Fed. Cas. No. 409; *Gilchrist v. Insurance Co.*, 44 C. C. A. 43, 104 Fed. 566.

In the English courts there is an unbroken line of authority in support of the general rule above stated in regard to the effect of an abandonment for a constructive total loss. From among their modern decisions we cite, as illustrating the English doctrine: *Yates v. Whyte*, 4 Bing. N. C. 272; *Cammell v. Sewell*, 3 Hurl. & N. 617; *Miller v. Woodfall*, 8 El. & Bl. 498; *Association v. Armstrong*, L. R. 5 Q. B. 244; *Simpson v. Thomson*, 3 App. Cas. 279; *Insurance Co. v. Turner*, 1 Macq. H. L. Cas. 334, reprinted in 9 Scots Rev. Rep. 312; *Insurance Co. v. Hadden*, 13 Q. B. Div. 706. The rule is thus laid down by Cockburn, C. J., in *Association v. Armstrong*, L. R. 5 Q. B. 244, 248:

"In case of total loss, whatever remains of the vessel in the shape of salvage, or whatever rights accrue to the owner of the thing insured and lost, they pass to the underwriter the moment he is called upon to satisfy the exigency of the policy, and does satisfy it."

In *Simpson v. Thomson*, supra, the lord chancellor, Lord Cairns, delivering the judgment of the house of lords, says that:

"The insurer becomes entitled to succeed to all the ways and means by which the person indemnified might have protected himself against or reimbursed himself for the loss. It is on this principle that the underwriters of a ship which has been lost are entitled to the ship in specie if they can find and recover it, and it is on the same principle that they can assert any right which the owner of the ship might have asserted against the wrongdoer for damage for the act which has caused the loss."

And Lowndes, in his work on Marine Insurance, at page 153, thus states the right acquired on abandonment:

"This cession or abandonment which accompanies a settlement gives to the insurers a right to all the advantages, direct and indirect, or ownership of the thing insured. Not only may they take possession of, sell, or otherwise dispose of the wreck or remains, but, if the assured is entitled, in virtue of the ownership had before, to any rights of action or recovery from third parties as for a contribution to general average, to recovery of damages against the wrongdoer in a collision suit, or the like, these rights pass by the abandonment to the underwriter."

Germane to the question we are considering, it should be noted that, having regard to the effect of an abandonment upon the right to recover freight, the doctrine is firmly established, both in this country and in England, that freight already earned at the time of the disaster on account of which the abandonment is made goes to the owner of the ship, or to the insurers of the freight if it be insured. This harmonizes with the rule, because in such case the right has matured, and is no longer an incident of the vessel. Where the freight is still pending, the English rule is (or has been) that, upon abandonment, the whole freight goes to the abandonnee. This doctrine goes upon the ground that the right is immature at the time the voyage is interrupted, and therefore not detachable from the ship. On the other hand, many American authorities, basing their ruling upon what seemed to them a more equitable basis, have es-

established a variation from the English practice by awarding the pending freight, where it has been finally matured by the underwriter, to him and to the owner of the vessel pro rata itineris which each has accomplished. This American rule recognizes the fundamental doctrine by dividing the earnings of the vessel at the date of the disaster, the division itself being a device of equity in favor of the owner and the insurer of freight against a strictly legal and technical consequence. So far as we know, there has been no decision in either country that upon abandonment the owner may still assert against his abandonee the right to the prospective earnings of the vessel. A case very nearly in point is *Miller v. Woodfall*, 8 El. & Bl. 498, where the insured, after an abandonment, had gotten the ship off, and had carried part of his goods on board to their destination. It was held that the abandonees of the ship were entitled to be allowed at the current rate of freight for the carriage of that part of the cargo taken by the ship into port. A case much relied on by the appellants, and thought to be decisive of this, is that of *Insurance Co. v. Hadden*, 13 Q. B. Div. 706; also reported in 5 Asp. 230. But the case is distinguishable. The question there was whether the insurers were entitled to recover from the owner of the ship money decreed to him by reason of his having been deprived of profits under a contract of affreightment, upon which there was another insurance by other underwriters. Now, the contract of affreightment is not an incident of the ship. Freight is of itself, and independently of the ship, the subject of a contract of insurance. They are two entirely separate things, and there are many cases in the books where the courts have been employed in protecting the interests of the owner in respect of the contract of affreightment, and, through him, of insurers of freight, in cases of this sort; as in the case of *Hickie v. Rodocanachi*, 4 Hurl. & N. 455, where Lord Bramwell observed, having reference to the fact that the captain had fulfilled for the owner the contract of affreightment, that the captain in such a case as the present acts for the owners of the ship, and not for the underwriters, and they are not entitled to any benefit from the freight acquired. The underwriters may, indeed, be entitled to advantages attached to the ship, but not to those arising from contracts, the fulfillment of which can be and is detached from the ship, which, as often happens, the shipowners may fulfill by another ship. Considerations of this kind lie at the bottom of the rule in this country that the owner of the ship cannot recover as damages arising from collision the freight arising on a charter party. This was the ground on which the judgment in *Insurance Co. v. Hadden* was rested. Brett, M. R., in giving his opinion, after quoting what was said by Lord Bramwell in *Hickie v. Rodocanachi*, said:

"If the vessel is insured by one set of underwriters, and the freight is insured by another set, then whatever is salvage from the loss of the ship goes to the underwriters of the ship, and whatever is salvage from the loss of the freight goes to the underwriters of the freight. How, then, are the damages which have been recovered in this case from the owners of the colliding vessel made up? They are made up of damages given in respect both of the loss of the ship and of the loss of freight. Therefore one set of

damages ought to go to one set of underwriters, and the other set to the other. It seems to me to be conclusive that the underwriters on the ship cannot recover what they here claim, because it seems clear that this recovery of damages in respect of the loss of freight is not a salvage which is a salvage out of the loss of the ship."

The difference in the facts, and consequently in the principle of law applicable thereto, between that case and this, is obvious. The claim there in question was founded upon a subject which was held to be not an incident of the ownership of the vessel, and which had in fact been separated therefrom by the owner. The right of the underwriter on the ship was derived from the owner, and was affected by his status. If he could recover against the wrongdoer upon it, the damage would, as the master of the rolls said, go to the underwriters of the freight. Here the damages in question were not for the loss arising upon a charter party, but for the loss of the prospective earnings of the ship, the charter party being used as evidence merely upon the question as to how much they would probably have been worth. The earning power of the vessel was an incident inhering in her ownership. That earning power passed with the ship, and, as we have already seen, the abandonees were entitled to the use of it from the moment of the disaster. If the ship had not been completely disabled, but had remained in such plight that she could have completed her voyage, there could be no question but that her earnings subsequent to the collision would have belonged to the underwriters. If that had happened, it would pro tanto have diminished the amount recovered by the owners from the insurers. In point of fact, the injury was so grave as to completely disable the ship from earning anything during the time of her detention, and it is for precisely that period of time that the owners have recovered for her prospective earnings, and it is that sum which the underwriters claim was recovered in trust for them. We do not see how that claim can be denied without overturning the settled doctrines which apply to an abandonment. And there is really no hardship to the owners of the ship. The right to abandon as for a constructive total loss is a privilege given by the maritime law to enable the owner of the ship to forthwith realize the substance of the value of the lost vessel, so that he may reinvest it in another ship by purchase or charter, and continue in his enterprises. The exercise of that privilege casts upon the underwriter an extraordinary burden. Both parties have all these consequences in view when the contract of insurance is made. The vessel owner can never be compelled to abandon. When he does so, he acts upon an estimate of the whole situation, and all the consequences; and, of course, he will not exercise his privilege unless it is for his advantage. In such a case the right of the insurer does not depend upon the doctrine of subrogation, as that term is understood in courts of equity, and which is employed in working out the right of the insurer in cases of partial loss only. In such cases there is no change in the ownership of the vessel, and the right to its earnings continues with the owner as an incident of his ownership. On the other hand, when the ship is abandoned to the insurer, the title to the ship passes by assignment immediately to the insurer, as from the moment of the disaster, with every right

which is incident to it. The distinction is an important one, though it is sometimes confused in the language of judicial opinions. Inasmuch as it is a consequence of the abandonment that the underwriter becomes substituted to all claims and remedies for the loss, in addition to the title to the ship itself, it is impossible to say that the owner may still recover to his own use damages which depend upon his right to continued ownership. We have not been referred to any case where this precise question has been determined, nor have we been able to find any, and this has been the reason for our discussion of the subject upon the reasons and analogies suggested by the authorities.

It is further contended that, notwithstanding the abandonment, the owners of the ship retained an interest proportionate to the difference between the amount of the insurance and her valuation, and that, consequently, they are entitled to share in the sum in controversy as in the nature of salvage. This contention rests upon the ground that this difference represents an uninsured interest in the vessel, or, to put it in the way which is suggested by counsel, an interest in respect to which the owners were their own insurers. But it is a mere figure of speech to say that the owner is the insurer of his own property. In reality the only insurance is that which is contracted for. Nor is it true that, because the insurance is for less than the value, the insurance rests upon some fractional part of the ownership. The whole vessel, "the body and tackle, apparel, and other furniture," to use the language of the policies, is the subject of the insurance. When an abandonment takes place, the entire ownership passes; and it is usually stipulated, as it was here, that the notice thereof, if accepted, must be efficient to convey to and to vest in the insurers "an unincumbered and perfect title to the subject abandoned." There is no suggestion that some aliquot part of an ownership is to be assigned. The owner does not continue to be an owner as a tenant in common. In the present case, before the acceptance of the abandonment and settlement as for a total loss, the underwriters required the whole title to be conveyed to them, which was done. We think, however, that that would have been the result if no deed of cession had ever been executed.

This question has never been expressly decided by the supreme court, though there are several cases which employ language which, we think, implies that the understanding of the court has been in accordance with the rule which we suppose to be the correct one. For instance, in view of the fact that insurance is not ordinarily for the full value, we should have anticipated a qualification in the statement of the rule as to what would pass by an abandonment, if the owner were recognized as remaining a tenant in common as to part of the ownership by reason of the insurance being for less than the value of the ship. The rule applied by the district court has on several occasions been held to be the true one by the federal courts of first instance, and has been recently affirmed by the circuit court of appeals for the Seventh circuit, Mr. Justice Harlan delivering the opinion. *Mutual Safety Ins. Co. v. Cargo of the George, Olcott*, 89, 17 Fed. Cas. 1082 (No. 9,981); *The Mary E. Perew*, 15 Blatchf. 59, Fed.

Cas. No. 9,207; *The Manitoba* (D. C.) 30 Fed. 129; *The Burlington* (D. C.) 73 Fed. 258; *Gilchrist v. Insurance Co.*, 44 C. C. A. 43, 104 Fed. 566. The rule is also recognized in *The St. Johns* (D. C.) 101 Fed. 469. There is some disagreement in state decisions upon this point, but, so far as we know, there has never been any difference of opinion in the federal courts. It seems to us that the maintenance of this claim of the owners would be to introduce a new doctrine into the law of abandonment, and one wholly inconsistent with its long-established principles.

Counsel for the underwriters refer, in support of their claim, to a clause in the policy which requires the insured, upon accepting payment for any damage or loss, to treat as assigned to them all rights to indemnity which the insured may have. But we think this language in the policy was employed to denote what should happen or result in cases of partial loss only, for in the preceding paragraph the subject of liability in case of abandonment for constructive total loss was fully provided for. We think the decree of the court below, so far as it is appealed from, is correct, and it is accordingly affirmed

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### THE NETTIE L. TICE.

(District Court, E. D. New York. June 28, 1901.)

#### **COLLISION—FAILURE TO DISPLAY LIGHT—TUG AND TOW.**

Where a canal boat being towed alongside a tug at night in a harbor failed to display a white light on her outboard bow, as required by inspectors' rule 11, both the tug and the canal boat are chargeable with the fault; and the tug is not exonerated from liability for a collision resulting by the fact that her master ordered the master of the canal boat to put out the light, but it was his further duty to see that his order was enforced.

In Admiralty. Suit for collision.

Wilcox, Adams & Green and Mr. Green, for libellant.

John Whalen, Corp. Counsel, and Mr. Probasco, for the city of New York.

James J. Macklin, for the *Nettie L. Tice*.

THOMAS, District Judge. This action is brought by the owner of the canal-boat *Frank X*, which was in tow alongside of the tug *Nettie L. Tice*, on October 30, 1899, at 6 o'clock p. m., when the fireboat *Zophar Mills*, belonging to the city of New York, collided with the canal boat, doing the injury. Upon the trial it appeared plainly that the fireboat was at fault, and it also appeared that the *Frank X* and the *Tice* were each at fault, if each was liable for failure to observe inspectors' rule 11, which is as follows:

"For the government of pilots of vessels propelled by steam, gas, fluid, naphtha, or electric motors, or of other vessels propelled by machinery, navigating the harbors, rivers, and inland waters of the United States (except the Great Lakes and their connecting and tributary waters as far east as Montreal, the Red River of the North, and rivers emptying into the Gulf of Mexico, and their tributaries). Adopted by the board of supervising inspectors of steam vessels January 26, 1899, under the authority of an act of congress approved June 7, 1897. Barges or canal boats towed alongside



a steam vessel, if on the starboard side of said steam vessel, shall display a white light on her own starboard bow; and if on the port of said steam vessel, shall display a white light on her own port bow; and if there is more than one barge or canal boat alongside, the white lights shall be displayed from the outboard side of the outside barge or canal boat. The white lights for barges and canal boats referred to in the preceding rules shall be carried at least 10 feet and not more than 30 feet abaft the stem or extreme forward end of the vessel, above the deck rail of the vessel on single-decked vessels, and on the upper deck of double or three-decked barges or canal boats; and shall be of such a character as to be visible on a dark night, with a clear atmosphere, at a distance of at least 5 miles."

It is admitted that there was not a compliance with this rule, but it is urged on the part of the libellant that noncompliance did not contribute to the accident. The burden of establishing this is upon those in fault, and that burden has not been discharged sufficiently. Had the light been placed as required, it is by no means certain that the Zophar Mills would not have discovered the same. But it is urged by the master of the Tice that he ordered the master of the canal boat to put the light out, and it is claimed that his duty began and ended upon doing this. He was in charge of the boat, and, if the command that the rule be observed was not sufficient, that command should have been enforced. This accords with the holding in *The Lyndhurst* (D. C.) 92 Fed. 681. The master of the canal boat contends that this primary responsibility imposed upon the tug to observe rules absolves him. This claim resolves itself into this: that the master of a canal boat in tow, knowing that the rule requires display of a light, and knowing that such display has not been made upon his boat by him or by anybody under him, or otherwise, may await calmly the results of this inattention, and, if his boat be injured, exclude himself from liability. It is considered that such is not the rule, and ought not to be the rule. The libellant is entitled to a decree for two-thirds of his damages and costs, and that the Zophar Mills and the tug Nettie L. Tice shall, as between themselves, each bear one-third of the damage.

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#### THE BAYONNE.

(District Court, E. D. New York. July 9, 1901.)

#### **COLLISION—SCHOONER AND TUG—VIOLATION OF RULES.**

A schooner was coming down North river, crossing on the port tack, with a strong ebb tide, while a tug with a car float on her port side was going up about 600 feet from the New Jersey shore. When in front of the tug, and 600 feet distant, the schooner went about, in violation of the rules; there being ample room for her to continue on the port tack until she had crossed the course of the tug. Before she acquired headway after coming about she was carried down by the tide and came in collision with the float. The tug reversed with all speed when the schooner went about, but it appeared that the bow of the float swung somewhat to starboard. *Held*, that the only fault possibly attributable to the tug was in failing to starboard her wheel, which was not culpable, since she acted in extremis after having been placed in a perilous position through the sole fault of the schooner, and that she could not be charged with liability for any part of the damage to the schooner.

Peter S. Carter, for libellant.

James J. Macklin, for claimant.

THOMAS, District Judge. On the 4th of January, 1900, at 2 p. m., the schooner Beatrice L. Corkum, whose length is about 80 feet on the water line, carrying coal, was on the port tack crossing the North river, with a moderate wind from the west southwest, and with a strong ebb tide, and clear weather. The steam tug Bayonne, with a car float on her port side, was coming up the river, about 600 yards from the New Jersey shore. When in a position hereinafter to be ascertained, the schooner went about with the intention of going on the starboard tack, and shortly her starboard side just aft her fore rigging came in collision with the starboard corner of the car float, whereby the schooner received the injuries which are the subject of the libel. When the schooner went about she was about 600 feet in front of the car float. The schooner had sufficient opportunity to continue her port tack, and her change of course was in disobedience of the rule, and primarily relieves the Bayonne from liability for the accident. *Burt v. The Nevada* (D. C.) 3 Fed. 928. Therefore the primary question is, why did the schooner change her course? Concerning this the captain of the schooner, who was at the wheel, gave the following evidence:

"Q. Who gave the order for the schooner to go about? A. Myself and the pilot. I said to the pilot, 'We had better go about,' and he said, 'Yes; we had better tack ship.' Q. Why did you say that to the pilot? A. I don't know. I hardly know myself why I said it. I thought probably if we went inside of him we might go into the piers, or whatever you call them, and that maybe there wouldn't be water enough for us. I didn't know the depth of the water. I was unacquainted."

The schooner had a pilot in charge, who testified that at the time the schooner backed the car float was 200 yards away, and about an equal distance from the shore; that, if the schooner had kept on her port tack, he would have cleared the bow of the car float and tacked inshore of it, without difficulty. "Q. Do you know who it was suggested that the vessel should go on the starboard tack before the collision? A. Yes; the captain of the tugboat. He blew an alarm whistle for us to go on starboard tack. That is why we went." He further testified that but for the alarm whistle he expected to tack inshore of the car float, and that the captain of the vessel had not spoken to him about going about. Here is a direct collision between the captain and the pilot. The pilot has attempted an excuse for change of course, and that excuse tends to involve the tug. It is undoubted that an alarm whistle was blown, but the important question is whether it caused the schooner to change her course. There is no suggestion whatever in the libel that the schooner changed her course on account of such alarm whistle, nor is it charged as fault against the tug. Nor is there the slightest suggestion of it in the evidence of the captain, or in the direct evidence of the pilot, but it only appears upon the cross-examination of the latter. Under such circumstances, the court is not justified in concluding that the alarm whistle impelled the change of course, misled the navigators of the schooner, or disturbed their judgment in any manner whatever. But it is contended on the part of the schooner that after she went about the tug should have immediately stopped and reversed her engines, and should have star-

boarded her wheel so that the float could not have swung the bow of the steam tug and float to starboard across the changed course of the schooner. It is also urged as fault against the steam tug that she did not keep "on her course and closer to the Jersey shore, when the persons in charge of the said steam tug should have known that, when the said schooner would go about, the strong ebb tide would naturally carry the schooner down, until she got sufficient headway on so as to have sailed clear and away from the said steam tug and float which the steam tug had in charge." It is alleged, therefore, by the libellant that the tug was in fault for not keeping her course, and was also at fault because she did not immediately stop and reverse under a starboard wheel. With a schooner going about in front of her, it was entirely proper for her to stop and reverse, and she should not be criticised for so doing. The schooner had disobeyed the rule, and the vessels were in such peril of collision, through the fault of the schooner, that the burden is upon her to show in extremis even the tug was at fault. The captain of the schooner states: "I attribute the collision to the steam tug. It could have been avoided by the tugboat keeping on her course." The evidence on the part of the tug tends to show that the alarm whistle was blown to call the attention of the persons on the schooner, and that the tug, which was going about three knots an hour, was slowed and stopped, while the schooner was yet on her port tack, and that the schooner did not go about until she had passed the bow of the float, but that she did not fill right away; that the tide brought her down upon the float; and that, in backing and reversing under a signal for full speed, the bow of the float was carried to starboard. It is apparent that, when the schooner went about, the engines of the tug were reversed, and that she was backed with all haste, and that the schooner did not fill sufficiently before the time of the actual contact to allow a clearing of the vessels, the starboard corner of the float striking a glancing and dragging blow along the starboard side of the schooner, and that the alarm whistle was given as a warning, and with no intention of suggesting that the schooner should go about. It does not appear what was done with the wheel at this time, although the captain of the tug states that he could not have done anything more than he did to have avoided the collision. The fact has not been overlooked that it is claimed on the part of the schooner that she went about before entering on the course of the tug and the float, and, according to the evidence of the captain of the schooner, not only was the schooner well off from the tug and float, but the latter went to starboard 500 feet, and thereby brought about the collision. This is so extravagant that it must be at once rejected. If starboarding would have tended to throw the car float to port, and it was not done, nevertheless it was an omission in an emergency caused by the reckless act of the schooner, which should not be held to be culpable negligence under the circumstances presented. The only fault possibly attributable to the float which contributed to the accident was the failure, if it was not done, to starboard the wheel. But, as has been already stated, that fault is not regarded as culpable, considering the extremity in which the schooner had placed the tug.

## HUMBIRD et al. v. AVERY et al.

(Circuit Court, D. Minnesota, Fifth Division. August 29, 1901.)

**1. PUBLIC LANDS—NORTHERN PACIFIC GRANT—CONSTRUCTION OF ACT FOR SETTLEMENT OF CONFLICTING CLAIMS.**

Act July 1, 1898 (30 Stat. 620), was enacted for the purpose of settling without litigation, with the full consent and through the voluntary action of the parties, all disputes relating to lands which arose through the conflicting rulings of the land department as to the eastern terminus of the Northern Pacific Railroad as affecting its land grant, in so far as such lands had not been disposed of by the railroad company. Such act, which was accepted by the company, gave to every purchaser or settler claiming in good faith any of such lands through any law of the United States or ruling of the land department, whose right attached prior to January 1, 1898, the option to retain such lands or transfer his claim, and provided that, in case he elected to retain the land claimed, the railroad company, on executing a relinquishment, should be entitled to select other lands in lieu thereof. *Held*, that such act became operative from the date of its passage, and that the railroad company, having accepted the same, could not thereafter convey to another any right in the lands to which it applied, except subject to its provisions, by which the company was bound to relinquish its claim to such lands as the settlers or purchasers from the United States elected to retain; since any other construction of the act would enable the company, at its option, to render it nugatory.

**2. SAME.**

Such act applies as well to lands which had been patented prior to January 1, 1898, as to those to which the rights of settlers and purchasers were then inchoate, both classes being equally within its purview. It is immaterial that the land department had lost jurisdiction over the lands patented, since the act does not require the department to determine any conflicting claims, but merely to perform the ministerial duties of notifying settlers and purchasers of the option given them, and of furnishing to the railroad company a list of the lands, which they elect to retain, upon which it becomes the duty of the company, under the provisions of the act itself, to execute the proper relinquishments therefor.

**3. SAME—JURISDICTION OF COURTS—INTERFERENCE WITH LAND DEPARTMENT.**

Neither a federal nor state court can properly assume to determine and adjudicate the rights of contesting claimants to public lands while the matter is pending before the land department.

**4. SAME—INJUNCTION.**

A court of equity will not interfere by injunction as between two contesting claimants of public lands, which are still within the jurisdiction of the land department, unless to prevent waste which will result in serious and permanent injury to the land.

In Equity. Suit to determine conflicting claims to public lands.

Billson, Congdon & Dickinson and H. Oldenburg, for complainants.

H. H. Hoyt, Jaques & Hudson, Towne & Harris, M. H. Stanford, John G. Williams, and S. H. Moer, for defendants.

LOCHREN, District Judge. The complainants above named, claiming the equitable title and ownership of very numerous tracts or parcels of land in the state of Minnesota lying in odd-numbered sections north of the line of the Northern Pacific Railroad, and east of the meridian of Duluth, and within the limits of the indemnity

belts of land granted by congress in aid of the construction of said railroad, under conveyances or contracts of sale from the Northern Pacific Railway Company, which is the successor of the Northern Pacific Railroad Company, and entitled to all rights of said last-named company in said lands, filed this bill against the numerous defendants named therein, who are respectively settlers upon parcels of said lands, or purchasers of parcels thereof from the United States, or grantees of such purchasers, to have adjudicated and established the right and title of complainants to said lands, and to have the claims of defendants thereto adjudged invalid, and disposed of as clouds upon the right and title of complainants; and for other relief specifically asked or generally prayed for. The answers of the answering defendants respectively assert their rights to lands as lawful settlers thereon under the laws of the United States, or under purchases from the United States. The controversy in regard to the title to these lands arose from conflicting action and rulings of the land department of the United States respecting the point of location on Lake Superior of the eastern terminus of the Northern Pacific Railroad, and as to the right of the Northern Pacific Railroad Company to receive any lands, under its land grant, in respect to that portion of its railroad which was built and operated between Thomson Junction, in the state of Minnesota, and Ashland, in the state of Wisconsin. The map of definite location of that portion of said railroad was transmitted to the secretary of the interior July 3, 1882, and was accepted, and the land grant adjusted to the line shown thereon, and the lands appertaining to that portion of the railroad withdrawn from sale or entry by order of the secretary. On August 28, 1884, the board of directors of the Northern Pacific Railroad Company, by resolution, fixed and located the eastern terminus of said railroad at Ashland, and transmitted a copy of such resolution to the land department December 3, 1884, and that was accepted by the land department as establishing such eastern terminus. That portion of the railroad was constructed, and was accepted by commissioners appointed by the president; and said Northern Pacific Railroad Company, pursuant to directions of the secretary of the interior, made and filed its lists of selections of lands in said indemnity belts in lieu of lands lost to it in its place limits, including all the lands in controversy in this suit; which lists of selected lands were accepted and approved by said land department, and some of the same were afterwards patented to said Northern Pacific Railroad Company, but not including any which are embraced in this suit. But thereafter, on August 27, 1896, the secretary of the interior ruled and decided that the eastern terminus of said railroad was at the city of Duluth, and that its land grant did not extend east of the meridian of that city; and thereupon, by his order, said lists of selections were canceled, and the land so selected opened for sale and entry as unappropriated public land; and thereafter, and conformably with such ruling of the secretary of the interior, the entries and purchases were made under which the present defendants now claim.

Most of the foregoing matters will be found stated more at length

in the reports of the cases of *U. S. v. Northern Pac. R. Co.*, 37 C. C. A. 290, 95 Fed. 864; *U. S. v. Northern Pac. R. Co.*, 177 U. S. 435, 20 Sup. Ct. 706, 44 L. Ed. 836; and *Doherty v. Railroad Co.*, 177 U. S. 421, 20 Sup. Ct. 677, 44 L. Ed. 830. These decisions finally adjudged that the eastern terminus of said railroad was at Ashland; and on the filing, on April 16, 1900, of the supreme court decisions just referred to, the secretary of the interior revoked the order canceling said lists of selections, and reinstated the said lists. Prior to July 1, 1898, the supreme court of the state of Wisconsin, in the *Doherty Case*, above cited, then pending before it, had adjudged and decided that the eastern terminus of said railroad was established at Ashland; and this court, in the other above-cited case, then pending before it, had rendered judgment to the same effect; and on that date, by provisions contained in 30 Stat. 620, c. 546, congress enacted:

"That where, prior to January first, eighteen hundred and ninety eight, the whole or any part of an odd numbered section in either the granted or the indemnity limits of the land grant to the Northern Pacific Railroad Company, to which the right of the grantee or its lawful successor is claimed to have attached by definite location or selection, has been purchased directly from the United States or settled upon or claimed in good faith by any qualified settler under color of title or claim of right under any law of the United States or any ruling of the interior department, and when purchaser, settler or claimant refuses to transfer his entry as herein provided, the railroad grantee or its successor in interest, upon a proper relinquishment thereof, shall be entitled to select in lieu of the land relinquished an equal quantity of public lands, surveyed or unsurveyed, not mineral or reserved, and not valuable for stone, iron or coal, and free from valid adverse claim or not occupied by settlers at the time of such selection, situated within any state or territory into which such railroad grant extends, and patents shall issue for the land so selected as though it had been originally granted," etc.

This act further provided that the secretary of the interior should ascertain, prepare, and deliver to the railroad grantee or its successor in interest lists of the tracts of land so purchased or settled upon and now claimed by the purchasers or occupants, their heirs or assigns; and that the right, title, and interest of the railroad grantee so relinquished should revert to the United States, and the lands be treated as if the grant had never included them. The act further provided that the railroad grantee, or its successors in interest, should accept as conclusive, in respect to the lands to be relinquished, the lists so to be made by the secretary of the interior; but should not be bound to relinquish "lands sold or contracted by it, or lands which it uses or needs for railroad purposes, or lands valuable for stone, iron, or coal." The act further provides that all qualified settlers, their heirs or assigns, who, prior to January 1, 1898, purchased or settled upon, or claimed in good faith under color of title or claim of right, under any law of the United States or any ruling of the interior department, any part of an odd-numbered section in either the granted or indemnity limits of said land grant, may, in lieu thereof, transfer their claims to other public lands, specified, with credit for their residence and improvements; and that the secretary of the interior should give notice to such persons of their option to take lieu lands before delivering the lists

to the railroad grantee or its successor in interest. This act of July 1, 1898, was duly accepted by the Northern Pacific Railway Company on July 13, 1898, and before it had sold or contracted to sell to complainants, or to any one, any of the lands described in the bill.

The obvious purpose of this act was to provide a certain, speedy, and equitable way in which all controversies between the railroad grantee or its successors and purchasers or settlers upon odd-numbered sections within the place or indemnity limits of the land grant, who claimed by color of any law of the United States or any ruling of the land department, should be settled and adjusted without contest or litigation either in the land department or in the courts. The railway company, by its express acceptance of the act, became bound by its provisions, and obligated to carry out its terms. By its terms, each of such purchasers and settlers is to be notified by the secretary of the interior of his option to transfer his entry or claim and take other lands in lieu thereof. If he takes such lieu lands, he relinquishes his former land, and this ends his contest with the railroad grantee. As to those purchasers or settlers who elect to retain their claimed lands, the railroad grantee or its successor, on receiving lists of such lands from the secretary, must relinquish the lands so listed, and may take lieu lands therefor, and the relinquished lands revert to the United States, and stand as if never included in the land grant, and the controversies about them are ended. But the complainants, while not conceding that by the act of July 1, 1898, it is made obligatory on the railroad grantee or its successor to relinquish any lands, contends that, if such obligation does arise as to any lands, it is only as to lands which shall not have been sold or contracted to be sold by the railroad grantee or its successor prior to the time when such lands shall have been included by the secretary of the interior in lists of contested lands served upon the railroad grantee or its successor, as required by that act. They claim, therefore, that the lands described in the bill are not affected by that act, because they were "sold or contracted" by the railway company to the complainants January 19, 1900, after the passage of said act, but before the service upon the railroad grantee or its successor, by the secretary of the interior, of any lists of lands claimed by purchasers or settlers, and therefore to be relinquished by the railroad grantee or its successor. This contention of the complainants is untenable. The act refers to conditions existing at the time of its passage. It does not embarrass the railroad grantee by requiring it to relinquish any land which before the passage of that act it had sold or contracted; neither does it provide for its own practical nullification by excepting from its provisions lands which the railroad grantee might thereafter choose to sell or contract, as in this immense sale of lands to the complainants; and after the passage and acceptance of the act the complainants could acquire no rights in the land not in subordination to its provisions. The act speaks from its passage. It does not make any rights or obligations dependent upon the celerity or tardiness of the secretary in the performance of the duties which the act imposes upon him.

It appears that a very few of the defendants claim under patents issued before January 1, 1898, and complainants contend that said act of July 1, 1898, has no application to lands so patented, and that such has been and is the ruling of the land department. 28 Land Dec. Dep. Int. 103; Id. 470; *Wasmud v. Railroad Co.*, 29 Land Dec. Dep. Int. 224, 226. It is apparent from these citations that such has been the construction placed upon that act by the secretary of the interior. I believe, however, that such construction of the act is erroneous. It appears from the statements in one of these citations that after the passage of said act some lands covered by its provisions were inadvertently patented, and the views of the secretary as to the scope of the act, and the powers and duties of the land department in carrying it into effect, appear in the instructions of Acting Secretary Ryan to the commissioner of the general land office, June 3, 1899 (28 Land Dec. Dep. Int. 471):

"Paragraph seven of the regulations approved February 14, 1899 (28 Land Dec. Dep. Int. 103), issued under the act of July 1, 1898, states that: 'Since the issuance of patent terminates the jurisdiction of the land department over the lands patented and exhausts its power to examine and decide upon claims to such lands, and since this act manifestly refers to conflicting claims to lands which have not passed beyond the jurisdiction of the land department, it follows that its provisions are confined to unpatented lands, and that lands which have been patented are not the subject of relinquishment and cannot be made the basis of a lieu selection under this act.' This portion of the paragraph can only relate to such lands as had been patented prior to the act of July 1, 1898, and as to all such lands said act is without application. But all conflicting claims coming within the provisions of said act, to land which remained unpatented July 1, 1898, should be disposed of in accordance with the provisions of that act. The patenting of all lands which were on July 1, 1898, the subject of such conflicting claims without following the provisions of said act, was in violation of its terms, and therefore erroneous. To the end that the benefits intended to be extended by said act may be still secured to those entitled thereto, and to avoid possible and unnecessary litigation in the courts as a result of the inadvertent or erroneous issuance of patents since July 1, 1898, in such cases, the following regulation is added to those adopted February 14th, last, under said act, namely: '(47) Where any portion of an odd-numbered section within the limits of the grant to the Northern Pacific Railroad Company coming within the provisions of the act of July 1, 1898, as herein construed, has been patented without following the provisions of that act, the individual claimant will, notwithstanding the issuance of such patent, be advised, in the manner prescribed by paragraph 18, of the option accorded him by said act. If the patent was issued to him, and he elects to relinquish his claim, he will be required to make reconveyance of the land to the United States in the manner prescribed by paragraphs 24, 25, and 26; but if he elects to retain the land patented it will be listed according to paragraph 23, with a view to its relinquishment by the railroad company. If the patent was issued to the railroad company, and the individual claimant elects to retain the land so patented, the company will be required to make reconveyance thereof to the United States according to paragraphs 24 and 26, whereupon the individual claimant may perfect title thereto, and the railroad company may select other lands in lieu thereof as in other cases.'"

The situation at the time of the passage of the act of July 1, 1898, was this: By reason of the erroneous ruling of the secretary of the interior as to the location of the eastern terminus of said railroad, and his revocation of his prior approval of lawful selections by the railroad company of indemnity lands, and permitting sales and en-



tries of such selected lands as unappropriated, he had introduced confusion and conflict in respect to the right to such lands, which was beginning to be litigated in the courts; as the suits which resulted in the supreme court decisions above cited had then been commenced, and very much litigation seemed probable. The fact that patents had issued in a few instances would not end such disputes as to the lands so patented, as courts would adjudge the patentee in any case to hold the title in trust for the other party, wherever the other party had clearly the right to the land. The quieting of claims and titles to such a vast area of land was matter of public concern, and it was proper and beneficent legislation on the part of congress to thus provide for the settlement and ending, with the full consent, and through the voluntary action, of the parties in each instance, of all disputes existing in the land department in respect to the unpatented lands, as well as all disputes which might arise in the courts as to whether patents for the patented land had been issued by the land department to the right parties. This act gives the option to keep or relinquish the disputed land to the individual claimant in every instance. If he elects to retain that land, it is to be listed by the secretary in lists to be furnished to the railroad claimant, who must relinquish, and whose consent to this was given by its acceptance of the act. The statement of the secretary, in his instructions above quoted, that "the issuance of patent terminates the jurisdiction of the land department over the lands patented, and exhausts its power to examine and decide upon claims to such lands," while true, is wholly irrelevant in respect to all lands affected by the act of July 1, 1898. That act does not provide for any examination or decision whatever, by the land department, of the merits of any claims to any lands. The acts required to be done by the secretary of the interior are merely ministerial,—first, to offer the option to the individual claimant, and, if the land is by him relinquished, to require such instrument as will make the relinquishment effectual. If he refuses to relinquish, then the secretary's duty is to place the land on the list respecting which relinquishment is to be required of, and cannot be refused by the railroad claimant; the lists so furnished being conclusive. The other statement in the secretary's instructions, that the act "manifestly refers to conflicting claims to lands which have not passed beyond the jurisdiction of the land department," is stated as a corollary to the last previously quoted statement, and is "manifestly" incorrect, as no sentence in that act favors such limited construction. On the contrary, its broad terms include patented as well as unpatented lands, respecting which such conflicting claims existed. There can be no more difficulty in executing the act in respect to lands coming within its terms, which were patented before its passage, than in respect to the lands which were inadvertently patented after the passage of the act, and about which the secretary finds no difficulty. The patents last referred to, though erroneously issued, were not void, and effectually passed the title, and exhausted the jurisdiction of the land department. *Moore v. Robbins*, 96 U. S. 530, 532, 24 L. Ed. 848. But the secretary very properly did not consider that this at all dis-

abled him from performing the ministerial duties devolved upon him by the act of July 1, 1898, in respect to the lands so patented. The same is true respecting the lands patented before the passage of the act, and the procedure which he directs to be adopted by paragraph 47 of his instructions is as appropriate and effectual in the one case as in the other.

Complainants' contention that the act of July 1, 1898, only applies to lands claimed by "settlers," cannot be maintained. The language employed is broad enough to include all purchasers from the United States, under any law, or ruling of the land department.

In respect to about 4,500 acres of the land described in the bill and claimed by the complainants, it appears by the exhibit attached to the bill that the entries thereof by the individual claimants were made later than January 1, 1898, and therefore that the act of July 1, 1898, does not apply to such lands. But the same exhibit shows that none of these lands have been patented to any one. It therefore appears that the legal title to these lands is not in either the complainants or defendants, but still in the United States, and that the contests as to the right to these lands are still pending, or may be prosecuted, before the land department of the United States. While the matters are in this condition, it is improper for a court to assume to adjudicate the rights of the contesting parties. The language of Mr. Justice Miller in *Marquez v. Frisbie*, 101 U. S. 473, 475, 25 L. Ed. 800, is applicable:

"We have repeatedly held that the courts will not interfere with the officers of the government while in the discharge of their duties in disposing of the public lands, either by injunction or mandamus. *Litchfield v. Richards*, 9 Wall. 575, 19 L. Ed. 681; *Gaines v. Thompson*, 7 Wall. 347, 19 L. Ed. 62; *Secretary v. McGarrahan*, 9 Wall. 298, 19 L. Ed. 579. And we think it would be quite as objectionable to permit a state court, while such a question was under the consideration and within the control of the executive department, to take jurisdiction of the case by reason of their control of the parties concerned, and render decree in advance of the action of the government, which would render its patents a nullity when issued."

It is just as improper for a federal court as for a state court to assume to determine and adjudicate the rights and equities of contesting claimants for public lands while the matter is still pending before the land department.

The only other ground upon which the complainants urge their right to equitable relief is as to two 40-acre tracts in section 19, township 54, range 12, claimed by the defendant Michael Kelley under conveyance from Malcolm A. McDonald, the entryman. The proof shows that said Kelley has caused to be cut and removed from said two tracts a large amount of pine timber, including substantially all the pine timber of merchantable value growing thereon, and complainants contend that they are entitled to an injunction to restrain said Kelley from cutting or removing any more timber from said tracts, and to a decree against him for the value of such pine timber already cut and removed by him, such value to be ascertained by reference to a master. But the complainants cannot be awarded the value of the pine timber so cut and removed without an adjudication in this suit that they have at least the equitable

right to the land, and such adjudication may not be made while jurisdiction to determine that matter remains in the land department as it does until patent for the land shall issue. It is unnecessary to decide whether a case may not arise when, even while the disputed question as to the rights of contesting parties to a tract of public land is pending or cognizable before the land department, a court of equity may properly interfere, by injunction at the suit of one of the claimants, to prevent the other claimant from despoiling the land by waste, and appropriating its substantial value, by denuding it of all its merchantable timber, before any final decision upon the disputed claims by the land department, which is only rendered by issuing the patent. I think a court of equity should in such cases refuse interference by injunction to preserve merely technical rights,—the status quo,—but only (if at all) to prevent serious and substantial injuries. Here it seems from the proofs that an injunction will be practically ineffectual, as the merchantable timber of any substantial value has already been taken and removed from the land. On the hearing no technical objection to any pleading was urged or has been considered, as the parties apparently desired a decision on the merits. Decree will be entered dismissing the bill, with costs.

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**BIBBER-WHITE CO. v. WHITE RIVER VAL. ELECTRIC R. CO.**

(Circuit Court, D. Vermont. September 3, 1901.)

**SPECIFIC PERFORMANCE—CONTRACTS ENFORCEABLE.**

An oral agreement with the receivers of an unfinished railroad to furnish the money required to complete the same for receivers' certificates and other securities as collateral is not such a definite and precise contract as to warrant a decree or order for its specific performance.

In Equity. On petition by receivers. See 107 Fed. 176.

Chas. M. Bruce, for receivers.

Eleazer L. Waterman, for Williams.

WHEELER, District Judge. This cause has now been heard upon a petition of a receiver for an order to compel Samuel Williams, a party to the cause, to furnish money for the further completion of the road, pursuant to an alleged agreement. There is no contract signed by the petitionee, and the making of such an agreement is disputed. The evidence seems to fairly show that he gave the receivers to understand that, for receivers' certificates delivered and subsidies assigned for security, he would furnish money for the purpose mentioned, which he has since refused to furnish. But this is not such a definite and precise contract as will warrant a decree or order for specific performance. The rights of the parties must be wrought out, or the consequences of the failure to perform be suffered otherwise. The petition is accompanied by a motion for a temporary injunction against transfer of the securities. The receiv-

ers appear to be entitled to such an injunction, although it may not be actually necessary.

Motion for injunction granted. Petition for specific performance denied.

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BIBBER-WHITE CO. v. WHITE RIVER VAL. ELECTRIC R. CO.

(Circuit Court, D. Vermont. September 3, 1901.)

RAILROADS—RECEIVERSHIP—SALE OF PROPERTY.

A court will not order the sale of railroad property in the hands of receivers, where the purpose of the receivership was to secure the completion of the road, to save to the company certain subsidies and subscriptions, the right to which has been pledged by the receivers to raise funds, until the road has been so completed as to assure their collection.

In Equity. Petition for sale of property in hands of receivers. See 107 Fed. 176.

Eleazer L. Waterman, for petitioner.

Chas. M. Bruce, for receivers.

Arthur H. Wellman, for Jose, Parker & Co.

Frank Plumley, for Ward & Douglass.

WHEELER, District Judge. This cause has been heard upon a petition of Samuel Williams for a sale of the railroad and property in the hands of the receivers. The principles invoked for the petition that a receivership should be terminated as soon as practicable after its purposes have been accomplished are recognized as well established and salutary. *Vermont & C. R. Co. v. Vermont Cent. R. Co.*, 50 Vt. 500. This receivership was created for the purpose of saving to the corporation its subsidies, voted by towns and subscribed upon conditions requiring prompt action in building the road, as well as for the purpose of completing the road. These subsidies are an important part of the property of the corporation; the right to them has been used by the receivers in connection with the construction of the road, and they have become involved with it by assignments; the road is not so far perfected as to leave them beyond dispute; and altogether the property does not appear to be now so well salable as to warrant forcing a sale of it in its present condition. The purposes of the receivership have not been accomplished, and a sale of the property before further accomplishment does not now seem to be wise.

Petition dismissed.

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CHICAGO, M. & ST. P. RY. CO. v. SMITH et al.

(Circuit Court, D. South Dakota, S. D. August 9, 1901.)

1. CARRIERS—STATE REGULATION OF RATES—CONSTITUTIONALITY.

Where the business of a railroad company within a state is efficiently, economically, and honestly conducted, and its operating expenses are no greater than such management requires, and the net earnings of its lines within the state, above operating expenses, both from local and through

business, are less than half the amount required to pay the interest on the mortgage debt upon lines within the state, the local earnings at the same time being insufficient to pay half of the proportion of such interest justly chargeable thereon, a state regulation reducing the rates it is permitted to charge on local business, the effect of which will be to materially decrease its net earnings, is unreasonable and unjust and a violation of its constitutional rights.

2. SAME—PROFITS OF RAILROAD—FIXED CHARGES.

The interest upon a valid bonded debt of a railroad company, contracted in a careful, economical, and honest administration of its business, constitutes a fixed charge, which the company is entitled to earn before its net earnings above operating expenses can be considered as dividends, which are subject to regulation or reduction in the discretion of the legislature.

In Equity. Suit to enjoin the enforcement by defendants of a state regulation fixing rates of charge for the transportation of passengers and freight within the state. On final hearing.

George R. Peck and A. B. Kittredge, for complainant.

John L. Pyle, Atty. Gen., Thomas H. Null, and T. B. McMartin, for defendants.

CARLAND, District Judge. This cause was before the court on pleadings and proofs at a previous term of this court. The disposition then made of the cause was disapproved by the supreme court in *Railway Co. v. Tompkins*, 176 U. S. 167, 20 Sup. Ct. 336, 44 L. Ed. 417. The mandate in that case required this court to refer the case to some competent master to report fully the facts, and to proceed upon such report as equity should require. As no exceptions have been filed to the master's report, the same stands confirmed, under rule 83. It only remains for this court to proceed upon the report as equity shall require.

In view of certain matters urged by counsel for defendants in argument, it is proper to state that this court can have no opinion upon the facts. Its duty is performed when a conclusion is drawn from the facts found which shall be consonant with equity. The master finds:

"The business of complainant has at all times been conducted efficiently, economically, and honestly, and the operating expenses have in no case been greater than such efficient, economic, and honest management required."

Such a finding must always be an important one in cases of this character. The master has taken the fiscal year ending June 30, 1897, being the year immediately preceding the filing of the bill, as a test year for showing the business of the complainant company. He finds that during said year the net local freight earnings were \$70,-888.43; the net passenger earnings, \$19,332.59; the net mail, express, etc., \$35,709.08,—total net earnings, \$125,930.10. He also finds that if the rates prescribed by the schedule adopted by defendants had been in force during the year aforesaid, the net local earnings of complainant would have been: Net freight earnings, \$53,049.18; net passenger earnings, \$26.34; net mail and express earnings, \$35,709.08,—total net local earnings, \$88,784.60. These figures show a reduction in net earnings for the year 1897 of \$37,145.50. It is also found that the lines of complainant in South Dakota are mortgaged to secure bonds amounting to the sum of \$19,365,247.10, which bear

interest at an average rate of 5.69 per cent. per annum, and that the total amount of the annual interest charge upon said South Dakota indebtedness is \$1,101,749.93; that the value of complainant's lines of railway, with the appurtenances and equipment, is the sum of \$15,000,000. The master also finds that, had the rates prescribed by the defendants' schedule been in force in the year 1897, the total net earnings of complainant, both interstate and local, would have been \$180,389.02, which would have left a deficiency in the amount due for interest on bonds of \$921,360.91. If this fixed charge of interest is an expense which complainant has a right to earn before the state may reduce its earnings, it becomes important to ascertain how much of this interest should be borne by the local earnings. It is found that if the rates proposed by the defendants had been in force in 1897, the net earnings would have been \$88,784.60, and that the total net earnings for the same year on interstate business would have been \$91,604.42. There seems to be no good reason why interstate and local business should not be charged with the interest on the South Dakota indebtedness in proportion to the amount of annual net revenue produced by each. There is so little difference between the amount of the annual net local earnings and the annual net interstate earnings that for all practical purposes the local earnings should be charged with one-half of the annual fixed charge for interest, or, in round numbers, \$550,874.96. Applying the net annual income from local business as shown in the year 1897, we have a deficiency on the interest account of \$462,090.36. Again, if it be urged that in equity interest should not be figured, for the purposes of this case, on a sum in excess of the value of the property, which is \$15,000,000, we have the following result: The interest on \$15,000,000 at the average rate of 5.69 per cent. would be \$778,500; one-half of it would be \$389,250. Taking the annual net local revenue of \$88,784.60 from this amount, and we have still a deficiency annually of \$300,465.40. With this deficiency each year for fixed charges, are the rates prescribed by the proposed schedule unjust and unreasonable? The solution of this question depends upon the further question as to whether interest on an honest debt is a fixed charge, which the complainant has a right to earn before any reduction in its earnings may be compelled by the state. It is claimed by counsel for complainant that the case of *Reagan v. Trust Co.*, 154 U. S. 362, 14 Sup. Ct. 1047, 38 L. Ed. 1014, is decisive upon this point. It is true in that case, which was brought by a second mortgage bondholder, that one of the reasons assigned by the court for its judgment was the fact that for three years prior to the filing of the bill the earnings of the company, above operating expenses, had been insufficient to pay the interest on the bonded debt, and that the proposed tariff, as enforced, would so diminish the earnings that they would not pay one-half the interest on the bonded debt. Yet there are numerous other reasons assigned by the court for its judgment, and it cannot be said that the case was disposed of upon this one ground alone. But a careful consideration of all the rate cases decided by the supreme court compels the belief that it is the opinion of that court that, when the earnings of a railroad, conducted efficiently,

economically, and honestly, with operating expenses in no case greater than such efficient, economical, and honest management requires, are insufficient to pay one-half the interest on a valid debt, contracted, as found by the master in this case, in a careful, economical, and honest administration of the company's business, then a schedule of proposed rates which materially reduced these earnings would be unjust and unreasonable. It must be taken as true in this case that the debt, which is bearing an average rate of 5.69 per cent. per annum, is an honest debt. It is also true that if the interest is not paid upon the bonds which the mortgage secures the usual result is a receiver, and consequent loss of the road.

The argument of counsel for defendants, so far as it is confined to the facts found, is to this effect: The master finds that if the proposed rates had been in force in 1897, the local gross freight earnings would have been \$84,449.98; that it would have cost the complainant, to earn this sum, \$31,400.80, leaving a net revenue of \$53,049.18 on local freight; that a profit of \$53,049.18 at an expense of \$31,400.80 is a large profit, and if there is any profit at all this court will not enjoin the defendants. This argument is plausible upon its face, but the view taken by counsel of these figures is too narrow. It leaves out of view the fact that the company has \$15,000,000 invested in its South Dakota lines, and has an annual interest charge of \$1,101,749.93 accruing on bonds secured by mortgage on these same lines. Experience has taught this court that there is nothing so deceiving in this class of cases as to take two or three items, and, by a system of percentages, seek to arrive at a just conclusion.

It is insisted by counsel for defendants that, as the findings of the master show a surplus over operating expenses of \$53,049.18 during the year 1897; that this court will not interfere by injunction. This would be true, if this amount could be called "dividends"; but the difficulty in this case, so far as I am able to interpret the decisions of the supreme court of the United States, is that, so long as the net revenues of the company do not pay one-half the interest on the bonded debt, its net local earnings cannot, in the true sense of the word, be considered as dividends. I find by an examination of the case of *Reagan v. Trust Co.*, supra, that the earnings of the railroad whose affairs were under investigation in that case left a surplus over operating expenses for the year 1889 of \$858,732.24; for the year 1890, \$498,177.24; for the year 1891, \$555,091.59. The supreme court, in the face of these surplus earnings, granted an injunction, and assigned as one of the reasons that the earnings of the company were not sufficient to pay one-half of the interest on the bonded debt, so that the conclusion necessarily follows that in the opinion of the supreme court, if the earnings of a railroad company do not pay but a small proportion of the fixed charges, then these surplus earnings cannot, in a true sense, be considered as dividends.

I have carefully considered the remaining points urged by counsel for defendants in so far as they bear on the facts found in this case, and cannot see how they change the result which must inevitably follow the findings of the master. It is not necessary to decide in this case just how much a railroad may be permitted to earn before

the state can reduce its earnings. All that is decided is that, on the facts found by the master, equity requires that the defendants be perpetually enjoined from putting into effect the schedule of rates and fares complained of. The decree, however, will provide that the board of railroad commissioners of the state of South Dakota may hereafter, and when circumstances have changed so that the rates adopted, fixed, and established in the proposed schedule contained in the order of said board of August 26, 1897, shall yield to the said complainant a reasonable compensation for the services aforesaid, apply to this court, by supplemental bill or otherwise, as they may be advised, for a further order in that behalf.

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NEAL et al. v. BRIGGS et al.

(Circuit Court, E. D. North Carolina. July 10, 1901.)

**1. EQUITY—EXCEPTIONS TO REPORT OF MASTER.**

It is the settled rule that exceptions to the report of a master in equity in a circuit court of the United States should set out specifically the errors upon which the party relies, and the court is justified in disregarding exceptions which merely state generally that a finding of the master is contrary to the law and the evidence, the consideration of which would require the chancellor to re-examine the entire evidence, and defeat the purpose of the reference.

**2. SAME—ENFORCEMENT OF CONTRACTS—EQUITABLE CONSTRUCTION.**

A party to a contract who has himself failed to comply with its conditions will not be permitted by a court of equity to insist upon a harsh and strict construction of it as against the other party.

In Equity. On exceptions to report of master.

W. W. Clark and M. W. Stevenson, for plaintiffs.

Edw. R. Baird, Jr., for defendants.

PURNELL, District Judge. This cause was on the 17th day of October, 1900, removed from the state court to the equity side of the docket of the circuit court for the Eastern district of North Carolina on the petition of defendants. Prior to such removal there was a general assignment by R. S. Neal, and the trustees named in such assignment were appointed receivers by the state court, and after such removal reappointed by the United States circuit court. On November 13, 1900, defendants, George S. Briggs & Co., filed an answer, and moved to dismiss the bill, which motion was heard and refused December 11, 1900, and without objection the cause referred to George Green, Esq., as special master, to take account of claims against the property in controversy, and of all accounts against the said R. S. Neal and George S. Briggs & Co., and of, in, and concerning the matters set forth in the pleadings. The appointment of George Green, Esq., as special master was made on account of his known ability as a bookkeeper and accountant. On April 23, 1901, the special master presented his report in open court, and an order was passed that the same be filed and counsel notified; upon exceptions thereto being filed, the judge presiding to be notified thereof. Such exceptions having been filed, the cause was set down for hear-



ing, counsel notified, and the same heard on June 17th, in accordance with the notice aforesaid. Now, on due consideration, it is considered, ordered, adjudged, and decreed that the report of the special master be, and the same is hereby, in all respects confirmed, both as to the findings of fact and conclusions of law.

The purposes of a reference to a special master—to relieve the chancellor of manual and clerical labor, and serve the convenience of parties; to shorten and simplify litigation as much as possible—seems to have been lost sight of in the exceptions filed by defendant. The case cited in the argument and brief (*Frick Co. v. Norfolk & O. V. R. Co.*, 32 C. C. A. 31, 86 Fed. 725) does not decide or even touch upon this, but the rule for filing exceptions to the report of a master in equity in the circuit court of the United States is laid down by the supreme court of the United States in *Railroad Co. v. Gordon*, 151 U. S. 285, 14 Sup. Ct. 343, 38 L. Ed. 164:

"That the exceptions to the report of a master should be set out specifically, and errors upon which the party relies, not only that the opposite party may be apprised of what he has to meet, but the master may know in what particular his report is objectionable, that he may have an opportunity to correct his errors, and reconsider his opinion. The main object of a reference being to lighten the labors of the court, the court ought not to be obliged to hear the full report on the whole evidence when the report is made."

This is only one decision of a series to the same effect, and the practice is too well established to require a tedious citation of authorities. A reference to the numerous decisions under equity rule 83 is only necessary to satisfy any one of this practice, which has been followed many years in the circuit courts of the United States. The same rule prevails in the state courts of North Carolina, where general or "broadside" exceptions are not permitted or considered. Not one of the exceptions to the master's report in this case complies with this rule. The court might well affirm the report as though no exceptions had been filed. But upon a careful examination of the exceptions filed, and the evidence taken before the special master, performing much labor not incumbent on the judge sitting as chancellor, I am constrained to overrule the exceptions as not being well founded.

Exception 1 is to the drafts of the National Bank of New Bern, "in that the special master finds that the defendants, George S. Briggs & Co., are jointly liable with the said R. S. Neal to the said National Bank of New Bern in the sum of \$2,555.69, due on account of said drafts, on the ground that the said finding is plainly in violation of the law and the evidence." The facts are that Neal drew certain drafts, which were accepted by George S. Briggs & Co., and these drafts were transferred to the bank, and not all paid at maturity; the amount stated being the balance due. There is some intimation, aliunde the record, that suit is pending against George S. Briggs & Co. on these drafts in the Eastern district of Virginia, but at the time of the hearing before the master there had been no recovery or collection on this account, and no authority is cited, and it would be a *novo impressio* that the acceptor is not jointly liable with the drawer of a draft. If there are such suits, of which there is no record here, and there should be a recovery, it would be credited

on this account, as a matter of course. And if the account is adjusted here, there could be a recovery elsewhere. This exception is overruled and not allowed.

Exceptions Nos. 2 and 3 conclude in the same way,—that the finding is plainly in violation of the law and evidence,—without pointing out the evidence, or specifying wherein the said findings excepted to are erroneous; thus making the exception general, and not specific. An examination of the testimony shows the finding of facts is well founded and the conclusions of law and equity correct. These exceptions are therefore overruled.

Exception 4 seems not to be well founded in fact. The defendant did not produce books of account, when notified and requested so to do, but declined, as found by the special master. The fourth exception is therefore overruled.

The findings of the special master charging the defendants, George S. Briggs & Co., with the rent of the mill and tugboats Nellie and Moore, and for the timber cut by him on the lands of R. S. Neal, to which exceptions 5, 6, and 7 are directed, seem to be supported by the evidence in the case, and by the principles of equity jurisprudence; hence these exceptions are overruled.

Exceptions 8, 9, 10, and 11, upon an examination of the depositions taken, are supported by the evidence, and in accordance with the lien laws of North Carolina, which this court follows in the administration of the rights of property and liens thereon.

Exceptions 12, 13, and 14 are directed to the statement of account between the defendants and R. S. Neal. The account is stated in such manner as to do credit to an expert accountant, and is supported by the testimony taken in the cause, which testimony justifies both the finding of fact and statement of account as a legal, equitable balance sheet. These exceptions are therefore overruled.

The defendants throughout these exceptions seem to insist upon an inequitable construction of a contract between Neal and George S. Briggs & Co., and a total disregard of all the equities applicable to the case; and this, too, when testimony shows that in the contract, depending on mutual agreement, the defendants, George S. Briggs & Co., have not performed their part of the contract, in that they failed to render accounts and returns of sale, or to credit Neal for lumber shipped them, according to the bills of lading, the grades of lumber, prices received, or to render a fair, full, and correct account of their dealings, when notified and requested so to do by the special master and counsel in the case.

True, Briggs advanced money in large sums to start Neal in the sawmill business, but, on account of the failure to make returns, Neal contracted debts for a large amount, and thus became heavily involved. In short, defendants received all the output of the establishment, sold or disposed of the same, and guarded with jealous care the proceeds of sale, rendered no accounts of sale, did no equity. They now insist on a harsh, exact construction of an inequitable contract,—“the pound of flesh named in the bond.” This a court of equity will not permit. Such demands are foreign to this jurisdiction.

The product of Neal's mill seems to have been shipped almost ex-

clusively to George S. Briggs & Co. at Norfolk, for which shipments he received very meager, if any, returns. The account between them has been stated by an experienced and expert bookkeeper and a competent business man, basing his findings on sworn testimony. The exceptions are all overruled.

A decree will be drawn and entered in accordance with the report of the special master and this decision.

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MILLER v. CONSOLIDATED LAKE SUPERIOR CO. et al.

(Circuit Court, D. Connecticut. August 2, 1901.)

No. 1,068.

CORPORATIONS—SUIT BY STOCKHOLDER—PRELIMINARY INJUNCTION.

The case made by a complainant by his bill and affidavits showed that he was a stockholder in the corporation defendant, of which the other defendants were the directors; that it became necessary to the successful prosecution of certain of the business of the corporation that it should construct a railroad and acquire and operate a line of steamers to transport the products of an iron mine which it had developed, but that it was without authority to do such things under its charter, which could not be amended for some two years; that thereupon the individual defendants organized a new corporation, having such authority, which obtained right of way for a railroad, together with a land grant from the Canadian government, purchased steamers, and constructed a portion of the railroad; that such defendants themselves took substantially all the stock in the new company, and, after the subsequent amendment of the charter of defendant company, conspired together, and, by reason of their controlling interest and influence therein, compelled such company to purchase the properties and rights of the new company at an exorbitant price, for their own profit. *Held* that, in the absence of a clear showing by defendants of sufficient reasons justifying their actions, complainant was entitled to a preliminary injunction, restraining the consummation of the purchase until the trial of the cause on the merits.

In Equity. On motion for preliminary injunction.

White & Otheman, for complainant.

J. S. Freeman and Lewis Sperry, for defendants.

SHIPMAN, Circuit Judge. The Consolidated Lake Superior Company, hereinafter called the Consolidated Company, is a corporation which was incorporated by the legislature of the state of Connecticut in 1897, under the name of the American Lake Superior Power Company. It received its present name by decree of the proper state court of Connecticut in 1898. By amendment of the charter, approved May 17, 1899, it was authorized to engage in manufacturing, milling, and smelting, to furnish light and power, to purchase and hold the stock and securities of other corporations formed for similar purposes, and with power, upon the vote of two-thirds of its stockholders, to exchange its stock for stock of other companies. Until May 16, 1901, its capital stock was "twenty million (\$20,000,000) dollars, divided into four hundred thousand (400,000) shares of a par value of fifty (\$50) dollars each, of which one hundred and twenty thousand (120,000) shares were preferred to the extent of seven (7)

per cent. of dividends, and two hundred and eighty thousand (280,000) shares were common." The first business of this corporation was to cause the purchase of an existing canal and water power at Sault Ste. Marie, in Canada. It then received, through a subsidiary company, the profit and advantage of a valuable concession from the provincial government of Ontario to cut timber from 10,000 square miles of government land, and established a wood pulp mill, which became, by improved machinery, a dry wood pulp mill of large extent. Subsequently, a machine shop and foundry, a sulphite pulp mill, a water and light company, a nickel steel plant, a nickel mine near Sudbury, Canada, and a hematite iron mine, 110 miles northwest of Sault Ste. Marie, called the "Helen" mine, and a water power canal on the Michigan side of the lake were added. These various enterprises, except the machine and foundry, are immediately managed by separate subsidiary local companies, the stock of which is owned by the Consolidated Company, with the exception of enough to preserve corporate organization. The subsidiary companies are called the Lake Superior Power Company (which owns the Hydraulic Power Works, the ferro-nickel plant, and the nickel and iron mines), the Sault Ste. Marie Pulp & Paper Company (of which the iron works are a department), the Tagoma Water & Light Company, and the Michigan Lake Superior Power Company; but all are a part of the system of development of the Consolidated Company. These various enterprises have apparently been very successful. The Consolidated Company has paid dividends of 7 per cent. on the preferred stock and 4 per cent. on the common stock, and prior to May, 1901, the preferred stock was listed on the Philadelphia Stock Exchange and sold at \$49 per share, of the par value of \$50, and the common stock was sold at \$38 per share of the same par value. In 1899, and after the amendment of the charter of that year, it became important and necessary for the complete development of the Consolidated Company's business that vessels for the transportation of ore on Lake Superior should be purchased, and that a railroad should be built northwesterly from Sault Ste. Marie for the transportation of timber, and from the Helen mine to Lake Superior. A charter was granted by the parliament of the Dominion of Canada in August, 1899, for the construction of this road of about 200 miles from Sault Ste. Marie to a point on the Canadian Pacific Railway, and from that point to the Helen mine, and thence to Michipicoton, a harbor on Lake Superior, to the Algoma Central Railway Company, which was also authorized to own vessels. A land grant of 1,500,000 acres of forest land was donated to the Algoma Commercial Company, Limited, which was organized under the Ontario companies' act, for the development of this grant, known to contain timber, and said to contain iron mines of great value. Ships were purchased in the name of the railway company for the transportation of ore on the lakes. It was necessary that a corporation in this country should furnish the capital and should own the stock of these two Canadian corporations, each of \$10,000,000, and for that purpose the Ontario Lake Superior Company, hereinafter called the Ontario Company, was organized under the joint-stock act of Connecticut on January

9, 1900, to carry on a general commercial and manufacturing business, and to own and operate railroad and steamship lines, with a capital of \$20,000,000, divided, as was the stock of the Consolidated Company, into "four hundred thousand (400,000) shares of a par value of fifty (\$50) dollars each, of which one hundred and twenty thousand (120,000) shares were preferred to the extent of seven (7) per cent. of dividends, and two hundred and eighty thousand (280,000) shares were common." The stock of the two subsidiary Canadian corporations is owned by the Ontario Company, with the exception of so much stock as is necessarily owned by individuals for the purpose of corporate organization. The complainant's exhibits are relied upon to show that the individual defendants are and have continuously been the officers and directors of the Consolidated Company, and are and have continuously been, excepting John Pitcairn, the corresponding officers and directors of the Ontario Company, and that the Ontario Company was formed by the individual defendants, with the exception of Pitcairn, for the purpose of having the benefit of the ownership of these railroads, ships, and franchises, deemed necessary by its promoters for the development and improvement of the property of the Consolidated Company, and nominally belonging to the two subsidiary companies, and with the intent of a joinder and merger of the Connecticut companies when the two boards of directors should deem that the proper time had arrived. The public addresses of Mr. Clergué, the general manager of the Consolidated Company, are relied upon as adequate to show that the new enterprises were or were to be those of the Consolidated Company. The entire stock of the Ontario Company was subscribed by some of the individual defendants. E. V. Douglas, as trustee, subscribed for 119,200 shares of preferred, and for 280,000 shares of common, stock. The stock was then offered to the public in a prospectus, which, in detail, described the abundant future profits which the company was to receive from its business. A large part of this business was to come from the Consolidated Company.

On May 3, 1901, the Consolidated Company obtained from the legislature of Connecticut an amendment of its charter, whereby power was given to increase its capital stock, and authorizing it to acquire and hold the stock of any other corporation engaged in operating railroad or steamship lines, and thereafter called a meeting of its stockholders on May 16, 1901, to accept this amendment, to increase its capital stock, and, among other things, to authorize the purchase and acquirement of the capital stock and property of the Ontario Company. It is estimated that not more than \$4,500,000 had been expended at this time by the subsidiary companies through which the Ontario Company either expends money or beneficially acquires property. In May, 1901, the treasurer of the two Connecticut companies, in reply to the complainant's letter of inquiry, said that 12 miles of the railway had been completed, which were between Michipicoton Harbor and the Helen mine, 40 miles of the main line from Sault Ste. Marie had been completed, and terminal docks at Michipicoton had been constructed, and four large, steel, ore-carrying steamers, besides other lake equipment, were owned. The fol-

lowing plan for the consolidation of the two Connecticut corporations, recommended by the directors of the Consolidated Company, was published for the information of the stockholders of each corporation on May 6, 1901, and was adopted by the stockholders of the Consolidated Company at their meeting on May 16th.

"Exhibit A.

"Plan: (1) The capital stock of the Consolidated Lake Superior Company to be increased, by resolution of the stockholders, so that the total capital stock shall be: Preferred, 7 per cent., noncumulative, \$35,000,000; common, \$82,000,000,—the par value of each share of stock to be changed from \$50 to \$100. (2) A stock dividend to be declared on the preferred and common stock of the Consolidated Lake Superior Company, based on a reappraisal of assets, particularly of the Helen iron mine, to the extent of 25 per cent. on preferred stock, payable in preferred stock, making each \$100 of present holdings \$125 in preferred stock, 100 per cent. on common stock, payable in common stock, making each \$100 of present holdings \$200 in common stock. After the declaration of the above stock dividends, and upon the surrender of the present outstanding preferred and common stock certificates of the par value of fifty dollars per share, new certificates of the par value of one hundred dollars will be issued for an equal amount in value. At the same time, orders will be given for the preferred and common stock dividends, for which certificates will be issued after June 1, 1901; the cash dividend on the present holdings of preferred stock to be paid June 15, 1901, to stockholders of record May 31, 1901, and quarterly thereafter on the entire amount. (3) The stock of the Ontario Lake Superior Company to be acquired by giving in exchange \$125 par value of the new issue of Consolidated preferred stock for \$100 par value of Ontario preferred stock, and \$200 par value of the new issue of Consolidated common stock for \$100 par value of Ontario common stock; dividend on preferred Ontario stock to be adjusted as of June 1, 1901, the date on which the dividend on the stock of the Consolidated Company received in exchange begins to accrue. (4) After providing for the stock dividends above referred to, and for acquiring the stock of the Ontario Lake Superior Company, the balance of the increased issue of preferred and common stock of the Consolidated Lake Superior Company will be used for the enlargement of the steel plant now in course of construction at Sault Ste. Marie, Ontario, to the capacity of twenty-five hundred (2,500) tons of steel daily, and for other subsidiary undertakings collateral thereto."

In the circular of May 6th it is said that the acquiescence of more than two-thirds of the stockholders of each company had already been formally secured. It is not difficult to understand the power of the influence that the recommendation of the directors of each company would carry. Steps were taken by the Consolidated Company for the immediate execution of this plan. At this meeting four stockholders and the complainant were present, but the recommended plan of consolidation was adopted, and was authorized by the vote of more than 80 per cent. of the stockholders, who had sent their proxies to the president. The complainant did not vote, but verbally protested against the proposed action, and has brought the bill in equity in this case to prevent the execution of the plan. On May 16th he owned, and still owns, 10 shares of preferred stock, bought in May, 1899, and 515 shares of common stock, bought on or before March 27, 1900. The whole number of stockholders of the Consolidated Company on May 16, 1901, was 820. The whole number of stockholders of the Ontario Company at said date was, approximately, 500. The directors of the Consolidated Company owned at said

date less than one-third of the stock of said company. The present motion is for a preliminary injunction to prevent the purchase of the Ontario stock until final hearing.

Inasmuch as it is not claimed that the action of the Consolidated Company or of its directors was *ultra vires*, the ground for seeking the interference of a court of equity is contained, in substance, in the eighth paragraph of the bill, which avers that the individual defendants, being the "directors of the Consolidated Lake Superior Company, and well knowing that the additions and extensions specified in paragraph seventh hereof were necessary to the Consolidated Lake Superior Company, together entered into a combination and conspiracy to acquire in their own behalf the rights and properties specified in paragraph seventh hereof, and by means of their controlling interest in the Consolidated Lake Superior Company to compel said last mentioned company to purchase such rights and properties at an excessive valuation, in fraud of the rights of other stockholders, and in violation of their duty as directors of the Consolidated Lake Superior Company." In brief, the bill is founded upon transactions alleged to have the characteristics of such fraud, completed or imminent, by the directors of the Consolidated Company, "either among themselves, or with some other party, or with shareholders, as will result in serious injury to the company or the other shareholders." The asserted facts upon which the conclusion of fraud is based are that the directors of the Consolidated Company, knowing that additional timber and mining lands, railroads, and ships were necessary to the development of the company, procured the necessary franchises and expended the necessary moneys for the immediate and partial enjoyment of them, through the intervention of the Ontario Company, of which they took the entire capital stock, with the intention of selling those properties to the Consolidated Company, and inducing it to buy them at a greatly enhanced and exorbitant price. It is evident that in the latter part of 1899 the Consolidated Company had been a very successful undertaking, and had developed different and not closely related enterprises with great apparent profit. Vessels for the transportation of ore and railroads for the profitable transportation of the products of its mines, its factories, and its forests were known by the managers to be needed. A charter for a railroad would also, probably, secure an extensive land grant, in pursuance of the known policy of the Canadian government. The strength of the complainant's case is in the question: Inasmuch as the intent of these acquisitions was their subsequent purchase by the Consolidated Company, why were they not secured by its directors, so as to be for its exclusive benefit, and to be ready for purchase by it at a reasonable price, instead of being secured by them for the benefit and great profit of another corporation, which they had formed for that purpose, and of which they were the promoters and originally the sole owners, and by whose plan and controlling recommendation these acquisitions were passed over to the Consolidated Company at an exorbitant price?

The defendants' affidavits do not state the affirmative reasons for the organization of the Ontario Company, but it is not difficult to

see that a new corporation was requisite for the purchase of ships and the construction of railroads. The capital stock of the Consolidated Company had been issued. Its charter did not permit the ownership of railroads or ships, or of the stock of other corporations established for the purpose of such ownership. The legislature did not meet until January, 1901, and until then the charter could not be amended. If these new enterprises were to be forthwith entered upon, such entry must be made by a new corporation, and the Ontario Company was formed under the joint-stock law of Connecticut, which must have been known by its promoters to be a temporary expedient. The question why a new corporation was organized for the benefit and profit of its promoters has not yet been answered. It was not presented as an outcome of the business of the Consolidated Company, which was to own it as soon as corporate power of ownership should be obtained, but as a corporation which was to be for the great benefit of its stockholders, and was presented to the public as one which had remarkable promise of profit. The business which was to create the profit must come almost exclusively from the business of the Consolidated Company, and the prospectus was so far attractive that the stock of the new company has now been scattered among 500 stockholders. In May, 1901, when the Consolidated Company's charter was last amended, the Algoma railroad was in operation from the Helen mine to Lake Superior, and a portion was in operation at the Sault Ste. Marie end. How much had been done towards the development of the land grant does not appear, but something must have been done, and it is said that mines of great value had been discovered. On the part of the Consolidated Company, its completed properties were paid for, except a bonded debt of \$160,000 upon the Tagoma Water & Light Company, and were in successful operation. A new steel mill, which would turn out 600 tons of steel rails per day, was expected to be in operation on August 1st. In this state of affairs, the plan proposed by the directors of the Consolidated Company provided for the increase of its stock to \$117,000,000, declared a dividend of 25 per cent. on the preferred stock and 100 per cent. on the common stock, acquired the stock of the Ontario Company by giving \$125 par value of Consolidated preferred for \$100 par value of Ontario preferred, and \$200 par value of Consolidated common stock for \$100 par value of Ontario common. The residue of the new stock, amounting to \$46,000,000, is to be used for the development of the steel plant and other subsidiary purposes. This amount of stock delivered for the purchase of the uncompleted and undeveloped plant of the Ontario Company seems extravagant; but, if no element of fraud existed at the time of the organization of the Ontario Company, an improvident price, approved by more than two-thirds of the stockholders of the purchasing company, constitutes no reason for the interference of a court. If fraud existed at the inception of the Ontario Company, the exorbitance, if any existed, of the purchase price is a circumstance which emphasizes the fraud.

The complainant has made by his exhibits a case which demands a stay in the execution of the proposed plan until the defense of the



defendants has been given, for I am of opinion that their defense is yet to be made. Their affidavits are inadequate, and do not answer the complainant's case that a breach of trust led to the formation by the directors of the old company of a new corporation, to take franchises necessary to the Consolidated Company for the apparent exclusive benefit and profit of the new corporation.

If a temporary injunction is refused, and the plan which has been adopted shall be carried into effect, a final decree in favor of the complainant would be of little value. The motion of the complainant for a preliminary injunction against the execution by the Consolidated Company of the plan hereinbefore recited, or of any similar plan for the purchase of the stock and property of the Ontario Company, and against the sale to the Consolidated Company by the Ontario Company of its franchises and property until further order of the court, is granted.

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PERCY SUMMER CLUB v. ASTLE et al.

(Circuit Court, D. New Hampshire. August 15, 1901.)

No. 315.

**1. INTERVENTION—EX PARTE ORDER.**

An order permitting the attorney general, as representing the state, to intervene in the federal courts in an action to restrain trespasses, will not be set aside because granted ex parte, where the officer was entitled to intervene, and, the parties having been fully heard, the court would be obliged to re-enter it if stricken out.

**2. TRESPASS—LAKES—FISHERIES—STATE'S RIGHTS—INTERVENTION BY ATTORNEY GENERAL.**

A bill alleged that complainant is the owner of a lake in New Hampshire covering over 200 acres, and as such owner entitled to an exclusive fishery therein, which defendants had infringed by trespass. Defendants defended on the ground that the lake is one commonly known as a "great pond," which belongs to the state. *Held*, that such suit involves a public question, in which the state is interested, and, though a judgment in favor of plaintiff might not estop the state, the attorney general will be permitted to intervene in its behalf. *Potter v. Beal*, 50 Fed. 860, 2 C. O. A. 60, distinguished.

**3. SAME.**

The fact that complainant amended the bill, and attempted to eliminate the public character of the question, could not prevent the intervention where the bill retained the description of the lake, since the court would be bound to take judicial notice of the fact that the state of New Hampshire claims all ponds of the extent of the one in question.

In Equity.

Philip Carpenter and F. C. Demond, for complainant.

A. S. Batchellor, W. P. Buckley, and H. F. Hollis, for defendants.

PUTNAM, Circuit Judge. The question now before the court arises from the intervention of the attorney general for the state of New Hampshire. On August 31, 1900, the following petition was offered and filed:

"To the Honorable the Judges of the Circuit Court of the United States for the District of New Hampshire: Respectfully represents Edwin G.

Eastman, attorney general for the state of New Hampshire, that the above-entitled action is one in which the citizens of New Hampshire are vitally interested; wherefore he prays that your honors will direct that his name be entered upon the docket as appearing for the state of New Hampshire.  
"Edwin G. Eastman, Attorney General."

Thereupon, without notice to the complainant, the court, on September 8, 1900, entered the following: "Leave to appear granted." October 1, 1900, the complainant moved to vacate this order for several reasons stated in the motion. Its brief in support of its motion has amplified those reasons, and, perhaps, added to them. However, the practice with reference to such interventions is so thoroughly settled in the federal courts that the propositions of the complainant need not be noticed except as appears in this opinion.

It is, first of all, objected that the order was unauthorized, because it was *ex parte*, and without notice to the complainant. As to that, it may well be said that, as the record stood when the order was entered, the authority of the court to enter it, and the practice in reference thereto, were each so clear and so thoroughly settled that the court might well have understood that no objection to it would be brought forward by the complainant, and that the order might well be entered as a matter of course. However, inasmuch as the parties have now been fully heard, it would be merely superfluous to strike out the original order, inasmuch as we find that we would be obliged to re-enter it if stricken out.

The bill, as originally framed, alleges, in substance, that the complainant is the owner in fee simple of a lake in New Hampshire, about one mile in length, from 30 to 80 rods in width, and covering about 200 acres; that, as such owner, the complainant is entitled to the exclusive right of fishery therein; and that the respondents trespassed on those exclusive rights, with various other allegations usual in bills in equity seeking relief against trespassers, which need not be referred to. The lake, therefore, is one of that class commonly known as "great ponds" within those jurisdictions in New England where the public and private rights with reference to "great ponds" have been determined in colonial or provincial times. This, as the bill was originally drawn, was entirely clear, because it charged that the respondents claimed that the lake in question is public property, belonging to the people of New Hampshire, and also that they maintained that they have right to fish in the lake by virtue of legislation of New Hampshire declaring all ponds in that state containing more than 20 acres to be public waters. Thus the bill on its face showed originally that it related to a subject-matter in which New Hampshire, both as a sovereign state and as representing the body of its people, has an interest, affecting not only this pond, but a common interest with reference to this pond and all other ponds of more than 20 acres in extent.

In this particular the case differs entirely from *Potter v. Beal* (decided by the circuit court of appeals for this circuit) 2 C. C. A. 60, 50 Fed. 860, in which, on the face of the papers, the controversy was of a purely personal and private character, and in which the attorney of the United States for the district of Massachusetts had

been allowed to intervene without making any showing of any public interest involved. In *Potter v. Beal*, as the case on its face showed nothing of public interest, the burden was thrown on the United States, if they desired to intervene, to make their intervention sufficiently specific to show a fact which the record did not disclose; as was done in *The Exchange*, 7 Cranch, 116, 118, 3 L. Ed. 287, and in *South Carolina v. Wesley*, 155 U. S. 542, 543, 15 Sup. Ct. 230, 39 L. Ed. 254. In the case at bar, however, it clearly was not necessary for the attorney general of New Hampshire to incorporate into his petition matters which the record itself disclosed. Moreover, the opinion in *Potter v. Beal*, at page 64, 2 C. C. A., and page 864, 50 Fed., reasserts the broad principles permitting the intervention of public authorities where the public interests are concerned.

The complainant confuses its propositions, at one place alleging that New Hampshire has been made a party to the cause, and asking certain orders growing out of that assumption, and at another that there is no occasion for intervention in behalf of the people of the state, because a judgment against the two individual respondents in this cause would bind no one else. As to the first proposition, neither the petition of the attorney general nor the order of the court assumes to make the state a party. The cause is left in that particular on the basis usual where interventions of this nature are allowed, as will be more fully understood from the decisions to which we will refer. So far as the other proposition is concerned, there can be no question that neither the state nor any of its citizens except those who are parties to this bill would be technically estopped by the result of this suit if adverse to the respondents. Nevertheless, the practical effect in that event would be prejudicial, and might substantially conclude further litigation, even though against other individuals. It is especially in consideration of this fact that this class of interventions are allowed, and it is on this account that the supreme court observed, though with relation to other circumstances, in *California v. Southern Pac. Co.*, 157 U. S. 229, 257, 15 Sup. Ct. 591, 602, 39 L. Ed. 683, 693, as follows:

"We have no hesitation in holding that, when an original cause is pending in this court, to be disposed of here in the first instance, and in the exercise of an exceptional jurisdiction, it does not comport with the gravity and finality which should characterize such an adjudication to proceed in the absence of parties whose rights would be, in effect, determined, even though they might not be technically bound in subsequent litigation in some other tribunal."

It would be especially unbecoming for the federal courts to pass on a great question in which a sovereign state of the Union has a direct interest, if not as lord paramount, at least as representing all its citizens, without affording it an opportunity to be heard before the legal proceedings in which the question is involved are concluded. It is in accordance with these principles of justice that interventions of the class in question have been, as already stated, most freely allowed in federal courts. The earliest, as well as the most interesting, precedent is *The Exchange*, 7 Cranch, 116, 3 L. Ed. 287,

already referred to. There certain gentlemen, residents of Maryland, filed a petitory libel against the schooner named, claiming her to be their own property. She was in fact in the possession of the naval officers of Napoleon, the emperor of France, and she carried his flag, which was sufficient to authenticate her as a public French vessel of war, no especial documents being necessary therefor; indeed, so far as international relations are concerned, nothing being needed to authenticate a public vessel of war except the flag and the uniform of the officer commanding the vessel. On the libel being filed, and monition issuing, the French government refused to respond thereto, or to show cause why the vessel should not be restored to the libelants. Thereupon the attorney of the United States for the district of Pennsylvania, acting at the instance of the federal executive, filed what is called in the report (at page 118, 7 Cranch, and page 288, 3 L. Ed.) a "suggestion," setting out the facts, and bringing into court the original commission of the commander of the ship, and praying that she be released. On this suggestion an issue was made by the libelants. The case went through the district and circuit courts to the supreme court, and there the suggestion of the attorney general was sustained, the libel was dismissed, and the vessel was returned to the custody of her commander. No parties appeared to formally claim the vessel, as required by the admiralty rules, and no counsel were heard on that side of the cause except the attorney of the United States for the district of Pennsylvania and the attorney general of the United States, each acting in his official and public capacity. Chief Justice Marshall, after summing up the facts, and showing that, inasmuch as she was a public, armed ship in the service of a foreign country with whom the United States were at peace, she should be exempt from the jurisdiction of our courts, added, at page 147, 7 Cranch, and page 297, 3 L. Ed., as follows: "If this opinion be correct, there seems to be a necessity for admitting that the facts might be disclosed to the court by the suggestion of the attorney for the United States." In this case neither the United States nor its citizens had any direct interest whatever, and the intervention was merely in the performance of international obligations. The United States did not become parties to the record. These particulars demonstrate that the rule which we are considering is of the broadest character, and is applied without formalities.

Another instance of permitted intervention by a sovereignty in what was, in form, merely the litigation of private parties, is found in *Re Cooper*, 138 U. S. 404, 11 Sup. Ct. 289, 34 L. Ed. 993; *Id.*, 143 U. S. 472, 12 Sup. Ct. 453, 36 L. Ed. 232. There a petition to the supreme court for a writ of prohibition to the judge of the district court for the territory of Alaska, with a suggestion in support of the petition from the attorney general of Canada, with the approval of the imperial government of Great Britain, were filed and heard. The court expressly authorized the filing of the suggestion in 138 U. S., at page 414, 11 Sup. Ct. 290, 34 L. Ed. 997, and the same is briefly explained again in 143 U. S., at page 474, 12 Sup. Ct. 453, 36 L. Ed. 233. There the interest of Great Britain was of the character of the alleged

interest of New Hampshire in the controversy before us, and related exclusively to the public right of fishing by her majesty's subjects; the case being, if anything, one step further removed from any direct right, because, in *Re Cooper*, the high seas, the public waters of all nations, were involved, while at bar New Hampshire claims to be lord paramount and to hold title.

Indeed, the rule is often applied where only private interests are at stake. It is the constant practice before the high courts of record—especially before the supreme court—to permit private parties who may be practically affected by the conclusions in particular causes, although not technically estopped thereby, to be heard in their own behalf on the most informal suggestions. Instances of this character, where the same question is involved in a suit later on the docket than that under argument, are numerous, and a notable example is found in the late *Porto Rico Cases*, 182 U. S. 1-397, 21 Sup. Ct. 742-829, 45 L. Ed. 1065, where the court went so far as to permit the intervention of certain local interests, which claimed that they would be prejudiced by the unrestricted importation of Porto Rican products.

It is not necessary that we should now determine the precise status with reference to the cause which will be occupied by the attorney general for New Hampshire, nor how far he can interfere with the conduct thereof. As the questions are practically developed as the cause proceeds, they can probably be easily determined with the assistance of *Florida v. Georgia*, 17 How. 478, 15 L. Ed. 181; *Stanley v. Schwalby*, 147 U. S. 508, 13 Sup. Ct. 418, 37 L. Ed. 259; *South Carolina v. Wesley*, 155 U. S. 542, 15 Sup. Ct. 230, 39 L. Ed. 254 (already referred to); *Belknap v. Schild*, 161 U. S. 10, 16 Sup. Ct. 443, 40 L. Ed. 599; and *Stanley v. Schwalby*, 162 U. S. 255, 16 Sup. Ct. 754, 40 L. Ed. 960. It is enough for the present to say that, as the record stood at the time the order in question was entered, there was no doubt of either the power or the duty of the court to make it.

Subsequently to its entry, the complainant made substantial amendments to its bill, and it maintains that, as it now stands, the bill involves no public interest whatever. In its original form it was a bill of peace, or substantially so, and therefore, both with reference to the question of jurisdictional amount and with reference to the nature of the proceeding, it was, perhaps, sustainable as a suit in equity in the circuit court of the United States, unless barred by the proposition, sometimes maintained, that a bill of peace will not lie in contradiction to what is claimed to be strictly a public right. If the amendments made by the complainant had so broad an operation as to exclude the possibility of a question of a public nature being involved in the result, it is quite probable that the bill would thus be stripped to bare poles, and brought down to an attempt to restrain ordinary trespassers, and to a controversy involving only a nominal amount, and therefore, in either respect, not within our jurisdiction as chancellor. Before, however, we can accede to the proposition that no question of a public character remains, the bill would require further amendments,—among other

things, by striking out the description of the lake as one which, if the statute of New Hampshire referred to in the bill as originally drawn was effective, would be a "great pond"; and by striking out also the claim of an exclusive right of fishery, which the bill still asserts; and also by inserting additional allegations so as to point out the basis of the respondents' claim of right with some particularity, instead of stating this, as the bill now does, in general terms only. While it is true that the charge originally in the bill with reference to the legislation of New Hampshire has been stricken from it, yet we are bound to take judicial notice of its statutes, and, consequently, to take judicial notice that New Hampshire claims that all ponds in the state of the extent of the one in question are public waters; so that there is enough left in any aspect to lead to the conclusion that a public question is involved, in which New Hampshire is concerned, and with reference to which, according to the undoubted practice of the federal courts, as we have already shown, the attorney general of the state should be heard.

In conclusion, it should be said that, while the action of the court in passing the order in controversy cannot be questioned, judicial tribunals can hold the scales equally between the complainant and any sovereignty, no matter how powerful, as well as between the complainant and the humblest citizens of New Hampshire; and no just interests of the complainant are involved in the question we have considered. We have, perhaps, carried this discussion to an unnecessary length, the rules appertaining thereto being so well known, and so commonly practiced, in the federal courts; but the careful and thorough presentation by the complainant of the question involved has invited us to do so.

The order entered on September 8, 1900, granting the petition of the attorney general of New Hampshire that his name may be entered as appearing for the state of New Hampshire, is affirmed.

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**CENTRAL TRUST CO. OF NEW YORK v. WORCESTER CYCLE MFG. CO.**

(Circuit Court, D. Massachusetts. July 12, 1901.)

No. 917.

**1. CORPORATIONS—MORTGAGES—WHO MAY ATTACK.**

Where bonds and a mortgage were executed by a corporation in accordance with votes of both its directors and stockholders, so as to negative any fraud or breach of trust towards the corporation, creditors whose claims arose subsequently, or an assignee in insolvency of the corporation, who represents such creditors, cannot attack the validity of such bonds and mortgage.

**2. MORTGAGES—CONSTRUCTION—DEFENSE THAT SUIT TO FORECLOSE WAS PREMATURE.**

A provision of a mortgage, made by a corporation to secure bonds, that no suit to foreclose shall be brought until six months after default, is for the benefit of the mortgagor only; and where it falls to interpose the defense that a suit to foreclose was prematurely brought, its general creditors cannot do so.

**3. CHATTEL MORTGAGES—INVALIDITY—EFFECT OF POSSESSION BY RECEIVER.**

Where a mortgage made by a corporation is insufficient to create a lien on after-acquired personal property, which it purports to cover, the taking of possession of such property by a receiver appointed in a suit to foreclose does not constitute a reduction to possession by the mortgagee as against other creditors of the mortgagor; the possession of the receiver being that of the court, which does not affect the status of the property, nor the rights of any party in interest therein.

In Equity. Suit to foreclose mortgage.

Arthur H. Van Brunt, for Central Trust Co. of New York.

C. Walter Artz, for receiver.

T. H. Gage, Jr., assignee, pro se.

Arthur J. Rugg, for city of Worcester.

George Alfred Lamb, for Queen City Const. Co.

BROWN, District Judge. This is a bill brought by the Central Trust Company, a corporation of the state of New York, against the Worcester Cycle Manufacturing Company, a corporation of the state of New Jersey, engaged in business and owning real and other property situated in the states of Massachusetts and Connecticut, praying for the foreclosure of a mortgage dated September 1, 1896, given to the trust company to secure an issue of bonds by the Worcester Cycle Manufacturing Company. Various aspects of this litigation have been before the courts in the Second circuit. *Central Trust Co. v. Worcester Cycle Mfg. Co.* (C. C.) 86 Fed. 35; *Id.*, 90 Fed. 584; *Id.*, 93 Fed. 712, 35 C. C. A. 547. In the present case T. H. Gage, Jr., assignee in insolvency, appointed on November 5, 1897, under the laws of Massachusetts, and who was upon his petition permitted to intervene in this suit, denies the complainant's right to relief. The answer of the assignee denies that the bonds were duly issued, or are a valid obligation of the Worcester Cycle Manufacturing Company; alleges that the said company was not, at the time of the commencement of the suit, in default, and that, therefore, the suit was prematurely brought; and also alleges that at the commencement of the suit there was a large amount of personal property in the state of Massachusetts, which, as after-acquired property, is not included within the mortgage. Upon a state of facts in some respects similar, it was held by the circuit court of appeals of the Second circuit that the bonds were issued for value, and that the holders are entitled to the rights and remedies which the mortgage secured to them. 93 Fed. 712, 714, 715, 35 C. C. A. 547. The decision in the circuit court was to the effect that a *prima facie* case had not been made out on evidence similar to that upon which the complainant relies. This decision was reversed in 93 Fed. 712, 35 C. C. A. 547; the court saying:

"They have certainly made out a *prima facie* case, and, in the absence of any evidence impugning the good faith of the transaction, it must be held that the bonds were issued for value, and that the holders are entitled to the rights and remedies which the mortgage secured to them."

The intervener contends that evidence impugning the good faith of the transaction has now been supplied, and that for this reason the decision of the circuit court of appeals is not in point. While it

is apparent from the statements of the old and new companies that the assets were taken at valuations greatly in excess of the actual values, there is no definite evidence upon which the court would be justified in finding that the issue of bonds was in pursuance of a scheme to defraud creditors, or that it was not made in good faith. As the directors and stockholders alike concurred in the votes, the case involves no breach of trust towards the corporation. *Sanford Tool Co. v. Howe, Brown & Co.*, 157 U. S. 312, 15 Sup. Ct. 621, 39 L. Ed. 713. While the assignee represents the creditors of the company, there is no proof of the names of these creditors, or of the amounts due them, or of the dates at which their claims matured. The fact that taxes on personal property assessed on May 1, 1896, have not yet been paid is not, in my opinion, a sufficient reason for invalidating the mortgage.

In view of the action of the stockholders and directors, we cannot assume that the corporation was improperly controlled by the holder of the bonds, or that the consolidation scheme was not a legitimate plan for the extension and carrying on of the business. As the representative of creditors whose claims came into existence subsequent to the date of the mortgage, the assignee, so far as appears, has no grounds upon which he is entitled to attack the mortgage. *Trust Co. v. Bridges*, 57 Fed. 753, 770, 771, 6 C. C. A. 539.

The assignee's further objection that the complainant has not shown any default existing for six months in the payment of interest is not substantial or tenable. *Central Trust Co. v. Worcester Cycle Mfg. Co.*, 93 Fed. 712, 718, 719, 35 C. C. A. 547.

The next question is as to the claim of the assignee to the personal estate of the mortgagor acquired subsequently to the date of the mortgage. The mortgage contains clauses covering after-acquired property. It is stipulated that \$14,000 of the personal property that came into the receiver's hands was acquired by the cycle company after the date of the mortgage. Unless the taking of possession by the receiver was a reduction to possession upon behalf of the mortgagee, this after-acquired property was not protected by the mortgage against the claims of the general creditors. It is clear, from the decision of the circuit court of appeals in *Central Trust Co. v. Worcester Cycle Mfg. Co.*, 93 Fed. 716, 717, 35 C. C. A. 547, that the appointment and custody of the receiver made no change in the status of the title. At the date of the appointment of a receiver, the general creditors were entitled to assert their claims against the after-acquired property. Upon the present hearing, it is proper only to determine the right of the complainant to a foreclosure, and the property to be affected thereby. The mortgage lien did not attach to the after-acquired property. What may be the right of the assignee to share in the fund now in the hands of the receiver is a matter to be determined hereafter.

The complainant is entitled to a decree of foreclosure upon all property of the defendant company described in the mortgage and in existence at its date, and to a lien upon the proceeds thereof; subject to such valid charges as may hereafter be determined to exist thereon.



**TERRY v. SKINNER. TUTTLE v. TERRY. TERRY v. NALOR et al**

(Circuit Court, E. D. North Carolina. August 8, 1901.)

Nos. 458, 463.

**1. NONRESIDENT PARTIES—NOTICE—DESIGNATING ATTORNEYS.**

Plaintiff, a nonresident of the state, not having designated an attorney within the district on whom notice or other process may be served, as required by circuit court rule 32, cannot complain that defendant's motion for removal of cause was heard *ex parte* without notice to him.

**2. REMOVAL OF CAUSE—DISCRETION OF JUDGE.**

Under circuit court rule 20, providing that on the affidavit of plaintiff or defendant, showing good cause, a judge may remove a cause from one place of holding court to another, the question of removal is addressed to the discretion of the judge.

F. H. Busbee, for Terry.

E. F. Aydlott, for Skinner.

PURNELL, District Judge. All the above-entitled civil causes are now pending in the circuit court for the Eastern district of North Carolina. *Terry v. Skinner* was commenced in the court at Raleigh, and on motion of defendant removed to the court at Elizabeth City, recently provided for. Harvey Terry is a citizen of Columbus, Ohio, and complains this motion was heard *ex parte* without notice to him. He has not designated an attorney within this district upon whom notice or other process may be served, as required by rule 32, hence cannot complain on this score. Notice was mailed to Columbus, Ohio. Rule 32, adopted at spring term, 1894, is as follows:

"Whenever any proceeding in a cause is filed in this court by any attorney not resident within the district in behalf of a non-resident party, such attorney at the time of filing such proceeding shall designate in writing to be filed in the cause, some member of the bar, resident within the district, upon whom can be served all papers in such cause which could properly be served on such non-resident attorney were he resident within the district."

Regardless of the old maxim, Mr. Terry has acted as his own attorney, and not observed this rule. In *Tuttle v. Terry* there was a motion to remove the cause to Elizabeth City for trial, but on the day set for hearing there was no appearance by or for plaintiff; hence motion was considered as abandoned and dismissed. This cause is retained in the circuit court at Raleigh. In *Terry v. Nalor et al.* there is a motion to remove the cause to the court at Elizabeth City for trial, which is resisted by defendant. The parties favoring removal put it upon the ground of convenience and economy. Terry resists because of local prejudice against him and in favor of Thomas G. Skinner, an ex-congressman, state senator, and prominent man in that section. *Tuttle v. Terry* is not under consideration, but is mentioned for a full understanding of the motions now pending,—one to rescind and to remove. On June 6, 1900, an act of congress (31 Stat. 274, c. 781) provided for terms of the circuit court in and for the Eastern district of North Carolina to be held at Elizabeth City and New Bern. The circuit court for the district is at Raleigh, where the clerk resides, and terms of the court are held at three other places,

where there are deputy clerks. All constitute one circuit court, held at different places. The statute in regard to removals has no application, but the motions under consideration are governed by the rules of court in force in this district since 1886. Rule 20 is: "Upon the affidavit on the part of a plaintiff or defendant, showing good cause, a judge may remove a cause from one place of holding court to another." Hence, the question where a cause shall be heard is one addressed to the discretion of the judge.

In this case or the two cases many affidavits are filed and good reasons given for the position of each party; the one arguing that Elizabeth City is more convenient to parties, witnesses, and records, the other, local prejudice, as before stated, arguing, if not successful, he will pay the cost of witnesses, etc. In exercising a sound discretion, these arguments should be given proper weight, but it is not necessary to answer or consider every reason in detail. Parties litigant should not only have a fair trial, but, as far as may be, even the unsuccessful party should feel that his case has been decided by an impartial court and jury. Mr. Terry evidently believes there is strong prejudice against him in the section of the district surrounding Elizabeth City, and that Mr. Skinner has great influence with jurors summoned to that court. He files strong affidavits to this effect. These affidavits are met with equally strong affidavits denying the prejudice against Terry, records showing he has been reasonably successful in former litigation in that section, but not denying the influence of Mr. Skinner. Allusions are made in the rebutting affidavits to Mr. Skinner's health, but it is hoped this is only a temporary complaint. He spent much time in Raleigh last winter, and it is hoped will again add to the pleasure of friends in that city. The question of economy should have but little weight. Elizabeth City is more than 100 miles from Raleigh, and the rules for taking depositions are ample. True it is more satisfactory to counsel to have witnesses face the jury, but this is not essential in arriving at the facts in a case, and the court can set aside a verdict not in accordance with the law and evidence. But why go through this when at a little inconvenience and additional expense a trial can be had on equal grounds, where there can be no just cause for even a suspicion. Terry lives in Ohio, Skinner near Elizabeth City. In Raleigh they must meet on neutral ground. One case remains in the court at Raleigh, and in the exercise of a sound discretion it seems it would better serve the ends of justice that all, which are to some extent interwoven, should be tried in the same division of the court, at the same place.

It is therefore ordered: That the order heretofore made in *Thomas G. Skinner v. Harvey Terry* be, and the same is hereby, rescinded, and the record in said cause returned to the office of the clerk of the circuit court at Raleigh. Said cause shall stand for trial as though said order had not been made. That the motion to remove No. 463, *Harvey Terry v. Nalor et al.*, from the circuit court at Raleigh, N. C., to the circuit court at Elizabeth City, N. C., be, and the same is, overruled and denied. That, until Harvey Terry complies with rule 32 by designating a member of the bar resident within this district therefor, the deposit of notices and other process in the

office of the clerk at Raleigh, N. C., shall be deemed sufficient service of such notices and process. That Harvey Terry pay the costs incurred in this behalf.

**TACOMA RY. & POWER CO. v. HAYS.**

(Circuit Court of Appeals, Ninth Circuit. August 19, 1901.)

No. 656.

**1. WITNESSES—SURPRISE OF PARTY CALLING WITNESS—RIGHT TO SHOW INCONSISTENT STATEMENTS.**

A party who has been surprised by the testimony of one of his own witnesses upon a material fact may be permitted by the court, in its discretion, to show that the witness had made a different statement previous to the trial, not for the purpose of impeaching the witness generally, but for the party's own protection, by showing why the witness was called, and counteracting his adverse testimony.

**2. STREET RAILROADS—COLLISION WITH VEHICLES—CONTRIBUTORY NEGLIGENCE.**

The rule that the failure of a person to stop, look, and listen before driving upon a railroad track constitutes negligence as a matter of law is not inflexible, even in case of steam railroads, and is only applicable to street railroads on a public street where the attending conditions are such that reasonable care and prudence would require such precautions.

**8. SAME.**

Plaintiff was driving with a covered wagon along a street in a city upon which was an electric railway track. He looked back along the track, which could be seen for a quarter of a mile, and no car was in sight. He drove along the street for 400 feet at a moderate speed, and then turned to cross the track, without again looking back, not having heard any warning signal, when his wagon was struck by a car approaching from that direction, and he was injured. A municipal ordinance limited the speed of cars to 12 miles an hour, and there was evidence tending to show that the car which struck plaintiff was running at double that rate of speed, and that, if the speed had conformed to the ordinance, no collision would have occurred. *Held*, that the question of contributory negligence was properly submitted to the jury.

Ross, Circuit Judge, dissenting.

**In Error to the Circuit Court of the United States for the Western Division of the District of Washington.**

This cause is brought into this court on writ of error to reverse a judgment of the circuit court for the district of Washington, Western division, awarding the plaintiff (defendant in error) the sum of \$2,500 as damages for injuries received from the negligent operation of a street car by the defendant. 106 Fed. 48. It appears from the evidence given at the trial of the case that the plaintiff was a farmer, living some distance from the city of Tacoma, in Washington, and was in the habit of driving to that city at least once a month for the purpose of trading; that on the afternoon of January 15, 1900, he drove up to Beulow's grocery store, at the corner of Thirteenth and C streets, in said city, with a double team attached to a farm wagon covered with canvas, closed behind. The electric cars of the defendant ran on C street generally in one direction, from north to south, there being but a single track on that street. The plaintiff's wagon stood on C street, about 20 feet south of the south line of Thirteenth street, facing south. After unloading his produce, the plaintiff looked around the side of his wagon up C street to the north, and saw no car on the street. He could see as far up as Ninth street, a distance of about a quarter of a mile. He then drove down C street in a southerly direction, between the curb and the track, the horses walking for a part of the distance, and trotting slowly the rest of the way, until they reached a point about 400 feet down

the street, when the plaintiff, without again looking up the street, suddenly turned the horses directly across the track, to go into a livery stable on the opposite side of the street. An electric car immediately struck his wagon, throwing him out upon the pavement, and causing the injuries for which damages are sought to be recovered. It was contended for the plaintiff that when he looked up O street, and saw no car within 1,400 feet of him, he could presume that a car would not overtake him before he could reach 400 feet distant, an ordinance of the city prohibiting the car from attaining a higher rate of speed than 12 miles an hour in that part of the city; that plaintiff was not compelled to anticipate violation of this requirement, or other negligence, on the part of the defendant, and was not guilty of negligence in not looking again for a car before driving across the track. The defendant, on the other hand, contended that the same rule of law applicable to railroad crossings should be applied to street-car tracks in the business portion of the city, and that plaintiff's negligence was, therefore, so great a factor in contributing to his injury as to defeat his action. The defendant moved for judgment in its favor, both at the close of plaintiff's case and at the close of the entire case, but these motions were denied, the court allowing the case to go to the jury.

Crowley & Grosscup (C. S. Fogg and A. G. Avery, of counsel), for plaintiff in error.

Govnor Teats, for defendant in error.

Before ROSS and MORROW, Circuit Judges, and HAWLEY, District Judge.

MORROW, Circuit Judge (after stating the facts as above). The assignments of error present but two questions for determination: (1) Did the court err in allowing the introduction of certain impeaching evidence? (2) Did the court err in submitting the case to the jury upon the evidence?

1. The particular testimony sought to be impeached was given by one F. F. Gray, a witness called for the plaintiff, who testified that he saw the accident in question, and that the car was going at a speed of about 10 or 12 miles an hour. He was then questioned as follows by plaintiff's attorney:

"Q. Did you not tell me, at your house, the other night, that it was going twenty or twenty-five miles an hour? A. I do not think that I did. Q. Do you not know, as a matter of fact, that you told me— Mr. Grosscup: I object to that. This is his own witness. The Court: If you are surprised by the statement of the witness— Mr. Teats: I am. A. I do not remember saying that to you. \* \* \* Q. Did you not state, also, that the car was running about twenty or twenty-five miles an hour? A. No, sir; I do not think I did. I have not any recollection of it."

On rebuttal the plaintiff called a Mr. Lund, who had assisted plaintiff's attorney in procuring evidence in the case, and the following testimony was given with reference to the statements of the witness Gray:

"Q. by Mr. Teats: Did you call upon Mr. Gray some time this week or last week? A. Yes, I called on Mr. Gray last week. Q. Did you talk with Mr. Gray concerning this accident? A. Yes, sir. Q. What did he say, if anything, as to the speed of the car? Mr. Grosscup: I object to that. The Court: Do you claim the right to impeach your own witness? Mr. Teats: I think we ought to, under the circumstances. The Court: It is sometimes admissible to do that where you are taken by surprise. Mr. Teats: We are absolutely taken by surprise. \* \* \* Mr. Teats: Our statement of the case is simply this— The Court: You need not state it. You may ask the

question. Mr. Grosscup: We wish to preserve our exception. (Question read to witness.) A. Have you reference to the car at the time this accident occurred? Q. Yes. A. He said that car was running not less than twenty miles an hour."

The court admitted this evidence upon the statement by plaintiff's counsel that he was absolutely taken by surprise in the testimony of the witness Gray. A diversity of opinion exists upon the question of whether it is competent for a party to prove that a witness whom he has called had previously stated the facts in a different manner, but the trend of judicial expression appears to be in favor of the admission of such testimony, not for the purpose of impeaching the general character of the witness, but for the protection of the party calling him. Like justice to each of the contestants would seem to require that, where the testimony is undoubtedly a surprise, the party should have the privilege of showing why he called the witness; and the jury is quite as competent to judge of the credibility of the witnesses under such circumstances as in other contradictory statements. Exception to the general rule that a party cannot impeach his own witness has been made in many jurisdictions by allowing the introduction by him of other evidence showing that the witness has at other times made statements inconsistent with the testimony then given, and especially is this permitted when the testimony in question relates to a material fact in the case. Provision has been made for such procedure by statute in England and in many of the states, and the practice seems to be favorably regarded by the federal courts.

In the case of *Swift v. Short*, 34 C. C. A. 545, 92 Fed. 567, in discussing the privilege of a litigant to introduce contradicting testimony of other of his witnesses, the court says:

"A litigant may not introduce testimony for the purpose of showing that the general character for truth and veracity of one of his own witnesses is bad, but this rule does not go to the extent of preventing him from showing the verity of any particular fact or transaction which he wishes to establish. He may call witnesses to prove a particular fact, although their evidence with relation thereto contradicts the testimony of other witnesses who have previously testified in his favor with reference to the same transaction. Moreover, under some circumstances, where a party has been deceived by one of his witnesses, who has given testimony which was unexpected, the better view is that the party so deceived may impeach the witness to the extent of showing that the statements made by him on the witness stand are contrary to those made by him before the trial, or before he was sworn,"—citing *Phil. Ev.* 905; *Greenl. Ev.* (15th Ed.) §§ 443, 444; *Melhuish v. Collier*, 15 Q. B. 878; and *Hemingway v. Garth*, 51 Ala. 530.

In *Hickory v. U. S.*, 151 U. S. 303, 309, 14 Sup. Ct. 334, 38 L. Ed. 170, error was assigned in that the court did not allow the defendants to show that they were surprised by the testimony of one of their witnesses. The supreme court stated the rule to be:

"When a party is taken by surprise by the evidence of his witness, the latter may be interrogated as to inconsistent statements previously made by him for the purpose of refreshing his recollection and inducing him to correct his testimony; and the party so surprised may also show the facts to be otherwise than as stated, although this incidentally tends to discredit the witness. \* \* \* By statute in England and in many of the states it has been provided that a party may, in case the witness shall, in the opinion of the judge, prove adverse, by leave of the judge show that he has made

at other times statements inconsistent with his present testimony; and this is allowed for the purpose of counteracting actually hostile testimony with which the party has been surprised,"—citing cases.

It is here specifically left to the discretion of the trial judge to admit the counteracting testimony. The court then shows that in the case in controversy the witness was not a hostile witness; that the testimony denied admission was not in itself prejudicial, but merely contradictory of an immaterial fact; that the privilege desired had been practically granted to the defendants by the court's allowing them to cross-examine the witness if they chose, and to prove the fact to be otherwise than as stated by him. It was held not to be error, because the court, in the exercise of its discretion, declined to concede any further relaxation of the rule. The discretion of the trial judge in the case at bar was similarly exercised. It does not appear that the testimony in question was admitted for any other purpose than that of showing why the witness Gray was called, and counteracting the hostile testimony with which plaintiff had been surprised. This is within the limits generally defined by statute and decision at the present time, and is therefore not reversible error.

2. Did the court err in submitting the case to the jury upon the evidence? The defense in this action is "contributory negligence" on the part of the plaintiff, and the defendant contends that the court erred in refusing to instruct the jury that the plaintiff's conduct in driving in front of the defendant's oncoming car without at that moment looking for its approach was such a want of ordinary care as to preclude him from recovery. The instructions given by the court are not in the record before us, and this question must be decided by the application of well-established rules of law to the evidence presented. The question of negligence is generally one of fact for the jury. It is only where the facts and the inferences to be drawn therefrom are such that all reasonable minds must reach the same conclusion that the question is ever considered one of law for the court. There is no fixed standard in the law by which a court is enabled to say arbitrarily in every case where the line must be drawn between negligence and ordinary care. What may be deemed ordinary care in one case may, under different circumstances, be gross negligence. The policy of the law has relegated the determination of such questions to the jury, under proper instructions from the court. It is their province to note the special circumstances and surroundings of each particular case, and then say whether the conduct of the parties in that case was such as would be expected of reasonable, prudent men under a similar state of affairs. When a given state of facts is such that reasonable men may fairly differ upon the question as to whether there was negligence or not, the determination of the matter is for the jury. *Railroad Co. v. Ives*, 144 U. S. 408, 12 Sup. Ct. 679, 36 L. Ed. 485; *Railroad Co. v. Griffith*, 159 U. S. 603, 16 Sup. Ct. 105, 40 L. Ed. 274. This rule applies equally to the question of contributory negligence, as there is no more of an absolute standard of ordinary care and diligence by which the conduct of the plaintiff is to be judged, as a contributing cause of his

- injury, than in the case of the negligence of the defendant. *Railroad Co. v. Ives*, supra.

In *Railroad Co. v. Powers*, 149 U. S. 43, 13 Sup. Ct. 748, 37 L. Ed. 642, the error assigned, as in this case, was the refusal of the trial court to instruct the jury that the deceased was guilty of such contributory negligence as to prevent a recovery. Mr. Justice Brewer, in delivering the opinion of the court, said:

"It is well settled that, where there is uncertainty as to the existence of either negligence or contributory negligence, the question is not one of law, but of fact, and to be settled by a jury; and this whether the uncertainty arises from a conflict in the testimony, or because, the facts being undisputed, fair-minded men will honestly draw different conclusions from them."

The primary negligence of the defendant is practically conceded in the case at bar. It appears from the evidence that at the time of the accident the car was rolling along the street of its own accord, there being a slight down grade at that point. The motorman testifies that he rang the bell, and supposed that the plaintiff heard it; that when the car was about 40 or 50 feet back of the wagon plaintiff turned his horses squarely across the track; that the brakes were immediately put on the car, but the track was moist and slippery, and the car could not be stopped before striking the wagon, nor until it had run some distance after colliding,—the testimony of the witnesses upon this point varying from 50 to 200 feet. The testimony of defendant's witnesses is not clear as to the rate of speed at which the car was running at the time the collision became imminent. Plaintiff's witnesses testify that it was running at the rate of from 20 to 25 miles an hour, and that the usual rate of running at that point was higher than 12 miles an hour, the statutory limit. In many jurisdictions the running of railroad trains within the limits of a city at a rate of speed greater than is allowed by ordinance is negligence per se, and with reference to street cars it has been held that any speed in excess of the allowable rate is at least evidence of negligence. *Shear. & R. Neg.* (5th Ed.) § 485a; *Railroad Co. v. Duvall* (Neb.) 58 N. W. 531, 533. The negligence of the plaintiff is, therefore, the pivotal point in the case at bar. Was he negligent, and, if so, was such negligence a contributing cause to his injury? The defendant maintains that the rule usually applied to the conduct of persons crossing the tracks of steam railroads is applicable to street railroads as well, and that the omission of the plaintiff to "stop, look, and listen" before crossing the track was negligence as a matter of law. This rule, even in the case of steam railroads, is not inflexible, but is dependent upon the surrounding circumstances to a greater or less degree, and is only applicable to street railways where the attending conditions are such that reasonable care and prudence would dictate such precautions. The duties of persons with respect to steam railways and street railways are not so analogous as to be governed at all times by the same rule. *Railway Co. v. Whitcomb*, 14 C. C. A. 183, 66 Fed. 915, 919. The rights of the person are greater, and the dangers less, in connection with the latter; the rights of street cars, no matter by what power impelled, not being superior to those of other vehicles, save in the one instance where a vehicle is

bound to get out of the way, and not to obstruct the passage of the car, owing to the inability of the car to travel in any other part of the street. The element of trespass is entirely absent in the case of a person crossing a street railway at any point, and the only care required of him is that which a reasonably prudent man would exercise, having due regard to the rights of others, and assuming that others (including the street-car companies) will exercise the same care; in fact, knowing that such care is imposed by municipal regulation upon the persons operating the street cars. This assumption does not, of course, warrant such a reliance upon it as to neglect means of self-preservation, but is an element of consideration in arriving at the standard of care to govern the particular case.

In the case of *Schilling v. Railroad Co.* (Sup.) 62 N. Y. Supp. 403, it was held that:

"Where a driver looked both ways before driving onto a city street on which a street railway was operated, to ascertain whether cars were approaching, he was not guilty of contributory negligence, as a matter of law, in not again looking behind him to ascertain the approach of cars during the time necessary to drive one block."

In *Shea v. Railway Co.* (Minn.) 52 N. W. 902, the supreme court of Minnesota held that:

"The degree of care required at the crossing of a highway and an ordinary steam railroad is not the test of care required in crossing the track of a street railroad on a public street. Hence the rule in the former case, that one approaching the crossing must look up and down the track before attempting to cross, is not necessarily applicable to the latter. The failure to do so is not, as a matter of law, negligence."

In *Railroad Co. v. Albright* (Ind. App.) 42 N. E. 238, the appellate court of Indiana declare that the "strict rules as to care governing in railroad crossing collisions do not apply to street-car cases." In that case the plaintiff, on turning into a street, looked, and saw that for a quarter of a mile no car was coming from the south, and also saw a car coming from the north, about a block away. He drove north until the south-bound car passed him, and then turned to cross the track, when he collided with a north-bound car. The evidence was conflicting as to whether a signal was given, and as to the speed of the car. It was held that the question of plaintiff's contributory negligence in not looking again at the moment of turning his horses onto the track was properly submitted to the jury.

In *Rapid-Transit Co. v. Seigrist* (Tenn. Sup.) 33 S. W. 920, plaintiff was approaching a street-car track while driving a delivery wagon. When about 10 yards from the crossing, before attempting to pass over the track, he looked back to see if the car was coming. He saw it some distance up the hill, seemingly 200 or 250 yards behind him, and thought he had plenty of time to cross the track in front of the car. He started to drive across, and did not look back again until the front wheels of his wagon were upon the track, and he heard the car coming very fast. A collision occurred, and plaintiff was injured. The court held that the jury was justified in finding that the plaintiff had observed the requisite precautions to prevent an accident, and that he was free from culpability in the matter; that, to entitle the plaintiff to recover for injuries received while passing



over a street railway, he need not show absolutely that he looked carefully up and down the track before venturing upon it,—citing *Beach, Contrib. Neg. (2d Ed.) § 290*. The court said further that, with the belief that he could safely cross the track, and rightly assuming that the motorman saw him, and had the car under reasonable control, the plaintiff had the right to continue his journey across the track without hindrance, and, having had that right, and having attempted to exercise it in a prudent manner, he could in no true sense be charged with responsibility for the consequences of his mistaken assumption that the motorman would likewise be prudent and not run upon him.

In *Laufer v. Traction Co. (Conn.) 37 Atl. 379*, the supreme court of errors of Connecticut discusses the standard of ordinary prudence applicable to such cases as the one at bar, and cites with approval the statement of the court in *Connelly v. Railroad Co. (N. J. Err. & App.) 29 Atl. 438*, with reference to the conduct of a traveler in crossing an electric railway track, as follows:

"If other vehicles threaten his safety, or if his attention is engrossed or distracted by the apparent imminence of danger from other sources, he must act with ordinary prudence with reference \* \* \* to the group of circumstances that makes up the situation by which he is confronted. How a prudent man would act in the face of concurrent and distracting dangers must, in the nature of things, be a question of fact to be passed upon by the jury, and not a question of law upon which the court may order a nonsuit or direct a verdict."

The Connecticut court further states that:

"In every case where the inquiry is whether or not a party has acted with due care, the trier must apply the standard of the ordinarily prudent man. What would a man of ordinary prudence have done, situated as this party was?"

The same question may be asked in the case under consideration. It appears from the evidence that the plaintiff looked up the street just as he left the grocery, and could see no car on the track for a distance of a quarter of a mile; that, after proceeding along the line of the track at a moderate speed for 400 feet, he turned to cross the track, without again looking for a car, not having heard any warning signal of the approach of a car, and not believing that a car could overtake him in that length of time if running at the rate of speed required by municipal ordinance. He had a right to drive along the street, and had he not the further right, after he had looked and seen no car approaching, to drive across the track within a reasonable time without again looking, and to assume that he would not be recklessly run down? In exercising such rights, did he do all that a cautious and prudent man would have done under like conditions? These are purely questions of fact, determinable from the circumstances of the case as presented by the evidence, and from which different inferences might be drawn by different minds. Such questions are entirely within the province of the jury, under proper instructions from the court as to the law applicable thereto. That the instructions given were proper must be inferred, as no objection thereto appears to have been made by counsel.

On the two points involved we find no error, and the judgment is therefore affirmed.

ROSS, Circuit Judge. I feel obliged to dissent from the judgment in this case. It seems to me to be a difficult matter to conceive of a stronger case of contributory negligence than this one, where, according to the statement of the court, the plaintiff, with a double team attached to a farm wagon covered with canvas, closed behind, with knowledge of a street-car track operated by electricity, and looking up it for a distance of about a quarter of a mile to see if a car was in sight, and, seeing none, drove down the track between it and the curb of the sidewalk, the horses walking for a part of the distance and trotting slowly the rest of the way until they reached a point about 400 feet down the street, when, without again looking up the street, he suddenly turned his horses directly across the track to go into a livery stable on the opposite side of the street, when he was struck by an approaching car. It seems to me to have been negligence of the grossest kind for any sane person to travel slowly 400 feet along a railroad track, and then undertake to cross it without looking to see or stopping to hear if a car is approaching.

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WHITMAN v. CITIZENS' BANK OF READING. SAME v. NORTON.  
SAME v. WATTS.

(Circuit Court of Appeals, Second Circuit. June 13, 1901.)

Nos. 92, 111, 93.

1. CORPORATIONS—DISSOLUTION—KANSAS STATUTE.

Under the provision of Gen. St. Kan. c. 23, § 40, that a corporation shall be deemed to be dissolved, for the purpose of enabling its creditors to prosecute suits against stockholders, if it has suspended business for more than one year, as construed by the supreme court of the state, such suspension of business operates as a dissolution only for the purpose stated; for all other purposes the corporation continues, and may be sued and may defend actions as before, and service may be made upon, or accepted by, the same officers.

2. SAME—VALIDITY OF JUDGMENT AGAINST—APPEARANCE BY CASHIER.

Under the statute of Kansas, which authorizes service to be made upon the cashier, secretary, or managing agent of a corporation when the president is absent from the county, the acceptance of service by the cashier of a corporation of that state, or his voluntary entry of appearance in a suit brought against the corporation more than a year after it has suspended business, is valid and binding on the corporation where the president was a nonresident and absent from the state.

3. SAME—STATUTORY LIABILITY OF STOCKHOLDER—ACTION TO ENFORCE.

An action by a creditor of a Kansas corporation against a stockholder to enforce the remedy given by Gen. St. Kan. c. 23, § 32, is transitory, and may be maintained in any court of competent jurisdiction, either federal or state, in states other than Kansas.

4. SAME—INTEREST.

Under the provisions of the constitution and statutes of Kansas, which secure dues from corporations by the individual liability of stockholders, and require a stockholder to pay an unsatisfied execution against the corporation, a creditor enforcing the remedy so given against a stockholder in another forum is entitled to recover 10 per cent. interest to

the date of trial, where that was the contract rate, and also the rate borne by the judgment rendered thereon against the corporation in a court of Kansas, in accordance with the requirement of the state statute.

**5. SAME—ACTION BY ASSIGNEE.**

The remedy given to judgment creditors of a corporation by Gen. St. Kan. c. 23, § 32, which authorizes a plaintiff in an unsatisfied execution against the corporation to "proceed by action to charge the stockholders with the amount of his judgment," may be enforced by an assignee of the judgment by an action in his own name.

**6. SAME—BASIS FOR ACTION—JUDGMENT IN SPECIAL PROCEEDING.**

Gen. St. Kan. c. 23, § 32, provides that after the return of an execution against a corporation unsatisfied an execution may be issued against any stockholder, but that no such execution shall issue "except on an order of the court in which the action, suit, or other proceeding shall have been brought or instituted." The section also provides that the plaintiff in the execution may proceed by action to charge the stockholder. A Kansas corporation made an assignment, and a creditor appealed from an order of the assignee disallowing its claim to the district court, as provided for by statute. Both the corporation and assignee appeared and contested the suit, and the court rendered a judgment establishing the claim, upon which an execution was subsequently issued against the corporation, and returned unsatisfied. *Held* that, notwithstanding such judgment was rendered in what was denominated by the statute a special proceeding, and was in the nature of a judgment in rem, it was one within the contemplation of said section 32, on which the court was authorized to award an execution, and that such judgment and execution constituted the required prerequisite to an action to charge a stockholder.

**7. SAME—LIMITATIONS—LAW GOVERNING.**

An action to charge a stockholder in a Kansas corporation with liability for debts of the corporation, under the constitution and statutes of the state, is governed as to limitation by the law of the forum; there being no limitation prescribed as to such actions by the statute of Kansas other than that contained in its general statute of limitations.

**In Error to the Circuit Court of the United States for the Southern District of New York.**

The Citizens' Bank of Reading, a Pennsylvania corporation, Kate A. Norton, a citizen of Kansas, and John Watts, as receiver of the American National Bank of Arkansas City, a national banking corporation established in the state of Kansas, each brought an action at law in the circuit court for the Southern district of New York against George L. Whitman, a citizen of the state of New York, resident in the city of New York, and stockholder in the Arkansas City Investment Company, an insolvent Kansas corporation, to recover the amount of debts due to the plaintiffs, respectively, by said corporation. The suits were brought under section 32, c. 23, Gen. St. That section and section 44 of the same chapter, which gave another remedy to the creditor of an insolvent corporation against a stockholder, and section 40 are as follows:

"Sec. 32. If any execution shall have been issued against the property or effects of a corporation, except a railway or a religious or a charitable corporation, and there cannot be found any property whereon to levy such execution, then execution may be issued against any of the stockholders to an extent equal in amount to the amount of stock by him or her owned, together with any amount unpaid thereon, but no execution shall issue against any stockholder, except upon an order of the court in which the action, suit or other proceeding shall have been brought or instituted, made upon motion in open court, after reasonable notice in writing to the person or persons sought to be charged; and, upon such motion, such court may order execution to issue accordingly; or the plaintiff in the execution may proceed by action to charge the stockholders with the amount of his judgment."

"Sec. 44. If any corporation, created under this or any general statute of this state, except railway or charitable or religious corporations, be dissolved, leaving debts unpaid, suits may be brought against any person or persons who were stockholders at the time of such dissolution, without joining the corporation in such suit; and if judgment be rendered, and execution satisfied, the defendant or defendants may sue all who were stockholders at the time of dissolution, for the recovery of the portion of such debt for which they were liable, and the execution upon the judgment shall direct the collection to be made from property of each stockholder, respectively; and if any number of stockholders (defendants in the case) shall not have property enough to satisfy his or their portion of the execution, then the amount of deficiency shall be divided equally among all the remaining stockholders and collections made accordingly, deducting from the amount a sum in proportion to the amount of stock owned by the plaintiff at the time the company dissolved."

"Sec. 40. A corporation is dissolved, first, by the expiration of the time limited in its charter; second, by a judgment of dissolution rendered by a court of competent jurisdiction; but any such corporation shall be deemed to be dissolved for the purpose of enabling any creditors of such corporation to prosecute suits against the stockholders thereof to enforce their individual liability, if it be shown that such corporation has suspended business for more than one year."

In the circuit court, a verdict in each case was directed for the plaintiff, and to review the respective judgments entered upon those verdicts, each defendant brought a writ of error. The facts which are applicable to each case are that the Arkansas City Bank was formed in September, 1886, for the purpose of receiving money on deposit, and conducting a general banking, loaning, and investment business. The name was changed by vote of the stockholders on May 25, 1889, to Arkansas City Investment Company. A voluntary assignment of all its property for the benefit of its creditors was made on December 15, 1890, to Charles A. Scruton. The defendant was, at the organization of the bank, and still is, a stockholder therein to the amount of 1,000 shares.

Wm. G. Wilson and Wm. G. Clarke, for plaintiff in error.

Wm. B. Hornblower, for defendants in error Citizens' Bank and Watts.

Charles E. Hughes, for defendant in error Norton.

Before SHIPMAN, Circuit Judge, and WHEELER and COXE, District Judges.

SHIPMAN, Circuit Judge, after stating the foregoing facts, delivered the opinion of the court, as follows:

#### The Citizens' Bank of Reading Case.

A judgment in favor of the plaintiff for \$4,997.50 upon suit brought on December 14, 1894, in the proper state court in Kansas, was recovered against the corporation on April 16, 1895. Execution was issued thereon on April 30, 1895, and was returned unsatisfied. The complaint also set forth the notes upon which the judgment was rendered. No defense arising upon a statute of limitations was pleaded. *Retzer v. Wood*, 109 U. S. 185, 3 Sup. Ct. 164, 27 L. Ed. 900. The answer denied the allegations in regard to the judgment, but made no averment of defects "which required extrinsic evidence to make them apparent." The face of the record showed an acceptance of service of process by Huey as cashier and manager, and the appearance of an attorney for the defendant, and proof was not permissible, under the averments of the answer, that he acted without authority. Hill

*v. Mendenhall*, 21 Wall. 453, 22 L. Ed. 616. It is said that the record shows upon its face that the Kansas court was without jurisdiction because the acceptance of service was made by Huey as cashier and managing officer, and the employment of an attorney was also made by him, four years after the general assignment for the benefit of creditors, and therefore after his authority and duties as cashier had ceased, and after the dissolution of the corporation. This position is not sustained by the Kansas decisions upon the construction of the statutes now in question, or of the statutes which regulate the service of process upon corporations. It is true that a Kansas corporation is, under section 40, heretofore quoted, deemed to be dissolved for the purpose of enabling any creditors of such corporation to prosecute suits against the stockholders to enforce their individual liability without a judgment against the corporation, if it be shown that such corporation had suspended business for more than a year; but this dissolution is merely for that specified purpose. "The cessation of business does not operate as a legal or complete dissolution of the corporation, but it is deemed to be dissolved but for a single purpose,—that of enabling creditors to enforce the individual liability of stockholders. For all other purposes, the bank continued to be a corporation in the eye of the law, and creditors had a right to sue the bank in its corporate capacity." *Sleeper v. Norris*, 59 Kan. 555, 53 Pac. 757. The remedies under sections 32 and 44 are distinct, and a creditor can adopt either, unless prevented by the statute of limitations. *Cottrell v. Manlove*, 58 Kan. 405, 49 Pac. 519.

In the absence of the president of a corporation from the county wherein the corporation is located, service upon the cashier, secretary, or managing agent is, by the statutes of Kansas, valid service upon the corporation. The waiver of the service of summons by the president of a Kansas corporation, and his voluntary entering of appearance more than a year after it ceased to do business, was held to be sufficient authority for a court to render a valid judgment against the corporation, which was a sufficient foundation for an action against a stockholder; the execution having been unsatisfied. *Bank v. Prescott*, 60 Kan. 490, 57 Pac. 121. The president of the investment company was a nonresident of Kansas. Huey was its cashier, secretary, and the only managing officer, and, if it is of any importance, he was also a director. Valid service could be made upon him, and his acceptance of service was also valid.

The next question is the one, which, having been presented to this court in *Whitman v. Bank*, 28 C. C. A. 404, 83 Fed. 288, came before the supreme court in the same case by certiorari (176 U. S. 559, 20 Sup. Ct. 477, 44 L. Ed. 587), and was whether an action upon the stockholders' liability, as prescribed in section 32, was transitory, and could be maintained in the courts of competent jurisdiction, either federal or state, in states other than Kansas. The supreme court decided the question in the affirmative, and held that the constitution of Kansas had cast a definite liability upon each stockholder of a banking corporation; that, to the extent of declaring the liability, the constitution was self-executing; that, by section 32, the legislature had prescribed the mode of enforcing the liability; and that "the lia-

bility, which by the constitution and the statutes is thus declared to rest upon the stockholder, though statutory in its origin, is contractual in its nature," and that the statute was not penal in its character.

It is now urged by the defendant, and the argument was pressed in each of the three cases, that, inasmuch as a few days after the decision in the Bank of Oxford Case, the supreme court of Kansas, in *Woodworth v. Bowles*, 61 Kan. 569, 60 Pac. 331, had declared that the constitutional provision was not self-executing, the decision of the highest court of a state in regard to its constitution is controlling, and that the supreme court of the United States will adopt the view of the Kansas court. *Fairfield v. Gallatin Co.*, 100 U. S. 47, 25 L. Ed. 544. It is incumbent upon this court to regard the expressed opinion of the supreme court of the United States as controlling until changed by itself, and, furthermore, it is not apparent that the conclusions of that court, in regard to the transitory character of an action against the stockholder will be modified, if it should accede to the views of the highest court of Kansas in regard to the self-executing character of the constitutional provision. This court, in the *Bank of Oxford Case*, 28 C. C. A. 404, 83 Fed. 288, decided that, upon the premise that the constitutional provision was not self-executing, the remedy by section 32 was transitory, and is still of that opinion; and, therefore, we do not think it needful to reconsider the question.

The judgment of the Kansas court was for the amount due, with 10 per cent. interest, and in the verdict of the jury in the circuit court the same rate of interest was allowed to the date of the trial. The propriety of an allowance of 10 per cent. interest was and is challenged by the defendant. The notes upon which the Kansas judgment was based bore interest at 10 per cent. The Kansas statute provides that when a rate of interest is specified in any contract, that rate shall continue until full payment is made; and any judgment rendered on any such contract shall bear the same rate of interest mentioned in the contract, which rate shall be specified in the judgment, not exceeding 10 per cent. per annum. The Kansas constitution declares that "dues from corporations shall be secured by individual liability"; in other words, that the stockholder shall be liable for the debts of the corporation to an amount equal to the par of his stock. The obligation of the stockholder is to pay the debts of the corporation, and section 32 declares that the stockholder must pay the unsatisfied execution, or that the plaintiff in the execution may proceed to charge him with the amount of the judgment. The suit is not upon the judgment, but to enforce the statutory remedy against a stockholder, arising upon his contract to pay the debts of the corporation, and the amount due to the plaintiff is conclusively established by a judgment bearing 10 per cent. interest. The distinction between the New York and Massachusetts cases (*Wells, Fargo & Co. v. Davis*, 105 N. Y. 670, 12 N. E. 42; *Clark v. Childs*, 136 Mass. 344), which allow only the statutory interest of the forum upon judgments of other states, and this case is that in those cases interest was allowed as damages, and in this case interest at 10 per cent. was al-

lowed to the date of trial, because the stockholder had agreed to pay it, and the Kansas statute required a judgment to bear interest not exceeding 10 per cent., if such interest was a part of the contract.

We see no error in the judgment in this case.

#### The Norton Case.

This suit was brought on July 15, 1897, to recover the amount evidenced by five judgments against the Arkansas City Investment Company, each rendered by the Kansas state court, having jurisdiction of the subject-matter, and each in favor of a citizen of Kansas. Kate A. Norton recovered judgment February 21, 1894, for \$2,982.28. Amanda A. Norton recovered judgment February 27, 1894, for \$3,752.31. Charles A. Scruton recovered judgment March 13, 1893, for \$6,149.65. Esther A. Denton recovered judgment September 25, 1895, for \$767.68. Sarah Young recovered judgment September 9, 1895, for \$7,513.08. The last-named four judgments were assigned to Kate A. Norton before the suit was brought. No statute of limitations was pleaded. The answer averred that the judgments were taken without jurisdiction on the part of the district court of Kansas acquired by due and personal service, or by any authorized appearance, or by any other mode of acquiring jurisdiction over the Arkansas City Investment Company. In the two Norton Cases the defendant appeared by attorneys, and apparently made a vigorous defense. The attempt to prove that neither attorney was authorized by the corporation to appear in its own behalf was very weak. The Denton and Young judgments were rendered upon voluntary appearances by Huey, the cashier of the defendant, who waived the issuance and service of process. Process in the Scruton Case was personally served upon Huey as cashier and managing officer, and judgment was rendered upon default.

The provisions of the Kansas statutes with regard to the service of a summons are as follows:

"Sec. 68. A summons against a corporation may be served upon the president, mayor, chairman of the board of directors, or trustees or other chief officer; or, if its chief officer is not found in the county, upon its cashier, treasurer, secretary, clerk or managing agent; or, if none of the aforesaid officers can be found by a copy left at the office or other place of business of such corporation with a person having charge thereof."

"Sec. 64. The service shall be by delivering a copy of the summons to the defendant personally or by leaving one at his usual place of residence at any time before the return day.

"Sec. 65. In all cases the return must state the time and manner of service.

"Sec. 66. The officer to whom the service is directed must return the same at the time therein stated."

Huey was the cashier, secretary, and managing agent of the corporation from the time of its organization, and, the president being a nonresident of the state, was in exclusive control of its affairs. The Kansas decisions and statutes show that the bank was continuously an existing corporation, and subject to be sued; that the cashier was the proper person to be served with process, and to act for the bank, in the absence of the president; and that, being the proper officer to be served, he has authority to give jurisdiction to the court by

waiving service of the summons, and entering his appearance for the bank. *Sleeper v. Norris*, 59 Kan. 555, 53 Pac. 757; *Bank v. Prescott*, 60 Kan. 490, 57 Pac. 121; *City of North Lawrence v. Hoysradt*, 6 Kan. 170.

It is next suggested that the claims evidenced by the assigned judgments cannot be included in one suit, because, under section 32, the plaintiff in the execution may proceed to charge the stockholder, and, therefore, the plaintiff in the action must be the person named in the execution. Such a construction of the statute would be an exceedingly narrow one. Inasmuch as the plaintiff in the execution may charge the stockholder, the statute can properly be construed to mean the plaintiff in the execution and the person who represents him, whether administrator, executor, or assignee. Inasmuch as assignments of judgments are permitted, and the assignee is permitted by statute to sue in his own name, it must follow that it was not necessary to bring five suits, but the claims could be consolidated without harm to the rights of the assignee.

The question in regard to interest in excess of 6 per cent. until the date of the judgment against the stockholder was considered in the previous case.

There was no error in the judgment.

#### The Watts Case.

The distinguishing question in this case is not whether the plaintiff had recovered a valid judgment, but whether it was the judgment which is made a prerequisite to an action; that is, a judgment upon which an execution could properly issue. The provisions of the Kansas statute (sections 362, 365-368, Gen. St. 1899) in regard to the allowance of claims against an estate which had been assigned for the benefit of creditors are as follows:

"The assignee, having given notice of the time and place of adjusting and allowing demands against the estate of his assignor, hears and decides upon the allowance of all claims that have been presented, and his decision is final, unless a creditor or some other person interested shall, after a decision is made on any such claim, ask an appeal therefrom; and all appeals so asked shall be allowed by such assignee to the district court of the county having jurisdiction thereof. All appeals so allowed shall be taken and made in the same manner as appeals are taken and made in justices' courts, and the assignee shall certify all cases and transmit the papers to the district court. Upon such appeal being allowed and certified, the court becomes possessed of the case, and hears it de novo. The parties are in court without further service of process. All judgments rendered in favor of any claimant in the district court are certified by the clerk thereof to the assignee, who shall allow the same, and class it as if such judgment had been rendered by him on the original hearing thereof."

In this case, the receiver of the American National Bank of Arkansas City presented the claim of that bank against the Arkansas City Investment Company to Charles A. Scruton, as its assignee, who disallowed the claim. The receiver thereupon appealed to the district court. The investment company appealed by its attorney, and contested the allowance of the claim. A trial by jury was waived, and the case was heard by the court, which made a finding of facts, allowed the claim, and entered a judgment as follows:



"That the plaintiff, J. Sam Brown, as receiver of the American National Bank of Arkansas City, Kansas, do have and recover of and from the Arkansas City Investment Company and O. A. Scruton, as such assignee, the sum of \$27,872.77, together with interest thereon from this date at the rate of ten per cent. per annum, together with the costs herein taxed at the sum of \$47.90; and that said Charles A. Scruton, as assignee of the Arkansas City Investment Company, and his successors in trust, pay said claim so allowed in due course of administration of said insolvent estate."

The judgment was rendered October 31, 1893, and execution was, at the request of the receiver, issued on March 3, 1896, and was returned unsatisfied. This suit was commenced August 13, 1896, and subsequently the complaint was amended by alleging the notes on which the claim before the district court was based. The statute of limitations was pleaded, and the answer denied the judgment, but made no averments in regard to nonservice or nonappearance of the bank. The admission of the judgment was objected to because it was not the judgment as alleged, but was the record of a special proceeding.

Without reciting the various particulars in which the record shows the appearance of the investment company upon the appeal, it sufficiently shows that the corporation and Scruton, as its assignee, both appeared and defended against the allowance of the claim. The argument that this judgment upon the appeal was not a judgment against the investment company in personam, or one upon which an execution could properly issue, is founded upon the fact that the statutes of Kansas divide remedies in courts of justice into actions and special proceedings; that a judgment is the final determination of the rights of the parties in an action; that the appeal was a special proceeding to determine the validity of the claim as against the assigned estate; that the judgment is in rem, and acts only upon the estate; and that the statute in regard to appeals of this class does not contemplate the issuance of an execution. In support of these propositions, reference is made to *Banking Co. v. Kitchen*, 8 Kan. App. 445, 57 Pac. 494, in which it was held that an allowance of a claim by an assignee is not a judgment in personam, and not a merger of the debt, but affects only the assigned estate; and to *Limbocker v. Higinbotham*, 52 Kan. 696, 35 Pac. 783, in which the court said that the assignment proceeding is in the nature of a proceeding in rem, and that while an assignment for creditors is open, a creditor can maintain an action upon the original claim against the assignor, and recover a personal judgment; and it has also been held that the district court upon the appeal acts only in an appellate capacity. *Kohn v. Hine*, 7 Kan. App. 776, 54 Pac. 117. This line of argument is based entirely upon the statutory character of an appeal from the decision of an assignee, which is a special proceeding, and may properly be styled a proceeding in rem; and if it was apparent that the provisions of section 32 were limited to a judgment in an action in personam, the argument would have much force. Section 32, after declaring that an execution may issue against a stockholder, provides that no execution shall issue "except upon an order of the court in which the action, suit or other proceeding shall have been brought or instituted; \* \* \* or the plaintiff in the execution may proceed by action to charge

the stockholder with the amount of his judgment." The original judgment was not necessarily to be founded upon an action in personam, but upon an action, suit, or other proceeding; and if a judgment in favor of the validity of the claim had been rendered in a proceeding in which the insolvent corporation was a party, and had been heard, although that proceeding was of a special character, the district court had apparently the authority to issue an execution. Section 32, in prescribing the mode of enforcing a stockholder's liability, did not apparently intend to provide that it was necessary to institute an original suit against the corporation; but if a judgment had in fact been rendered in a proceeding to ascertain the validity and the amount of the debt in which the corporation and the creditor were opposing parties, an execution could rightfully be issued.

In the appeal from the decision of Scruton the validity of the debt alleged to be due to the receiver of the American National Bank was the matter in issue, and the receiver and the investment company were in fact the contending parties, although Scruton, as assignee of the insolvent estate, was also a defendant. The cause was sometimes entitled as that of the receiver against the investment company and sometimes against Scruton, as assignee, and finally, upon a motion for a new trial by the investment company, the defendant was given 90 days to make and serve a case for review, and execution upon the judgment was stayed for 90 days. When the district court decided in favor of the appellant, it decided that the investment company owed, and ought to pay, the debt, and by that decision the stockholder is bound. *Bank v. Farnum*, 176 U. S. 643, 20 Sup. Ct. 506, 44 L. Ed. 619. We are of opinion that the judgment and the execution were such as were contemplated by section 32, and as the Kansas court had the apparent power to render and to issue, and constituted the prerequisites to an action against the defendant which the section required.

In this case statutes of limitations were pleaded. The investment company made a general assignment on December 15, 1890. The claim of the American National Bank, which had been presented to the assignee, was rejected on July 7, 1891, and the appeal was decided October 31, 1893. This suit was brought August 31, 1896, less than three years after the date of the judgment, and was brought under section 32, which requires a judgment against the insolvent corporation and an unsatisfied execution as prerequisites to a suit against a stockholder. Under that section, an action does not lie until a judgment has been obtained. Although by amendment the notes upon which the judgment was based were set forth, and upon the trial their existence and validity were proved, the complaint was still founded upon a single cause of action, and the amendment did not introduce a new and independent cause. But it is said that the cause of action accrued on December 15, 1891, at the expiration of one year from the date of the general assignment, because the decisions of the state of Kansas upon the subject of the applicability of its statutes of limitation have so decided; and the defendant relies upon *Cottrell v. Manlove*, 58 Kan. 405, 49 Pac. 519, and *Bank v. King*, 60 Kan. 733, 57 Pac. 952. In *Cottrell v. Manlove* the su-

preme court of Kansas decided that the remedies under sections 32 and 44 are not cumulative, and that either one can be adopted, and that there was no occasion for a creditor to await the recovery of a judgment against the company; but that, as the statute of limitations of Kansas limited an action to three years from the time when the cause of action accrued, if a plaintiff who can, under section 44, sue the stockholder in one year after the corporation ceases to do business, waits more than three years, and then sues under section 32, the statute of limitations will be applicable. He cannot neglect his remedy under section 44 for more than three years, sue upon another section, and avoid the Kansas statute.

Inasmuch as the Kansas statute is a general one, and the statutes in regard to the liability of stockholders of an insolvent corporation to its creditors do not contain provisions in regard to the limitations of actions, we think that the statutes of the forum in which the suit was brought must apply, and that the Kansas decisions upon the construction of the statute of limitations are not controlling in this state. *Boyd v. Clark* (C. C.) 8 Fed. 849. If the Kansas decisions which have been quoted should be held applicable in this case, it would follow that, because the plaintiff did not sue the defendant upon the notes which were due by the insolvent bank in the district or state of his residence within three years after December 15, 1891, the action would be barred; which would virtually import into the case the Kansas statute of limitations.

The several judgments are affirmed, with costs of this court.

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MILLS et al. v. LEWIS et al.

(Circuit Court of Appeals, Ninth Circuit. August 19, 1901.)

No. 629.

**BANKRUPTCY—PROOF AND ALLOWANCE OF CLAIMS—PREFERRED CREDITORS.**

A payment on account, made by an insolvent within four months prior to his bankruptcy, constitutes a preference, which must be surrendered, under Bankr. Act 1898, § 57g, before the creditor can prove the remainder of his debt; notwithstanding it was made in the usual course of business, and without knowledge on the part of the creditor of the debtor's insolvency, and without relation to the state of the account at the time.

Appeal from the District Court of the United States for the Southern District of California.

John D. Works and Bradner W. Lee, for appellants.

I. H. Johnson and Edward W. Forgy, for appellees.

Before GILBERT and MORROW, Circuit Judges, and HAWLEY, District Judge.

MORROW, Circuit Judge. This is an appeal by creditors of Fixen & Co., bankrupts, from an order of the United States district court in bankruptcy, disallowing appellants' claim against said bankrupts' estate. It appears that the bankrupts were customers

of the appellants, and purchased goods from them at various times within four months from the filing of the petition in bankruptcy, and during the same four months, in the ordinary and usual course of business, made a payment on account to the appellants in the sum of \$288.66. The bankrupts were insolvent at the time this payment was made, but the fact of such insolvency was unknown to the appellants. After the adjudication in bankruptcy, the appellants presented their claim to the referee for allowance, to the amount of \$1,138.29, as being the amount due them from the bankrupts on open account. Objection was made to the allowance of this claim by the appellees,—one a creditor of the bankrupts, and the other the trustee of the bankrupts' estate,—on the ground that the payment of \$288.66 by the bankrupts within the four months' period constituted a preference, under section 60, subds. a, b, of the bankrupt act, precluding the allowance of their claim unless the amount of this preference was surrendered by the appellants. Upon the hearing, the objection was sustained by the referee, and an order made disallowing their entire claim unless the preference adjudged to have been received was surrendered within 30 days' time. The case was then brought before this court upon appeal from the order of the district court. In the case of *In re Fixen* in this court (42 C. C. A. 354, 102 Fed. 295, 50 L. R. A. 605), it was held that a creditor who had received a partial payment of his debt while the debtor was insolvent, and within four months before the latter became bankrupt, could not prove the balance of his debt as a claim against the estate of the bankrupt without surrendering the preference so received, notwithstanding the fact that the payment was made in the ordinary course of business, and that the creditor had no knowledge or reasonable cause to believe that the debtor was insolvent or that a preference was intended. This construction placed upon the provisions of the bankrupt act has since been affirmed in the recent case of *Carson, Pirie, Scott & Co. v. Chicago Title & Trust Co.*, 5 Am. Bankr. R. 814, 21 Sup. Ct. 906, 45 L. Ed. 1171. The present case arises in the same bankruptcy proceedings as in the former case in this court (*In re Fixen*, *supra*), and the facts are substantially the same; the only difference being that in the former case the claim of the creditor included goods sold to the bankrupts both before and after the preferential payment, while in the present case the claim of the creditor is entirely for goods sold to the bankrupts before the preferential payment was made. Furthermore, it appears that the several bills of merchandise involved in the claim of the creditor were sold on 30 and 60 days' credit, and that bills amounting to \$755.38 had not yet become due when the payment which the creditor has been required to surrender was made by the bankrupts. If there is any difference in the legal effect of the payments made by the bankrupts in these two cases, it must be that a payment on account, in the ordinary course of business, followed by further purchases on credit, is less preferential in its character than one where no such credit is received. Especially is this so where there is an actual preference in a payment made in advance of the maturity of the debt. It is contended by

the appellants, however, that there was no legal or actual preference in this case, for the reason that the value of the merchandise sold to the bankrupts during the four months prior to their bankruptcy was in excess of the payment made by them, and that, as the estate of the bankrupts was thereby enriched by the transaction between creditor and debtor, there was no preferential payment on the part of the bankrupts coming within the provisions of the statute. This claim on the part of the creditor is without foundation. The statute declares when a payment made by a bankrupt shall be deemed a preference. The state of the account between the debtor and creditor at the time the payment is made has nothing to do with its character as a preferential payment. The payment in the present case comes within the statute as construed in the cases referred to, and the claim of Mills & Gibb must therefore be disallowed. The order of the district court herein will be affirmed.

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In re NEW YORK ECONOMICAL PRINTING CO.

(Circuit Court of Appeals, Second Circuit. August 22, 1901.)

No. 156.

1. BANKRUPTCY—RIGHT OF TRUSTEE TO AVOID LIENS—EXTENT.

Bankr. Act 1898 does not vest a trustee with any better right or title to the bankrupt's property than belonged to the bankrupt or to his creditors at the time when the trustee's title accrued. Sections 67a, 67b, providing that claims which, for want of record, or for other reasons would not have been valid liens as against the claims of the creditors of the bankrupt, shall not be liens against his estate, and that whenever a creditor is prevented from enforcing his rights as against a lien created or attempted to be created by his debtor, who afterwards becomes a bankrupt, the trustee may enforce such rights for the benefit of the estate; and section 70e, providing that the trustee may avoid any transfer by the bankrupt of his property which any creditor of such bankrupt might have avoided,—are designed to subrogate the trustee to rights of creditors, as against liens or transfers, which exist at the time of the bankruptcy, but they vest him with no additional rights. If a lien was invalid as to one creditor, but valid as against others, or if one creditor only was in position to enforce his rights as against it, the trustee can avoid it only to the extent of the claim of such creditor.

2. SAME—CHATTEL MORTGAGES—NEW YORK STATUTE.

The chattel mortgage statute of New York (Laws 1833, c. 279, and amendments) provides that any mortgage filed in pursuance thereof, "shall cease to be valid as against the creditors of the person making the same," or against subsequent purchasers or mortgagees, after the expiration of one year from the filing thereof, unless, within 30 days next preceding the expiration of each and every term of 1 year after such filing, a copy, together with a statement, shall be again filed. As construed by the highest court of the state, a failure to comply strictly with such requirement renders a mortgage invalid as against creditors, and no subsequent compliance can restore its validity. But it is also held that no creditor can take advantage of such noncompliance unless armed with a legal process under which the mortgaged property may be seized, or is otherwise in a position to enforce a lien upon it, and that the mortgage is good as to creditors at large as well as between the parties. *Held* that, where a mortgagor became a bankrupt after de-

fault by the mortgagee in failing to file a copy of the mortgage as required by the statute, the trustee could avoid the mortgage only to the extent of the claims of judgment creditors, who were at the time of the adjudication in a position to enforce their claims against the property, since general creditors had at that time no perfected right to impeach the mortgage, and no right which could not have been defeated at any time by the surrender of the property to the mortgagee.

**3. CORPORATIONS—MORTGAGES—VALIDITY UNDER NEW YORK STATUTE.**

The provision of the stock corporation law of New York requiring the filing of the consent of stockholders to the execution of a mortgage by the corporation is for the protection of the stockholders, and only stockholders can take advantage of a failure to comply with it.

Petition for Revision of Proceedings of the District Court of the United States for the Southern District of New York, in Bankruptcy.

A. R. Latson, for petitioner.

Henry L. Stimson, for respondent.

Before WALLACE, LACOMBE, and SHIPMAN, Circuit Judges.

WALLACE, Circuit Judge. The question in this case is whether the trustee in bankruptcy or the mortgagee in a chattel mortgage executed by the bankrupt is entitled to a fund in the registry of the bankruptcy court arising from a sale of the mortgaged property pursuant to an order of that court, which order provided that all liens upon the property should attach to the proceeds. The mortgage was made July 31, 1895, and secured the payment of certain bonds maturing January 1, 1911. Possession of the mortgaged property was not delivered to the mortgagee, and the property remained in the possession of the mortgagor from the time of the execution of the instrument until the title of the trustee accrued. The mortgage was filed August 1, 1895, in all respects in compliance with the statutes then in force (Laws 1833, c. 279). The statute reads as follows:

"Any mortgage filed in pursuance to this act shall cease to be valid as against the creditors of the person making the same, or against subsequent purchasers or mortgagees in good faith, after the expiration of one year from the filing thereof, unless within thirty days next preceding the expiration of each and every term of one year after the filing of such mortgage, a true copy of such mortgage, together with a statement exhibiting the interest of the mortgagee in the property thereby claimed by him by virtue thereof, shall be again filed," etc.

The statute was amended in 1896 (Laws 1896, c. 528), whereby, in lieu of the filing of a true copy of the mortgage within 30 days, it was provided that a statement should be filed describing the mortgage, and the time and place of its filing. Subsequent to this amendment, and August 8, 1896, a copy of the mortgage was filed, but, as this was eight days too late, it is conceded that the filing did not comply with the original or the amended statutes. July 31, 1897, a copy of the mortgage was again filed, but no statement was filed of the time or place of the filing of the original. Subsequently, but in 1897, the statute was again amended, and thereby the original provisions were substantially reinstated. On July 14, 1898, a copy of the mortgage was filed in the proper office, together with a statement, complying in all respects with the statute as amended in 1897. On each occa-

sion of refiling a copy of the mortgage both the mortgagor and the mortgagee filed also a statement setting forth that the whole amount of the debt secured by the mortgage remained unpaid. Debts were contracted by the mortgagor after the making of the mortgage, and these have been proved against the bankrupt's estate; but at the time when the petition for the adjudication was filed only one creditor had brought any action for the collection of his debt. That creditor (one Reilly) had obtained a judgment, and an execution was issued upon that judgment to the sheriff of the county in which the mortgaged property was, and was returned unsatisfied. It is insisted for the trustee in bankruptcy that from August 1, 1896, the mortgage ceased to be valid as against creditors of the mortgagor because the statutory requirements in respect to filing were not complied with, and that because it became invalid as to them the trustee took the title of the mortgaged property discharged from any lien in favor of the mortgagee.

According to the settled construction of the chattel mortgage statute by the decisions of the New York courts, the provisions in respect to filing must be strictly followed. Compliance stands as a substitute for immediate delivery and an actual and continued change of possession of the mortgaged property, and repels the conclusive presumption of fraud which would otherwise infect the transfer. The effect of noncompliance is to nullify the mortgage as against all creditors of the mortgagor whose debts arise while the property remains in his possession, whether these debts originated previous to or after the default, and whether with or without notice of the existence of the mortgage at the time of giving credit. A default in complying with the requirements of the statute is not cured by any subsequent act of attempted compliance, and, although the departure has been rectified in all respects save as to the time within which the act is required to be done, a creditor who afterwards obtains a judgment can subject the property to his execution as though the mortgage had never existed. By the peremptory language of the statute the mortgage ceases to be valid by failure to comply with the requirements. It cannot, therefore, be revived except by some act of the parties which is equivalent to the making of a new transfer of the chattels,—such as a surrender and redelivery of the instrument, or a surrender of the possession of the chattels in satisfaction or as a further security of the debt; but no act of the mortgagee alone would be effective. These propositions are well settled by the judgments of the courts of last resort. *Thompson v. Van Vechten*, 27 N. Y. 568; *Karst v. Gane*, 136 N. Y. 316, 321, 32 N. E. 1073; *Tremaine v. Mortimer*, 128 N. Y. 1, 27 N. E. 1060; *Marsden v. Cornell*, 62 N. Y. 215; *Porter v. Parmley*, 52 N. Y. 185; *Ely v. Carnley*, 19 N. Y. 406; *Dillingham v. Bolt*, 37 N. Y. 198; *Stephens v. Perrine*, 143 N. Y. 476, 39 N. E. 11. In attempting to mitigate the supposed hardship of the statute when the question has arisen between the mortgagee and a creditor with notice of the existence of the mortgage at the time the credit was given, some of the lower courts have given to it a more latitudinarian interpretation (*Swift v. Hart*, 12 Barb. 530; *Nixon v. Stanley*, 33 Hun, 247; *Newell v. Warner*, 44

Barb. 258); but these decisions cannot be reconciled with its plain language, and are inconsistent with the opinions of the courts of last resort. Adopting the construction placed upon the statute by the highest courts of the state, it is manifest that at all times after August 1, 1896, the date of the expiration of one year from the filing of the mortgage, any creditor of the mortgagor was entitled to treat the lien as void upon obtaining a judgment and execution. The omission to file a copy during the 30 days preceding August 1, 1896, was a fatal departure from the statute. So, also, was the omission to file during July, 1897, a statement showing the time and place of the original filing of the mortgage. The statute then in force made the filing of this statement essential. It has been decided in *Stevenson Brewing Co. v. Eastern Brewing Co.*, 22 App. Div. 524, 48 N. Y. Supp. 89, and *McCrea v. Hopper*, 35 App. Div. 572, 55 N. Y. Supp. 136, that the refiling of a copy of the mortgage with the dates of filing and refiling indorsed thereon, together with a statement showing the amount then due, does not satisfy the statute as amended in 1896. The attempts to comply with the statute doubtless operated as notice of the continuing existence of the mortgage to such creditors as may have examined the records of the office, but they could have no other effect. They were not intended to revive a defunct mortgage, and, if they had been, would have been unavailing for that purpose.

It remains to consider whether the trustee can take advantage of the noncompliance with the statute. It has always been held by the courts of New York that only such creditors can take advantage of it as are armed with some legal process authorizing the seizure of the mortgaged property, and are thereby in a position to enforce a lien upon it (*Jones v. Graham*, 77 N. Y. 628; *Button v. Rathbone*, 126 N. Y. 187, 27 N. E. 266; *Stephens v. Britannia Co.*, 160 N. Y. 178, 181, 54 N. E. 781), and that the mortgage is good as to creditors at large as well as between the parties. Under the bankruptcy act of 1867 (14 Stat. 517), a failure to file a mortgage of goods and chattels in the manner prescribed by the law of the state, while rendering the mortgage void as against the creditors of the mortgagor if it was not accompanied by an immediate delivery and followed by an actual and continuous possession of the chattels, did not affect its validity as against the assignee of the mortgagor in bankruptcy. The assignee succeeded merely to the title of the mortgagor, and as between the mortgagor and the mortgagee the validity of the mortgage was unaffected by the failure. *Stewart v. Platt*, 101 U. S. 731, 25 L. Ed. 816. Under the present act, however, by section 67, "claims which for want of record or for other reasons would not have been valid liens as against the claims of the creditors of the bankrupt" are not liens against his estate (subdivision "a"), and by subdivision "b," whenever a creditor is "prevented from enforcing his rights against a lien created or attempted to be created by his debtor, who afterwards becomes a bankrupt," the trustee of the estate is subrogated to and may enforce the rights of such creditor for the benefit of the estate. And by section 70 (subd. "e") "the trustee may avoid any transfer by the bankrupt of his property which any creditor of



such bankrupt might have avoided." When the mortgagor was adjudicated a bankrupt, there was, so far as appears, but one judgment creditor. Whether any other creditor could have eventually entitled himself to the benefit of the statute was a matter of mere conjecture. It would have depended not only upon his own vigilance in pursuing his legal rights, but also upon the volition of the mortgagor. The mortgagor could have made a general assignment of its property for the benefit of its creditors, or surrendered possession of the mortgaged property to the mortgagee; and in either event the right of all creditors to impeach the lien would have been extinguished. *Sheldon v. Wickham*, 161 N. Y. 500, 506, 55 N. E. 1045; *Bowdish v. Page*, 153 N. Y. 104, 47 N. E. 44.

The bankrupt act does not vest the trustee with any better right or title to the bankrupt's property than belongs to the bankrupt or to his creditors at the time when the trustee's title accrues. The present act, like all preceding bankrupt acts, contemplates that a lien good at that time as against the debtor and as against all of his creditors shall remain undisturbed. If it is one which has been obtained in contravention of some provision of the act, which is fraudulent as to creditors, or invalid as to creditors for want of record, it is invalid as to the trustee; and if it is one which was invalid as to some particular creditor, though valid as to other creditors, the trustee is in certain cases subrogated to the rights of that creditor. The provisions which have been quoted do not necessarily touch a lien which at the date of the adjudication of bankruptcy was valid as to the bankrupt, and could not then be disturbed by any of his creditors. The lien of the present mortgage "would not have been valid as against the claims of the creditors," within the terms of subdivision "a," if the creditors had obtained the right to question it; but otherwise it was valid. A similar question was considered by Mr. Justice Hunt in *Re Collins*, 12 Blatchf. 552, Fed. Cas. No. 3,007. That case arose under the act of 1867, which, as he construed it, authorized an assignee in bankruptcy to contest the validity of any lien which the creditors might have challenged; but, placing that construction upon the act, he was of the opinion that the assignee could not contest a mortgage invalid for want of proper filing, because the assignee did not represent any creditor who had obtained, by judgment or otherwise, a specific lien upon the property. Subdivision "b," § 67 (Act of 1898), preserves for the benefit of the estate in bankruptcy a right which some particular creditor has been prevented from enforcing by the intervention of the debtor's bankruptcy. If a creditor, by an execution or a creditors' bill, has secured a legal or equitable lien upon the mortgaged property before the mortgagor has been adjudicated a bankrupt, under this provision his rights will or will not inure to the benefit of the estate, depending upon the time when the lien was acquired. If acquired more than four months before the commencement of the bankruptcy proceeding, his lien would inure to his own exclusive benefit; but, if acquired at any time within the four months, it would be null and void, under subdivision "f" of the section, except as preserved for the benefit of the estate as provided in that subdivision and in subdivision "b." Sub-

division "c," like the other provisions, does not authorize the trustee to avoid a transfer unless some creditor might have avoided it. We think these provisions ought not to be extended by construction to cover cases which are not distinctly within their terms, for the purpose of subverting liens which have originated in good faith, which have remained unchallenged at the time of the commencement of the bankruptcy proceeding, and which no creditor of the bankrupt could ever have attacked successfully except at the option of the debtor. We conclude that, except as to the Reilly judgment, the lien of the mortgage was valid, and that the trustee is entitled only to the amount of that judgment out of the proceeds in the registry of the court.

We have not overlooked the point made by the trustee that the mortgage was invalid because the consents of the stockholders of the mortgagor had not been filed in the office of the proper official, as required by the provisions of the stock corporation law. These provisions are for the protection of stockholders, and only stockholders can take advantage of any defects in complying with them. *Bank v. Averell*, 96 N. Y. 467, 475; *Paulding v. Steel Co.*, 94 N. Y. 334.

The order of the court below should be modified conformably with this opinion, and it is accordingly reversed, with instructions to so modify it.

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In re TATEM et al.

(District Court, E. D. North Carolina. September 1, 1901.)

**BANKRUPTCY—SECURITY OF CREDITOR—FAILURE TO RECORD.**

As against the creditors of a bankrupt, one who had sold to him a chattel by contract providing that title shall remain in the seller till purchase price is paid cannot claim a lien, the contract not having been registered, as required by Laws N. C. 1883, c. 342; Code, § 1275.

**In Bankruptcy.**

P. H. Williams, for petitioners.

J. H. Sawyer, for respondents.

**PURNELL**, District Judge. In January, 1901, Tatem, Mann & Co. purchased of the R. L. Barnes Safe & Lock Company a safe, for which the several notes filed, with others paid, were executed. In the notes it is provided that the ownership and title to said safe remains in the said R. L. Barnes Safe & Lock Company, or their order, "until this note is paid," and the benefit of homestead exemption is waived. Neither the notes nor contract are registered. On July 3, 1901, Tatem, Mann & Co. made an assignment, including therein the safe in question, for which act of bankruptcy the firm was, on the 10th of August, adjudged bankrupt. The safe and lock company now claim a lien on this safe by virtue of the contract above referred to. The most favorable construction of the contract is that it is a conditional sale of personal property, in which the title is retained by the bargainor, and the laws of North Carolina (Act 1883, c. 342; Code, § 1275) provide such contracts must be regis-

tered in the same manner, and with the same legal effect, as is provided for chattel mortgages. The supreme court of the state has construed this statute in numerous cases, and the law is, or ought to be, well understood by all, laymen as well as lawyers. Its purpose, among others, was to prevent contracts of this nature being sprung on creditors, who after a careful examination of the records, gave credit to persons against whom nothing appeared; to some extent, as regards personal property, to prevent secret parcel trusts. Agents selling safes, sewing machines, organs, and other articles generally understand the law, and when they do not it is their fault, and their principal suffers loss. Other states have similar laws, and it is not peculiar to North Carolina. As between the parties the contract would be valid, but where other interests have intervened it is not valid. In this cause there has been an assignment, and an adjudication in bankruptcy, and the lien of the conditional sale could not be effective against other creditors; certainly not in a court of bankruptcy. The lock and safe company cannot, therefore, prove their claim as a secured creditor. Their lien is not valid as against other creditors of the bankrupt. If it is desired to prove the claim as an unsecured one, any payment made within four months of the adjudication is a preference, and must, under *Pirie v. Trust Co.*, 182 U. S. 438, 21 Sup. Ct. 906, 45 L. Ed. 1171, 3 Nat. Bankr. N. 566, be refunded, before such claim can be proved. The safe should be retained by the trustee, and sold for the benefit of the estate in bankruptcy. Claimants have no lien thereon.

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WYCKOFF et al. v. HOWE SCALE CO. OF 1886.

(Circuit Court, D. Vermont. August 14, 1901.)

**1. TRADE-NAME—WRONGFUL USE—PARTICIPATION—EVIDENCE.**

Where defendant engaged as selling agent for typewriters sold under the trade-name of "Remington-Sholes," manufactured by a corporation organized by descendants of the original Remingtons, the right to use whose name was sold to plaintiff, in an action for defendant's participation in the use of the name in connection with the name "Sholes" as applied to typewriters, evidence relating to such machines emanating from the Remington-Sholes Company, under whom defendant justified, and with the name in controversy on them, and transactions relating thereto, was admissible as *res gestæ*.

**2. SAME.**

It was not material that the transactions referred to by such evidence occurred in foreign countries, since in such suit the boundaries of the dealing, and not of countries, constitute the limits of investigation; nor could the laws of such countries vary the rights of parties in the United States with respect to transactions emanating therefrom, though carried out in foreign countries.

**3. SAME.**

Plaintiffs acquired from the original manufacturers of Remington typewriters the sole right to use the name "Remington" as a name for typewriters. Thereafter descendants of the original manufacturers, also named "Remington," became members of a corporation making a typewriter under the name of "Sholes," when the name was changed to the "Remington-Sholes." Held that, since ultimate purchasers of typewriters might be led to think that the addition of the name "Sholes" was a

new style of the old machine coming from the same source, such use of the name "Remington" was an attempt to deceive the public, and unwarranted.<sup>1</sup>

4. **SAME—NAMES—RIGHTS OF DESCENDANTS.**

No special right to use a family name which has become a trade-name applied to a manufactured article accrues by virtue of the relation which descendants bear to the original manufacturer of the same name, such descendants being entitled to no other than their natural rights to use their own names in the transaction of their own business.

5. **SAME—USE OF NAME—GIFT TO CORPORATION.**

Though all persons have a natural right to use their own names in their own business, the giving of the name "Remington" to a corporation engaged in making typewriters by two persons of that name, descendants of the original manufacturers of Remington typewriters, who had sold the right to use the name as applied to typewriters to plaintiff, such persons not being manufacturers of typewriters, except as stockholders in the corporation, nor having become such in their own names, nor having their own names put on the machines, was not a legitimate use of their natural right to use their name in their own business to the injury of the plaintiff.

6. **SAME—ABBREVIATION.**

Where a corporation wrongfully used the name "Remington" in connection with the word "Sholes" as applied to typewriters, the fact that it subsequently shortened the name to "Rem-Sho" was not such a change of the term as would guard purchasers against belief that they were not Remington machines.

In Equity.

Wilder L. Burnap, H. D. Donnelly, and Charles E. Mitchell, for plaintiff.

Butler & Moloney, James H. Pierce, and George P. Fisher, Jr., for defendant.

WHEELER, District Judge. E. Remington & Sons, a corporation of New York of 1865, made and sold firearms. It began to make and sell typewriters as a branch of its business in 1873, which became well and favorably known, and were marked as Remington machines. The plaintiff, then a partnership, now a corporation, of New York, became the selling agent of these typewriters, which were largely advertised and introduced by that name in this and foreign countries, and acquired and maintained a good reputation for style and workmanship. In 1886 the plaintiff bought out the typewriter business, including franchises and trade-marks, and has continued and largely increased the manufacture and sale of the Remington machines by that name. In 1893, Zalmon G. Sholes got up a machine called the "Z. G. Sholes Typewriter," and a corporation of Illinois was organized to make and sell it, called the "Z. G. Sholes Company." Carver Remington and Franklin Remington, of Chicago, acquired an interest in the corporation and business, and the name of the machine was changed to "Remington-Sholes," and in 1894 the name of the corporation was changed to "Remington-Sholes Typewriter Company." This company has made, advertised, and extensively sold those machines in this and foreign countries by the

<sup>1</sup>Unfair competition in trade, see notes to *Scheuer v. Muller*, 20 C. C. A. 165; *Lare v. Harper Bros.*, 30 C. C. A. 376.

name "Remington-Sholes" in full, or "Rem-Sho," an abbreviation of it, and placed one or the other prominently upon the machines. The defendant, the Howe Scale Company of 1886, is a corporation of Vermont, and has been and is a sales agent of these machines to a large extent for the Remington-Sholes Company, and so has prominently participated in this use of the name "Remington" and this abbreviation of it in this business in this manner. This suit is brought for that participation. The defendant justifies under the Remington-Sholes Company, and that company has assumed the defense of the suit, and the validity of the defense depends upon the right of that company to so take and use the name "Remington" upon its machines.

Several questions in the case have been made by motion to suppress evidence, and have been brought into the final hearing. They relate principally to testimony taken in rebuttal as not properly such; to testimony as to the use of the name in business correspondence and transactions not shown to have emanated from the defendants; and to testimony showing the use of the name upon, and in connection with the sale of, typewriters in foreign countries. Perhaps some of the testimony taken in rebuttal is not strictly such, but is rather cumulative; still it is such as would be admissible if taken at the proper time, or with leave, and as the motion has been brought along the consent to the hearing in chief, and the testimony might be the subject of a motion to retake, without intending to relax the rule as to order, it is deemed best under the circumstances that this testimony be left to stand for what it is worth. The evidence relates to machines emanating from the party under whom defendant has acted and justifies, with the name in question upon them, as placed there by that party; and evidence as to transactions in respect to such machines in connection with and relation to the plaintiff's machines and names in trade, although not proceeding directly from that party, or from the defendant, or authorized by either, appears to be admissible as a part of the *res gestæ* for the purpose of showing the effect upon the plaintiff's trade of putting these other machines into the markets with the names in question upon them. As this is a suit for interference in trade, the boundaries of the dealing, and not of governments or countries, is material. There is said to be a difference between the laws of this country and those of some of the countries in question; but the laws of those countries would not govern or vary the rights of parties here in respect to transactions emanating from here, although carried out there. The motion to suppress is therefore overruled.

The intricate and delicate machinery of typewriters requires good materials and nice workmanship, and their reputation depends largely upon the quality of their manufacture. The Remington typewriter was among the pioneers, and one of the foremost in reputation for good construction. That the introduction to the markets of another machine with that name upon it, at the time when the Remington-Sholes machine appeared, would make confusion in the plaintiff's trade, and tend to pass off the new machines for the regular Remington machines of the plaintiff, needs no proof but the circumstances.

That it actually did have that effect well appears from the evidence. That was what the taking of the name was calculated to do, and what was to be expected. The ultimate purchasers would be led to think that the addition of the name "Sholes" was a new style of the old machine coming from the same source. Upon the well-established principles that one has no right to push his wares as those of another, this would ordinarily be an actionable wrong at law, repetition of which, to save multiplicity of suits for repeated wrongs, would be restrainable in equity. That these Remingtons are descendants of one of the original Remingtons, and Sholes a descendant of an inventor of some part of the original typewriters, is set up and relied upon as establishing a right to the use made of the name "Remington-Sholes" in this connection. No right descended, however, in these respects, from any of these ancestors to any of these persons; and this excuse has no legal foundation, but is entirely sentimental. They were situated, as to this, as any other persons of the same names would have been, with no standing but their own natural rights to the use of their own names in the transaction of their business. That all persons have, respectively, the right to use their own names in their own business, is entirely clear; but this right is subject to the limitation common to all rights that it is to be so used as not to injure the rights of others. These Remingtons were not themselves manufacturers of typewriters, and did not start in as nor become such in their own names, nor have they had their own names put upon machines of their own make; but they gave their name to a large corporation as a distinct entity, which took the name into its typewriter business, and put it upon the machines of that corporation, whereby they undertook to confer the right to the use of that name upon that entity for the benefit of others, who had no right to use it at all. This was not a legitimate exercise of the natural right to use their own name in their own business, but was an attempt to exercise a fictitious right to use the name in, to a great part, others' business. This was going far beyond their own rights, and was an undertaking to give what they did not have; and their own natural right to the use of their own name in their own business became thereby so mingled with the unlawful use of it for the benefit of others that it is indistinguishable here. They lost their identity in that of the corporations. Connecting the name "Sholes" with "Remington" in the business and on the machines would not or might not adequately indicate to a purchaser who had known or heard of the Remington typewriters, and wanted one, that these were not original Remingtons, such as were wanted. The name, although linked with "Sholes," would indicate "Remington" connection in typewriter production, and imply the original manufacture. This use of the name "Remington," although done in such connection, appears to be an unjustifiable invasion of the right to that name belonging to the plaintiff. The long name "Remington-Sholes" got shortened into "Rem-Sho" in writing and speech in conducting the defendant's business, which was well understood to be an abbreviation of the full name. The defendant has put the abbreviation upon the machines in place of the full name, and claims that this, at least, is so different

from the name "Remington," as used by the plaintiff and its predecessors, that it can and does not amount to any representation that the machines are Remington machines. If this short name had been the one first used, there would be much plausibility in this argument; but, following "Remington-Sholes," as it has, in use, it has become a well-known short representation of what the long name it stands for represented, and of itself now amounts to a wrongful representation of the source of the defendant's machines.

According to these views, the plaintiff appears to be entitled to a decree suppressing the use of the name "Remington" in the compound name of "Remington-Sholes," and the use of the compound abbreviation of that name upon the defendant's typewriting machines, or in the sale thereof. Decree for plaintiff.

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### HOSTETTER CO. v. MARTINONI.

(Circuit Court, N. D. California. July 8, 1901.)

No. 12,780.

#### 1. TRADE-MARK—UNFAIR COMPETITION—INJUNCTION.

There is a fraud on complainant, entitling it to injunction, it having the exclusive right to the name "Hostetter" as applied to bitters, and defendant, on inquiry being made for Hostetter's Bitters and objection made to the price named, having stated that he could sell Hostetter's Bitters in bulk at a less price, and having thereon furnished bitters not made by complainant, in a demijohn marked "H. Bitters," and having on another occasion, when the bulk bitters were called for, furnished an empty Hostetter's Bitters bottle and filled it therewith.<sup>1</sup>

#### 2. SAME—MERIT—PRESUMPTION.

Hostetter's Bitters presumptively have merit, entitling the owner to protection against unfair competition, having been sold for years with an increasing demand.

In Equity. Suit for infringement of trade-mark.

Albert H. Clarke and E. Edgar Galbreth, for complainant.  
Morrison & Cope, for defendant.

MORROW, Circuit Judge. This is a suit in equity, brought by the complainant, a Pennsylvania corporation, against the defendant, a citizen of California, to enjoin him from manufacturing, selling, or offering for sale, directly or indirectly, any article of stomach bitters as and for, or in the name of, "Hostetter's Celebrated Stomach Bitters," "Hostetter's Bitters," "Hostetter," "Host," or "H. Bitters," or from using in any way any of said names in connection with the selling of any article of stomach bitters not manufactured by complainant. It is alleged that the complainant, on May 1, 1889, acquired by purchase the right to make and sell the compound known by the above names, and has the exclusive right to the name "Hostetter," and the abbreviations thereof, as used in connection with the

<sup>1</sup> Unfair competition in trade, see notes to *Scheuer v. Muller*, 20 C. C. A. 165, and *Lare v. Harper & Bros.*, 30 C. C. A. 376.

compounding and sale of stomach bitters, as a trade-name; that said stomach bitters have been since May 1, 1889, and for over 30 years before said date, by complainant's predecessor, put up and sold in square, amber-colored bottles, holding nearly a quart, with the words "Dr. J. Hostetter's Stomach Bitters" blown in the glass, and having on two sides of said bottles certain descriptive labels (which have been duly registered as trade-marks in the patent office); that said bottles, when filled with the said preparation and sealed, are packed in boxes containing one dozen each, and in this condition are sold to the trade generally; that the said preparation is never sold in bulk or by the gallon, or in any manner except as just described. It is further alleged that said preparation has become well known to the public, and that the good will of complainant's business in the manufacture and sale of said stomach bitters is of the value of over \$1,000,000. Complainant charges defendant with fraud and unfair dealing in selling at his place of business an imitation article of stomach bitters purporting to be that made by complainant, whereby complainant has been damaged in the sum of \$6,000. The fraud and unfair dealing is specifically stated to consist in the following acts: When an intending purchaser calls at defendant's place of business, and demands to be sold Hostetter's Stomach Bitters, the defendant sells to him stomach bitters resembling the bitters made by complainant, by the gallon, in demijohns, at \$2 per gallon, billing the same as "H. Bitters," and also refills with defendant's bulk bitters the bottles of complainant which once contained the genuine Hostetter's Bitters, and still retain the original labels thereon, selling such refilled bottles at 35 cents per bottle. The defendant enters a denial to these specific charges, and, in turn, alleges that complainant is not entitled to any protection in this court, for the reason that the several names by which said preparation is known to the trade are merely descriptive of a certain kind or quality of bitters, made according to a formula for many years known to pharmacists and chemists, and that complainant has no proprietary interest in, or exclusive right to, said formula, and, further, that complainant is itself guilty of fraud, in knowingly and willfully placing upon the market as a medicinal preparation of value said bitters, when in reality the bitters are of no value whatever, save as an intoxicating beverage.

With regard to the first contention of the defendant, whether the names by which complainant's preparation are known to the trade are merely descriptive or not, the complainant's rights to the benefits arising from the high reputation of the preparation designated by such names, gained by the efforts of complainant and its predecessors through many years, is undoubted. It is a fundamental principle of the law that one cannot make use of a reputation which another has acquired in a trade name or mark for the purpose of deriving such advantage in the manufacture and sale of the goods as arises from the good will and reputation of the original manufacture. Courts demand a high order of commercial integrity in the use by competitors of a name under which a rival has gained a business reputation, whether that name is strictly a trade-mark or is descriptive of quality merely, and frown upon all filching attempts to obtain the reputation



of another. *Fuller v. Huff*, 43 C. C. A. 453, 104 Fed. 141, 51 L. R. A. 332, and cases cited. Did, then, the defendant wrongfully attempt to use the reputation of complainant's preparation for his own advantage? It appears from the testimony that two of the complainant's employes went to the defendant's place of business, and asked for Hostetter's Bitters. Upon the price being named (70 cents a bottle, by the case), they remarked that it was pretty high. The defendant's salesman then stated that he could sell them Hostetter's Bitters in bulk at \$2 per gallon, that they made barrels of it, and that it was a fine article. Complainant's employes offered to purchase a half a gallon at this rate, whereupon the salesman went to the back part of the store and told a man there to fill a half-gallon demijohn with "H. Bitters." A demijohn was filled with bitters from a keg, and a tag attached to it, reading as follows: "E. Martinoni, importer and dealer in wines, liquors, and cordials, 714-716-718 Front St., San Francisco, California. H. Bitters." The word "Bitters" was stamped upon the tag with a rubber stamp, apparently, and the letter "H" written in front of the word "Bitters" in pencil. This was written upon the tag by the man who filled the demijohn. This proceeding was repeated a few days later, complainant's employes then also asking for an empty bottle. The defendant's salesman inquired whether a Hostetter's Bitters bottle was desired, and, upon receiving an affirmative reply, brought forward an empty Hostetter's Bitters bottle, with the original labels thereon and proper revenue stamps. He offered to fill the bottle with the bitters sold in bulk, and upon the agreement of his customers did so, filling it from the same keg from which they had purchased the half gallon of H. Bitters, and charging them 35 cents therefor. In each instance the salesman had a bill made out for the article purchased; the bitters contained in the demijohn being described as " $\frac{1}{2}$  gal. H. Bitters," and the filled Hostetter's bottle as "1 bottle Bitters." The bitters purchased on these occasions and in the manner stated were not manufactured by complainant. No other deduction can be made from this evidence than that the defendant was attempting to palm off upon its customers goods of its own manufacture as and for the goods of the complainant. This is undoubtedly a fraud upon the complainant's rights, regardless of the comparative quality of the two preparations.

And with regard to defendant's second contention, that the complainant's preparation is of no value whatever, save as an intoxicating beverage, this statement appears to come at a rather late hour, considering the number of years it has been before the public and the numerous lawsuits in which it has been involved, wherein such a proposition would undoubtedly have arisen and been determined, if meriting attention. The fact of its being alcoholic to a certain extent cannot be unknown to the public, as the very word "bitters" can only be defined as "a liquor, generally spirituous, in which bitter herbs or roots are steeped." While the precise formula is claimed as a trade secret by complainant, analyses show the preparation to contain certain solid extracts having medicinal properties. Experts upon any subject are prone to conflicting opinions in this day of evolving

theories and progressive research, and the medical experts testifying in this case exhibit this general characteristic. But the court need only concern itself with inquiry as to the merits of the preparation to the extent of discovering whether it has sufficient merit to justify the court in protecting complainant's rights therein, whether complainant has come into court with clean hands, under the fundamental principle that he who seeks equity must do equity. The preparation is designed for the use of the public. The public has tested it for a great number of years, and has stamped it with its seal of approval, as evidenced by the increased demand for the preparation. This is certainly proof of its commercial value, and presumably establishes the fact that it possesses merit. In the case of *Hostetter Co. v. Wm. Schneider Wholesale Wine & Liquor Co.*, 107 Fed. 705, in the United States circuit court for the Eastern division of the Eastern district of Missouri, a state of facts existed similar to those in the case at bar. An injunction was granted; the court, in handing down its decree (November 8, 1900), stating that such a state of facts presented "a clear case of unfair competition in trade, and the doctrine rests squarely upon the proposition that men must be honest in their business transactions and rely upon the merits of their own goods, and not undertake to palm off inferior goods as and for goods of the genuine manufacturer." To the same effect is *Hostetter Co. v. Sommers* (C. C.) 84 Fed. 333. The court is of the opinion that this decision is correct, and that the injunction prayed for in the present case should be granted. Let a decree issue accordingly, and the case be referred to the master in chancery for the proper accounting.

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CHILD v. NEW YORK TIMES CO.

(Circuit Court, S. D. New York. May 27, 1901.)

**COPYRIGHT—INFRINGEMENT OF COPYRIGHT FOR PHOTOGRAPH—ACTION TO RECOVER PENALTY.**

Under Rev. St. § 4965, as amended by Act 1895 (2 Supp. Rev. St. p. 437), no penalty is recoverable for infringement of a copyright for a photograph, except for such sheets of the infringing publication as have been found in the defendant's possession and seized for the purpose of forfeiture and condemnation under the preceding provisions of said section.

Action at Law to Recover the Statutory Penalty for Infringement of a Copyright for a Photograph. On motion for new trial.

Alfred A. Cook, for the motion.

George E. Waldo, opposed.

HAZEL, District Judge. This action is brought against the New York Times Company to recover a penalty under the provisions of section 4965, Rev. St., amended by the act of 1895 (2 Supp. Rev. St. p. 437), for infringement of a copyrighted photograph. The plaintiff seeks to recover, pursuant to that section, the sum of one dollar for a number of copies of the New York Times purchased by him containing the alleged infringing photograph. The copies of the paper produced upon the trial, and therefore the sole evi-

dence upon which the judgment rests, were not seized for purposes of forfeiture and condemnation. The case of *Falk v. Publishing Co.* (C. C. A.) 107 Fed. 126, seems conclusive upon the point at issue. The circuit court of appeals there distinctly held that, unless there had been a legal forfeiture, the right to sue for the forfeited penalty has not accrued. No proceedings have been taken against the defendant for forfeiture, and no seizure by condemnation or other legal proceedings has been made. Therefore, under the doctrine of the case cited, no papers have been "found in the possession" of the defendant within the meaning of the statute. No cause of action, therefore, exists against the defendant to recover the statutory penalty. The motion for a new trial is granted.

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GENERAL FIRE EXTINGUISHER CO. v. MALLERS et al.

(Circuit Court, N. D. Illinois, N. D. May 12, 1900.)

No. 24,709.

PATENTS—INFRINGEMENT—AUTOMATIC FIRE EXTINGUISHER.

The Freeman patent, No. 415,166, for an automatic fire extinguisher, in view of the prior art, cannot be construed broadly to cover the principle of the "strut" form of valve support, as distinguished from the so-called "lever" type of support, but must be limited to the particular form of support described in the specification and drawings. As so construed, *held* not infringed.

In Equity. Suit for infringement of patent. On final hearing.

Offield, Towle & Linthicum, for complainant.

Gridley & Hopkins, for defendants.

KOHLSAAT, District Judge. This is a suit for the alleged infringement by defendants of claims 3 and 5 of letters patent No. 415,166, issued November 12, 1889, to John Freeman, for improvements in automatic fire extinguishers, which patent is now owned by complainant. Said claims read as follows:

"(3) In an automatic fire extinguisher, the valve and separable valve support, combined with the separable clamping plates to hold the parts of the valve support in contact, said plates extending laterally and being fusibly connected beyond the said support, substantially as described." "(5) The combination with the valve of an automatic fire extinguisher of the fulcrum, I, and the fusibly united independent valve support, consisting of a post, L, and a bent lever, M, one end of the post bearing against the valve, and the other against the bent lever, the direction of thrust of said post against the lever being at one side of the fulcrum, I, at a point lying between said fulcrum and the outer end of said lever, so as to tend to pull said outer end of lever, M, away from post, L, substantially as described."

The chief contention between the litigants is as to the state of the art prior to Freeman's invention. Complainant insists that Freeman was the first to utilize what it terms a "strut" form of valve support, as distinguished from the prior so-called "lever" type of support. This distinction is nowhere in the patent referred to. In the descriptive portion of the specifications the patentee states as one of the objects of his invention the provision "of improved mechanism for holding the valve closed, which shall, while acting upon the valve with great force, yet exert but slight strain upon the fusible

material"; and patentee described the piece, M, as a bent lever of the second order. The claims in question cover more than the parts composing the valve support proper, but the gist of the controversy herein relates to this separable or independent valve support; i. e. the lever and post. An examination of the prior art with reference to the existence of separable valve supports in automatic fire extinguishers discloses the fact that in patent No. 305,663, issued to J. R. Brown September 23, 1884, a separable valve support, consisting of two overlapping posts or struts, is shown. It may be conceded that in the drawings of the Brown patent the thrust of either post is in direct line with the point of support of the other, but provision is made in the specifications for placing one of the posts at an angle with the other, which would throw the direction of thrust of one post to one side of the point of support of the other. The Harkness patents, Nos. 323,578 and 356,874, also show separable valve supports, as also does the Neracher patent, No. 388,905. In Harkness patent, No. 356,874, a lever, L, and strut, M, corresponding in function and operation to the lever, M, and post, L, of complainant's device, are specifically named, and the thrust of the strut or post against the lever is described as being to one side of the fulcrum of the lever. This relative direction of the thrust of the post supporting the valve to the fulcrum of the lever is also described in Neracher patent, No. 361,179. In fact, as regards both the principle of operation and general form, defendants' device more nearly utilizes the ideas embraced in this last-named Neracher patent than those shown in the Freeman patent; and the general operation and appearance of defendants' sprinkler could very readily be evolved by attaching a duplicate of arm, 6, to post, 7, in the Neracher sprinkler, in lieu of the arm, 4, which is attached to the yoke. As I am of the opinion that the principle involved in complainant's device is nothing more than is embodied in the lever and post of the prior art, it follows that whatever is patentable in complainant's device is confined by the prior art to the particular form of valve support shown in complainant's specifications and drawings. In other words, that complainant is not entitled to the broad construction of the claims of its patent which might be accorded to a pioneer invention. In this view of the nature of complainant's patent, it was practically conceded on the hearing that defendants' sprinkler could not reasonably be held an infringement of the Freeman patent. The bill is dismissed for want of equity, on the ground of noninfringement.

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GENERAL FIRE EXTINGUISHER CO. v. MALLERS et al.  
(Circuit Court of Appeals, Seventh Circuit. June 26, 1901.)

No. 757.

**1. PATENTS—AUTOMATIC FIRE EXTINGUISHER—NOVELTY.**

Freeman, to whom patent No. 415,166 for an improvement in automatic fire extinguishers was issued, was not the first to introduce the conception of a strut which, though composed of different members, was, as an entirety, separate from the environing framework; hence his claim on the score of separableness of the strut cannot be maintained.

**2. SAME—CLAIM—DESCRIPTION.**

Where, in the claim for a patent for improvement in automatic fire extinguishers, no emphasis was placed on the idea of angular pivoting of the strut, and no grant on that score was either asked or allowed, an action for infringement of that feature cannot be maintained, since, though the court may go to the description to amplify a claim, it cannot, out of the mere descriptive portion, wholly create a claim.

**3. SAME—CHANGE OF CLAIM—LIMITATION OF PURPOSE.**

Where the original claim for a patent is rejected as infringing on a former patent, and the inventor modified the objectionable claim by inserting words specifying the purpose of the combination of parts therein, and on such modified claim the patent is allowed, such action of the patent office and his acquiescence therein should be held to limit the claim to such purpose.

### Appeal from the Circuit Court of the United States for the Northern Division of the Northern District of Illinois.

The bill in the Circuit Court was to restrain infringement of Letters Patent No. 415,166, issued November 12, 1889, to John R. Freeman for an improvement in Automatic Fire Extinguishers. 110 Fed. 528.

The substantial portion of the Letters Patent, together with its drawings, is as follows:

"This invention has for its object to construct an automatic sprinkler to be used for the extinction of fires by sprinkling with water or other appropriate liquid which, prior to the occurrence of the fire, is retained in appropriate conduits or reservoirs, the said sprinkler comprising a valve normally held closed by connections or supports, which are in part composed of easily-fusible material, and which under the action of undue heat will permit the said valve to open.

"The object of my present invention is to provide means for protecting the sprinkler against the action of corrosive vapors and to prevent accumulation of dust or lint upon the working parts; also, to provide improved mechanism for holding the valve closed, which shall, while acting upon the valve with great force, yet exert but slight strain upon the fusible material; also, to provide convenient means for the renewal of the protector for the sprinkler; also, to provide simple means for assisting the valve in its movement from its seat; also, to provide other details of construction, to be hereinafter pointed out.

"Figure 1 shows in vertical section an automatic sprinkler embodying this invention, the yoke holding the operating parts being broken off; Fig. 2, a vertical section of the automatic sprinkler shown in Fig. 1, taken on the dotted line x x; Fig. 3, a horizontal section of the fusibly-united valve-support; Fig. 4, a side elevation of the fusibly-united valve-support, the parts being shown as separating to permit the valve to leave its seat; Figs. 5 and 6, details of a modified form of valve-support; and Fig. 7, a detail of the valve-support shown in Fig. 5, provided with fusibly-united clamping plates.

"The top plate A is provided centrally with an externally screw-threaded nipple C.

"The top plate A has formed upon its under side at the nipple C a valve-seat, against which is normally pressed a valve B, (shown as a flat plate,) loosely connected to the outer or free end of a flat spring Q, attached to the under side of the top plate A. The tendency of the spring Q is to move the valve away from its seat, so that after the said valve has been held closed against its seat for a long period of time the spring Q will assist in its removal. Attached to or formed integral with the top plate is a yoke K, which serves as a support for the operating parts. The yoke K is tapped to receive the screw-threaded plug I, having the conical end portion I', the shank of said plug I between the conical end portion and its screw-threaded portion being made smooth and adapted to receive upon it the distributor J, said distributor bearing upon the yoke K, but rotating upon the plug I. This valve-support is composed of a post L and a bent lever M, the point where the lower end of the post L thrusts against the bent lever M being

out of line with the point where the lever M bears on its fulcrum I, so that the lever M is practically a lever of the second order, the thrust of L and reaction of I tending to cause L and M to separate, as shown in Fig. 4, the contacting faces also being offset from the supporting-points of the post and lever; but the greater the length of that arm of the bent lever M which is united to the post L by the fusible solder the less will be the strain on the uniting-solder, making the strain small in proportion to direct pressure exerted against the valve. Each bar L M is grooved or corrugated vertically upon its contacting side, so that when held together movement of one upon the other is prevented. The post and bar are held together by fusible material placed between them, and also by two clamping-plates N O, embracing them and extending a short distance beyond them at each side to present large contacting surfaces for the said clamping-plates, and the said clamping-plates are also joined by fusible material—such, for instance, as solder—as best shown in Fig. 3. The valve-support is placed beneath the valve B, the upper end of the post L bearing against the under side of the valve and the step or offset of the bar M resting on the end of the plug I. An internally-screw-threaded cap H, having a ring G placed loosely upon the shank thereof, is turned upon the screw-threaded end of the plug I, and the loose ring G is surrounded by a ring of paraffine, stearine, or other equivalent material, which is adapted to melt at a low temperature.

"A glass case or shell D incloses all the operating parts, it having at its lower end a neck M<sup>3</sup>, which snugly fits and adheres to the paraffine ring F, and having its upper edge slightly tapered and adapted to enter a recess or groove E, which has been previously filled with paraffine or equivalent material.

"The shell D prevents access of dust and corrosive vapors to the operating parts, so that they cannot deteriorate or become injured in any way. The shell is made, preferably, of transparent glass, so as to permit the internal parts to be readily examined, and, moreover, being diathermous, it permits radiant heat to pass through it and begin to act on the fusibly-united valve-support L M; also, the external shell D retains any leakage which may possibly occur.

"On the occurrence of a dangerous rise of temperature the ring of easily-fusible material F loses its sustaining power, and the material in the groove E, also being softened, loses what little adhesiveness it possesses, thereby permitting the shell D to fall. The action of the heat next causes the easily-fusible solder or like material uniting the thin metallic clamping-plates N O, and also uniting the post and bar L M, to lose its strength, whereupon these parts separate and permit the valve B to fall, assisted, as above described, by the spring Q, and the water or other liquid issuing from the nipple C strikes the distributor J, revolving it by force, and thereby distributing the water.

"I preferably use paraffine or stearine for making the ring F, such material being non-corrosive and fusible at a temperature a little lower than that of ordinary fusible solder, such as is used in holding the valve-support L M; but it is obvious that the ring F might be made of ordinary fusible metal.

"In lieu of the paraffine or like material placed in the groove E, an elastic ring or washer may be used. I make the upper edge of the glass shell sharp in order that when this shell is forced into place by a slight pressure of the screw H the edge may cut into the material in the groove to a small extent, and thus make the sealing of the joint more secure.

"The proportions of the post forming the valve-support may be materially varied, and also the grooves or corrugations on the contacting faces or sides of the parts of the valve-support may be omitted, if desired; but by their employment the strain on the solder is reduced. I also preferably groove or corrugate the clamping-plates N O, as best shown in Fig. 3, the corrugations varying in width, so that the plates cannot be misplaced.

"By making the plates N O thin and of large area, as shown in Fig. 7, heat is quickly absorbed.

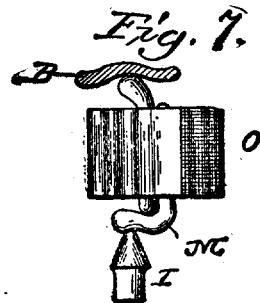
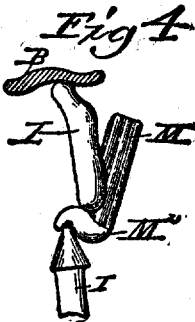
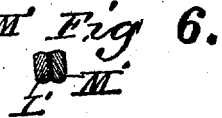
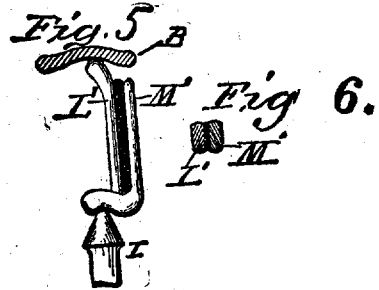
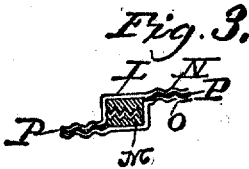
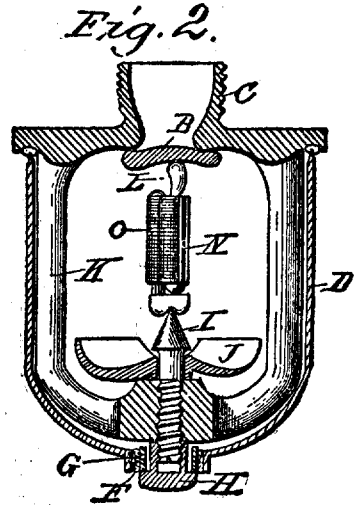
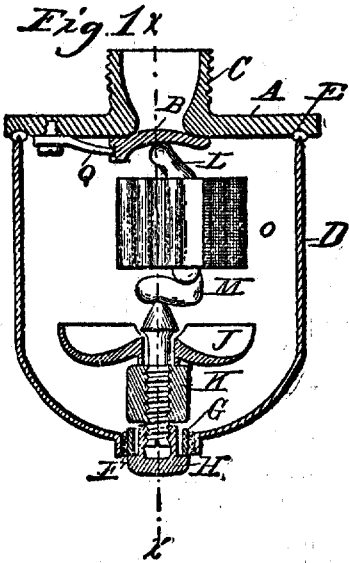
"I preferably cover the outer surface of the plates N O with a thin coating of lamp-black to thereby increase the rapidity with which it will absorb heat.

"It is obvious that the glass shell or case may be employed as an inclosing-case for the automatic sprinklers of various kinds now on the market, and

and therefore do not desire to limit my invention to the combination therewith of the particular form of sprinkler herein shown.

"In practice it may be found that the fusibly-united plates N O, embracing the post and bar L M, may be in themselves sufficient to hold in place the valve, thereby omitting the fusible material between the contacting faces of the said post and bar.

"The object of the screw-threaded cap is to permit substituting a new glass case or cover for a broken one without displacing the valve."



The claims sued upon are the following:

3. "In an automatic fire-extinguisher, the valve and separable valve-support, combined with the separable clamping-plates to hold the parts of the valve-support in contact, said plates extending laterally and being fusibly connected beyond the said support, substantially as described."

5. "The combination, with the valve of an automatic fire-extinguisher, of the fulcrum I and the fusibly-united independent valve-support consisting of a post L and a bent lever M, one end of the post bearing against the valve, the other against the bent lever, the direction of thrust of said post against the lever being at one side of the fulcrum I, at a point lying between said fulcrum and the outer end of said lever, so as to tend to pull said outer end of lever M away from post L, substantially as described."

The principal patents relied upon as anticipations are as follows:

Letters Patent No. 277,481, issued to R. W. & F. Grinnell, May 15, 1883, for an Automatic Fire Extinguisher.

Letters Patent No. 388,905, issued September 4, 1888, to W. Neracher for an Automatic Fire Sprinkler.

Letters Patent No. 356,874, issued February 1, 1887, to W. Harkness for an Automatic Fire Extinguisher.

Letters Patent No. 305,663, issued September 23, 1884, to J. R. Brown for an Automatic Fire Extinguisher.

The substantial portion of the latter patent, with its drawings and first claim, is as follows:

"This invention has reference to an improvement in the construction of automatic fire-extinguishers; and it consists in the peculiar and novel device by which one or two outlets are closed, so as to resist the internal pressure, until, on the occurrence of a fire, the same are released by the action of heat on a fusible solder, as will be more fully set forth hereinafter.

"In automatic fire-extinguishers as heretofore constructed the parts which are secured together by a fusible solder to restrain the action of the extinguisher until the breaking out of a fire would melt the solder have been secured so that the strain on the soldered surface was on a line with such surface, so that on the partial yielding of the solder the surfaces commenced to slide on each other, and such sliding, if arrested, would cause the extinguisher to leak. To prevent this creeping, I employ the solder simply to hold the two parts together surface to surface, which, on the melting of the solder, will separate without any movement of the surfaces upon each other.

"Fig. 1 is a view of my improved automatic fire-extinguisher. Fig. 2 is a view of the same, partly in section.

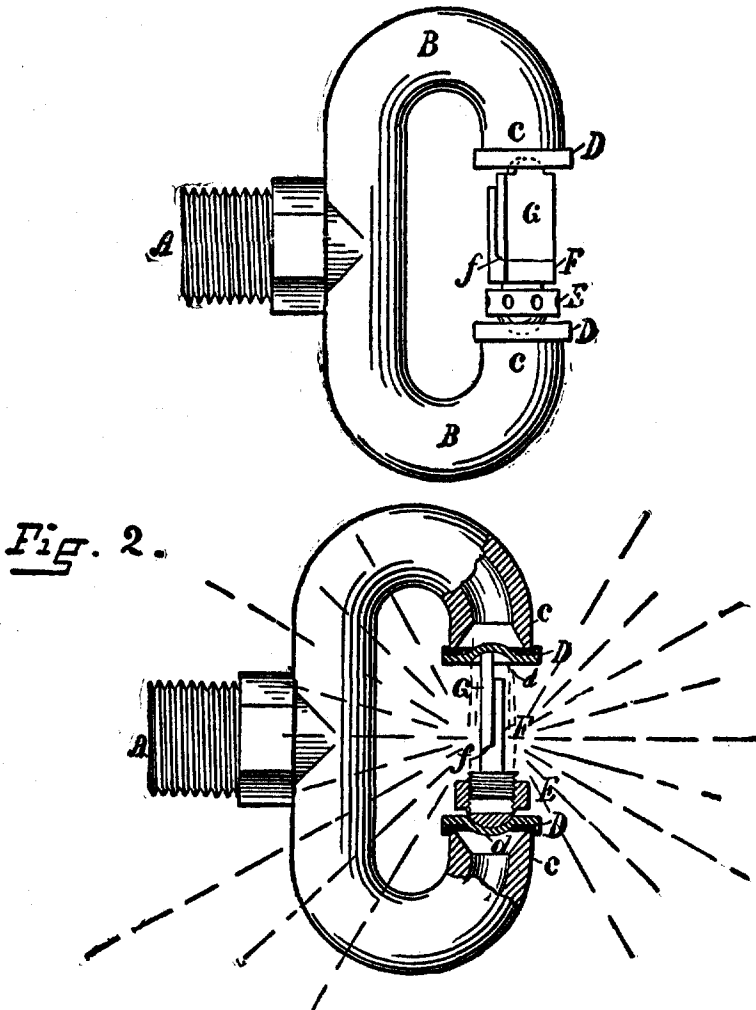
"In the drawings, A is the inlet, provided with a screw-thread by means of which it is secured in the usual branch-fitting of the pipes placed in the building to be protected, and connected with the water-supply. B B are two branches, ending in the discharge-outlets C C, placed opposite each other, so that the two streams issuing from the outlets will impinge against each other, and thus disperse the water in a fine spray over a large area. D D are caps by which the outlets O C are closed. They are preferably provided with a packing-ring, to insure a tight joint, and are provided with the central indentation, d d, in which the device for securing the caps rests. This device consists of the round-ended cup E, the interior of which is screw-threaded, and which is provided with holes into which a pin may be inserted to turn the cup E; or it may be made square or polyangular, so that a wrench can be applied. Screwed into the cup E is the post F, provided with the shoulder f, which shoulder is concave, so as to form a firm bearing for the post G, which is secured to the post F by solder, the upper end of the post G bearing against the cap D and resting in the cavity d. By holding the posts F G and turning the cap E in one direction the whole device is elongated, and the caps D D are forced against the outlets, while by turning in the opposite direction the same are loosened. As long as the posts F G are held together by solder, the device will resist the internal pressure on the caps D D; but as soon as the solder is weakened by heat the joint is torn apart by the upsetting of the post F. The surfaces soldered do not slide in the least on each other, but are torn asunder as soon as the joint is sufficiently weakened by heat.



"The device can be arranged to require a greater or less force to rupture the soldered joint by placing the post G at a greater or less angle with the post F. By this arrangement the caps D D are firmly held in place until the solder is weakened by heat, and the caps D D do not move in the slightest degree until the soldered joint is separated completely, thus preventing the possibility of a leak until the caps are entirely released and are removed by the internal pressure.

"Having thus described my invention, I claim as new and desire to secure by Letters Patent—

"1. In an automatic fire-extinguisher, the combination, with an extinguisher-body having oppositely-disposed discharge-openings and valves for said openings, of a separable holding-connection for the said valves, composed of two members interposed between each pair of the discharge-openings, and arranged in approximate alignment with such openings, the contiguous ends of said members being united by solder, and their opposite ends resting against the valves, substantially as described."



The substantial portion of Letters Patent No. 331,394, issued December 1, 1885, to A. M. Granger, with its drawings, is as follows:

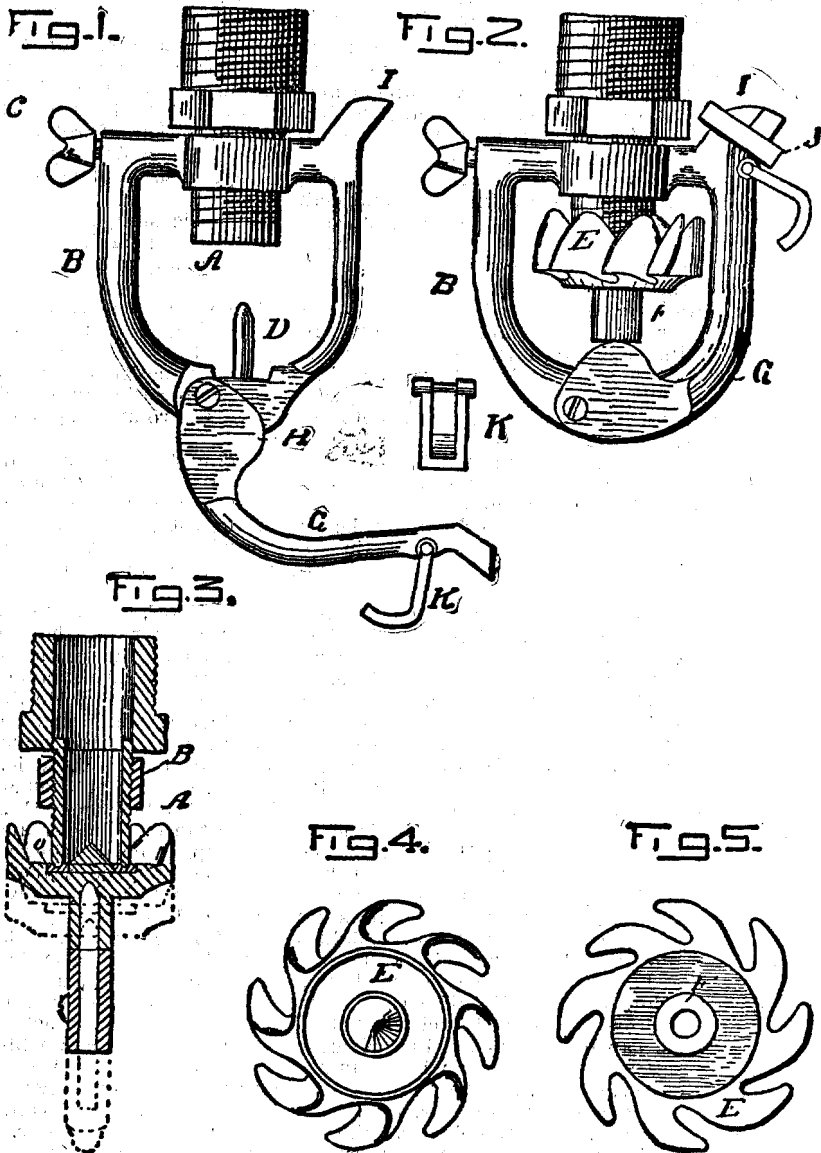
"This invention relates to automatic sprinklers for the purpose of extinguishing fires; and it consists in the construction hereinafter set forth, whereby a rotary valve-distributor, while being used as a valve, is held off its pivotal support when not in operation, but is dropped to its support when the water is flowing; also in an improved construction of rotating sprayer or distributor; also in a non-fusible securing device which may be readily adjusted to hold the valve closed temporarily; also in details of construction, as hereinafter pointed out and claimed.

"The object of the invention is to produce an automatic sprayer, which may be quickly closed to stop water damage, temporarily held in closed position after a fire shall have been extinguished, and to improve the construction of the working parts.

"In the drawings, Figure 1 is a side elevation of the frame, nozzle, and lever, the lever being down and the sprayer removed. Fig. 2 is a similar elevation of the complete device as applied to the pipe. Fig. 3 is a vertical cross-section of the device, the rotating sprayer elevated in position to close the nozzle in full lines, but shown in depressed or rotating position in dotted lines. Fig. 4 is a top plan, and Fig. 5 a bottom plan, of the rotating sprayer or distributor.

"A indicates the nozzle, on which the frame B screws, as is usual in devices of this character, the frame being locked in position, when desirable, by set-screw C. The bottom of the frame bears a fixed spindle, D, of such length as to extend into the socket in the bottom of the rotating distributor E, when the latter is raised to bear against the nozzle, (see Fig. 3,) and having a conical top, which serves as a bearing for the rotation of said distributor when depressed.

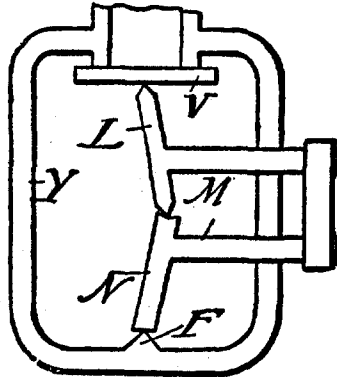
"E is the rotating distributor, which has a hollow hub, F, on its lower face. When in its lowest position, this spindle will not quite reach the bar of the frame B. A lever, G, is pivoted near the bottom of the frame B, and has a cam-bearing surface, H. This lever may be a forked lever, having one prong at each side of the frame, or may be simply placed alongside the frame, as shown, in such position that the bearing surface H will, when the lever is raised, come against the bottom of the hub F, and lift the valve-distributor, but not far enough to lift it clear from the spindle D, which spindle thus serves as a guide. The frame B should have a projection or horn, I, which will receive one end of a fusible link, J. When lever G is turned up against the frame, the link J is slipped over the end thereof and over the horn I. The bearing H holds the spindle F up. The distributor-valve is held firmly against the nozzle, and, if properly constructed, leakage from the nozzle is impossible. On the fusing or breakage of link J the lever G falls and the distributor falls until it is supported only on the spindle D, where it can be rotated with very slight expenditure of power. The lever G has a non-fusible link or hook, K, attached. When the lever has fallen, it may be returned to closed position by pressing up with a stick or rod just below the link K. The fusible link having melted away link K will be folded over the horn I, and will hold the device closed; but before the fusible link can be applied the link K must be thrown back, and while the fusible link is in position it will be impossible to lock the device by the non-fusible attachment. The rotating distributor has spiral wings or vanes surrounding a central disk portion. The inner ends of these vanes are about on a level with the floor of the distributor, but gradually rise toward the periphery. The spiral construction causes the distributor to rotate with great rapidity when water is allowed to flow from the nozzle upon its face, the distributor being then depressed and resting on spindle D. The peculiar forms of the blades or vanes give an upward as well as an outward distribution to the water, throwing it off as a spray rather than spattering it in drops, as a fixed plate would do. As the blades of the distributor have no inner corners, any threads or fibers which may lodge thereon will be immediately washed off by the current of passing water."



Claim (3) of the Freeman patent, as originally filed (Claim 8), read as follows: "In an automatic fire extinguisher the valve and separable valve support, combined with the separable clamping plates, for the valve support, said plates extending laterally, beyond the said support, substantially as described."

This claim was rejected by the Patent Office, the Granger patent No. 331,894 being cited, and was then amended by Freeman to read as it now appears.

The following drawing illustrates, with sufficient definiteness, and accuracy, the device charged as an infringement.



In the Circuit Court the bill was dismissed for want of equity, on the ground of non-infringement, the court holding that, in view of the prior art, the appellant was entitled to no broad construction of the claims, and that the appellees' device did not come within the particular form of the Freeman patent. From this decree the appeal is prosecuted.

Wilmarth H. Thurston, for appellant.

L. M. Hopkins, for appellees.

Before WOODS, JENKINS, and GROSSCUP, Circuit Judges.

After the foregoing statement of the case, GROSSCUP, Circuit Judge, delivered the opinion of the Court, as follows:

Without going into the prior art, in full, it is enough to say that the Brown patent shows, in an automatic fire-extinguisher, a valve and separable valve support, combined with separable clamping plates, fusibly connected. Freeman was not the first to introduce into the art the conception of a strut which, though composed of different members was, as an entirety, separate from the environing framework. The claim, on the score of separableness of the strut, can not, therefore, be sustained.

But it was insisted at argument that neither the Brown device, nor any of the preceding fire extinguishers, show a strut, the members of which are set angularly to each other, and pivoted one upon the other. In the Brown device the convex end of one member of the strut fits into the concave shoulder of the other, and the drawings show that the pivoting is not out of alignment with the strut.

One of the chief difficulties of appellant's case is that its existence is not, strictly speaking, along the lines of the patent under which it claims; nor do the claims lay any emphasis upon the idea of angular pivoting. We may go to the description to amplify a claim, but we can not, out of the mere descriptive portion of the patent, wholly create a claim. Whether the feature of angularity, upon which so much stress is now laid, would have been sustained, had it appeared in the claim, need not be now considered. It is sufficient that, as a matter of fact, no grant, upon that score, was either asked or allowed.

We are of the opinion, also, that the action of the Patent Office, and Freeman's acquiescence therein, upon the original application constitute a limitation upon the Freeman claims. In view of the prior art, including the Granger patent, we can see no occasion for adding the words, "to hold the parts of the valve supports in contact" unless it was meant that the contact should be by a direct clamping, as shown in the drawings; for the Granger patent brings about an operative contact by clamping at some distance off; and it was to avoid this citation that the additional words were introduced. We can not escape the conclusion that a limitation such as this was intended; at least, that it was so understood by the Patent Office; and this interpretation excludes the appellees' device from the charge of infringement.

The truth seems to be that present operative fire extinguishers—both those constructed by the appellant, and those constructed by the appellees—are, in the means leading to delicacy of adjustment, somewhat different from all the patents brought to our attention; and, if this difference be a step forward, it would be inequitable, by any strained construction, to bring this advance in the practical art within the monopoly of any of the patents that lag after.

The decree of the Circuit Court is, accordingly, affirmed.

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DE LAMAR v. DE LAMAR MIN. CO.

(Circuit Court, D. Idaho. August 23, 1901.)

1. PATENTS—ISSUANCE—PRESUMPTIONS.

While there is a presumption in favor of the validity of a patent regularly issued, arising from such issuance, such presumption is not a conclusive one, so as to sway the judgment of the court, in an action relating to its validity, against the conviction naturally following from the evidence and the law.

2. SAME—PRECIPITATION OF METALS—PATENT NO. 607,719.

Patent No. 607,719, for a process of recovering precious metals from their solution, specified that it related to the recovery of precious metals from their solution by the use of a "definite quantity" of a finely-divided precipitating reagent in a state of agitation. In an action for infringement it was proved that, in order to use the process, it was necessary to use more zinc dust than was actually necessary to precipitate the solution, to prevent the process of the redissolution of the metals, which otherwise would immediately begin, and it was contended that by reason of such fact the specification was not concise and exact, so as to enable a person skilled in the art to make use of the same, as required by Rev. St. § 4888. *Held*, that the term "definite quantity," as used in the specification, should receive a liberal construction, and should not be limited in its meaning only to an amount of zinc dust necessary to properly precipitate the metals, but may mean the certain amount needed in either case to properly produce the result, as distinguished from an indefinite or unlimited amount, as was used in the older process.

3. SAME—APPLICATION OF OLD PROCESS TO NEW USE.

De Lamar patent, No. 607,719, issued July 19, 1898, for a process for recovering precious metals from their solution by the use of zinc dust in a state of agitation, is an old process applied to a new use, and is anticipated by prior publications and patents, and is therefore void.

Dickson, Ellis & Ellis, for complainant.

John H. Miller and Johnson & Johnson, for defendant.

BEATTY, District Judge. The complainant, the owner of patent No. 607,719, issued July 19, 1898, "for a process of recovering precious metals from their solution," brings this action against the defendant as an infringer. As gathered from the record of this case, the process known as the cyanide process for separating the precious metals from the ore state consists of pulverizing the ore and then subjecting it to an aqueous solution of cyanide of potassium. The pulverized ore and this solution being mingled, the cyanogen, an element in the solution, having a greater affinity for the gold and silver than for the potassium, unites with the former and forms a new solution. By subjecting this last solution to contact with zinc, the gold and silver are separated from the solution. Such was, and is, the general process. The complainant's contention is that, under the only processes in existence prior to his patent, zinc in some massive form, as in plates, shavings, etc., was used; that to mechanically reduce the zinc to any of these forms was a considerable expense; that it was not in any of these forms so minute that all of it would be reached by the solution, and as a result an amount of zinc beyond that actually needed to precipitate all the metal was necessarily used, which resulted in so fouling the solution with zinc that to some extent it was rendered unfit for future use; that it required much time to work the ores by this process; and that, prior to his patent, there was no process by which each particle of the necessary amount of zinc could be brought into contact with each atom of the precious metal contained in the solution, which, he claims, is done by the process described in his patent, and through which all the difficulties referred to in the prior processes are avoided. The patent specifies that it "relates to the recovery of the precious metals from their solutions by the use of a definite quantity of a finely-divided precipitating reagent in a state of agitation"; that the zinc alloys, shavings, turnings, etc., heretofore used, had to be used in excess of the quantity actually required for precipitation; that the by-product known as "zinc dust," being a very fine powder resulting from the manufacture of zinc products, is a cheap substitute, which can be used in the exact quantity which the solution may require for precipitation, for the use of which, with agitation, the claims provide. The chief improvement claimed by the patent over prior processes is that by the use of zinc dust, with agitation of it with the solution, it can be used in the exact quantity needed for precipitation, thus so avoiding the fouling of the solution with a surplus of zinc that it can again be used. If the court does not reach the correct result in the consideration of this cause, it will not be from want of either ability or diligence upon the part of counsel, for each party has been ably and faithfully represented. If the court does not, in its discussion of the issues, refer to all the questions and details presented by counsel, it is no reflection upon their judgment.

In this examination we start with the presumption in favor of the validity of the patent, which is but the logical conclusion of its issuance. This presumption, however, is but *prima facie* evidence, and is not of such conclusive weight as to sway the judgment of the court against the conviction naturally following from the evidence and the

law. We are justified in concluding this presumption is not controlling when we consider the great number of patents that the courts hold void. Either the courts or the patent office often err. The system, as it is, certainly is vicious. Almost it seems the practice is to issue patents and leave the courts to wrestle with the question of their validity, thus affording ample opportunity for the display of erudition upon technical subtleties at the expense and cruel disappointment of unfortunate patentees and litigants.

As understood by the court, the claim of the patent is for more than claimed, or than can be, by complainant. The third claim seems to include the entire process of extracting the precious metals from their ores: (1) Subjecting the ores in a pulverized state to the action of an aqueous solution of cyanide; (2) supplying to such solution the zinc dust; (3) the agitation of the solution and the zinc dust; and (4) recovering the precious metals from the precipitate resulting from the prior steps. Undoubtedly the first and last of these steps are old processes, and are not the invention of the patentee. The second and third are all, as is understood, that are claimed by complainant, or that can be within the protection of the patent. The important question, then, is whether, within the law, these constitute an invention by the patentee, and whether they are useful. What were the conditions—the state of the art—when the patentee commenced his investigations, and what changes or improvements did he make? Long before he commenced such investigation it was well known, and was in daily practice, that zinc was a valuable metal for the precipitation of the precious metals from a cyanide solution; in fact, it was the metal alone used in such solutions. It was also discovered that this precipitation was increased as the surface of the zinc used was increased. As with a given amount of zinc the surface would be increased as it should be divided into a greater number of parts, it resulted that, the finer the particles of zinc, the better it operated, by bringing it into contact with more of the solution carrying the metals. It followed that, instead of using the sheet or bar zinc, shavings, granules, and other forms of comminuted zinc were substituted. These different forms of zinc were used in different ways, but probably the most approved was to so pass the solution over a body of such zinc as that it could percolate through it. To even this there was the objection that it required more zinc than could be actually used, much of it not being reached by the solution. Also, to prepare zinc in the form found best was an item of considerable expense, as it had to be specially prepared for that purpose. It resulted that at the time the patentee, Waldstein, commenced his experiments, it was well established that zinc was the metal for this use, and that the finer it could be made, or the more surface that could be had for a given quantity of it, the better the results. There is no question that at this time zinc dust, or zinc fume, was a well-known article of commerce, and there is evidence that efforts had been made to use it for the precipitation of the precious metals; but, when used in large bodies of the solution, it was found to sink to the bottom of the vessel, or, if the effort were made to percolate the solution through it, it so clogged as to be impracticable, and was

pronounced a failure. There is no evidence that it was being used in a mill or in large operations until so used by Waldstein. This zinc dust is the most minute form to which zinc can be reduced. It is a powder. It fully meets the desirable object of presenting the most possible surface with a given amount of zinc. It is also cheap, being but a by-product from other operations. By being well mingled with the solution carrying the metals, it comes in contact with every part of the solution, thus precipitating more of the metals with the same amount of the zinc than in any other form that it can be used. It was an improved form over that before used; but, of course, as the patentee did not invent the form, he cannot, and does not, claim any rights for that, but he claims for the discovery and application of its use. Another difficulty confronted him, and those who had attempted its use. Being in such a fine powder, it readily packed or clogged when put into a solution, or when the attempt was made to percolate a solution through it. It can readily be seen how this would result, and that, with this difficulty in the way, it would not be as valuable as zinc shavings, or other forms of zinc which would not pack into a solid mass. This difficulty was overcome by Waldstein by such agitation of the solution and zinc dust as that the whole mass would be kept in motion and thoroughly commingled,—a very simple thing, it seems, but the only thing that made the zinc dust a most valuable precipitant, instead of a failure. So what Waldstein did was to use the zinc dust, and so put it in motion that it could be used. If in this there was an invention, it was chiefly in the principle of agitation. It cannot be doubted that with certain ores, at least, it was an improvement over former processes, and that it is useful. That it is of the great utility claimed is not shown by the facts; for, while it appears to be now used in several places, it also appears that it has not entirely supplanted the former process, which still seems to be successfully used.

An objection made to the patent is that the process described therein cannot be followed with any beneficial result; hence its lack of utility. The claim is that it provides for the use of only the exact amount of zinc dust necessary to precipitate the metal in the solution, the result of which would be that the dust being all used in the process of precipitation, there being in the solution an excess of cyanide, the process of a redissolution of the precious metals would immediately begin, by reason of the great affinity between them and the cyanide. It is claimed that an excess of zinc dust must always be used, and the evidence shows that such is the practice, even with those who adopt the process under this patent. Of the expert witnesses who have testified upon this subject, some say the directions of the patent cannot be successfully carried out, while others say its proper construction removes all difficulty. The statute (section 4888) says that the applicant for patent shall file in the patent office a written description of his discovery, "of the manner and process of making, constructing, compounding, and using it in such full, clear, concise, and exact terms as to enable any person skilled in the art or science to which it appertains \* \* \* to make, construct, compound, and use the same." The patent, to me, unskilled in the



art, would seem to direct that exactly the amount, and no more, of the dust needed to precipitate the metal, should be used. It directs the use of a "definite quantity,"—the exact quantity which the solution may require. It is argued by the complainant that to one skilled in the art this means only that amount which is necessary to properly precipitate the metals and retain them in such precipitated state, which implies a slight excess over the exact amount needed for actual precipitation. "Definite quantity" may mean the certain amount needed in each case, as distinguished from an indefinite and unlimited, or any, amount, as was used in the older process; that the amount must be gauged by the actual necessity, as shown by proper calculation, instead of using by mere guess any indefinite amount. Certainly a specified amount cannot be named in the patent for all cases, for it must vary according to the nature of the ores and solution. While a very strict construction of the language of the patent might lead to the conclusion that it intended to specify that only the actual amount needed for precipitation should be used, yet I think a liberal construction should be placed upon it, and with that view I think one acquainted with the business of working ores could, from the description in the patent, follow it to a successful operation. If this is so, the patent conveys such a practical description of the process as brings it within the intent of the statute. While the patent might have been safely made more explicit, I doubt that this defect is of such gravity as to render it wholly void.

Another objection made is that this patent is but the application of an old process to a new use, or, as denominated in the patent law, a "double use." For the law upon this question, reference need be made only to the case of *Manufacturing Co. v. Cary*, 147 U. S. 623, 13 Sup. Ct. 472, 37 L. Ed. 307, wherein not only is there a full discussion of the law, but the authorities are collated. The patent in that case was concerning the tempering of coiled steel springs used in the construction of furniture. The court says:

"The claim limits the method to its application to 'furniture or other coiled springs'; but it appears from the evidence that the process, as applied to those springs, is in no respect different in method or effect from the same process when applied to any mechanically strained wire, or to steel made in straight pieces or strips, or otherwise. The claim covers broadly the described method of tempering applied to any coiled springs, as well as coiled springs for furniture; and if the evidence shows that, prior to Cary's invention, the method had been used for the restoration of any springs of strained steel, or other articles of strained steel, having resiliency, which is a well-known property of steel, the claim is substantially anticipated. Particularly if the method claimed had been used by others to restore articles of coiled spring steel, even though they were not used for furniture springs, the claim is anticipated."

Again:

"It is clearly shown by the witnesses for the defendant that, prior to Cary's alleged invention, wire clock bells and hair springs had been subjected to heat in the manner described in the Cary specification and with the same bluing effect. The treatment to which the articles were subjected was in all respects the same in the prior use as in the patented process. The only contention of the plaintiffs is that the purpose of the prior use was not the same, and that the results, so far as they were those of the patent, were accidental."

Also:

"In *Smith v. Nichols*, 21 Wall. 112, 22 L. Ed. 566, it was held that a mere carrying forward, or new or more extended application, of the original thought, a change only in form, proportions, or degree, the substitutions of equivalents, doing substantially the same thing in the same way, by substantially the same means, with better results, was not such invention as would sustain a patent; and in *Roberts v. Ryer*, 91 U. S. 150, 23 L. Ed. 267, it was held that it was no new invention to use an old machine for a new purpose, and that the inventor of a machine was entitled to the benefit of all the uses to which it could be put, no matter whether he had conceived the idea of the use or not."

And the court, after citing numerous authorities, says:

"The principle deducible from those cases is that it is not a patentable invention to apply old and well-known devices and processes to new uses in other and analogous arts."

As will be seen, the chief object of the patent was for the tempering, by heat, of coiled steel springs used in the construction of furniture; but the court held that it was anticipated by any prior process for tempering any other kind of springs, used for any other purpose, but particularly referred to the springs used in clocks, and held the patent void.

Let us now apply the law of this case to the facts in the cause here. The United States issued, February 25, 1868, its patent to Bischof & Kidwell for "improvement in preparing finely-divided iron and the separation of copper, silver, and other metals from their solutions." It describes the process of making iron powder from oxides of iron powder and the solutions, and then describes a revolving cask, in which are certain slats, or partial partitions, for thoroughly mixing the solution as the cask is turned on its axis, and says that the copper is precipitated almost instantaneously. The claims of this patent also include the "precipitation of metallic copper from its solutions by the use of finely-divided iron, and the use of finely-divided metallic copper \* \* \* for separating silver from its solutions." The English patent, No. 5,407, issued November 16, 1883, to Astley P. Price, "for obtaining copper from cupreous solutions," specifies that it is for the—

"Precipitation of the copper from its solution or solutions, by the employment of zinc when in a state of fine division, such, for example, as that which is known as 'zinc fume,' or the condensated vapor of zinc. In carrying out my invention, I add, to the solution or solutions containing copper, zinc in a state of fine division, such as zinc fume, which is substantially metallic zinc in a state of fine division, and I cause the cupreous solution or solutions to be intimately mixed with the same, either by the injection of steam or of air, or by a mechanical agitation, in order that the copper existing in solution may be precipitated therefrom."

Without suggestion, it is evident that the process here described is the same as in the Waldstein patent, using the zinc dust or fume, and mechanical agitation, but for the precipitation of copper, instead of gold or silver. The Waldstein patent is but the application of this process to a new use; that is, for the precipitation of gold and silver, instead of copper. To the same general effect is defendant's Exhibit No. 9, the French patent to Messrs. Paraf-Javal, issued July, 1866. I am unable to see why the facts shown by these patents

do not bring this case within the rule established by the supreme court case above cited.

The law intends to protect by patent only those who actually invent,—those who discover and give to the world something that was unknown,—and not to confer upon a claimant that which he merely adopts from the suggestion and genius of others. Accordingly the statute provides by section 4886 that:

"Any person who has invented or discovered any new and useful art, \* \* \* or any new and useful improvement thereof, not known or used by others in this country, and not patented or described in any printed publication in this or any foreign country, before his invention or discovery thereof, and not in public use or on sale, for more than two years, prior to his application, \* \* \* may \* \* \* obtain a patent therefor."

The defendant, in support of its claim that under this provision of the law the patent is void, has introduced a number of domestic and foreign patents and publications, a part of which, including those already referred to, will be noticed.

Defendant's Exhibit No. 8, English patent No. 18,146, granted to Sulman, August 17, 1895, is for the recovery of the precious metals from cyanide solutions by the use of zinc in an "extremely fine state of division." The patentee says he finds the best form of zinc for use is where it is obtained by "condensation from the metallic vapors given off in the distillation of zinc,—say, for example, the product from the flues and settling chambers." In the claims of the patent zinc dust or fume is named. The American patent to the same party, for which application was made February 25, 1895, and granted February 2, 1897, No. 576,173, refers to the use of metallic zinc vapor, generally known as "zinc dust or fumes." In connection with the question discussed in this case as to the value of zinc oxide, it may be noted that in this patent a part of the process described consists in "purifying the fumes or dust of zinc of oxides." This patent includes the use of zinc dust purified of its oxide, and the agitation of its mixture. Defendant's Exhibit No. 11 is the English patent, No. 5,125, to Astley Paston Price, October 29, 1883, which is for the "extraction of the precious metals from their ores, and from compounds," etc. It provides for the use of zinc or other metals than copper in a state of fine division, and for the agitation of the mixture, either by the injection of steam, air, or by mechanical means. In the subsequent patent to the same party, and above referred to (No. 5,405), it is added to his specifications that the zinc dust used is that which is known as "zinc fume," or the condensed vapor of zinc. The last patent, however, refers to the precipitation of copper.

Among the publications referred to are defendant's Exhibit No. 20, a German publication, published at Leipsic, October 17, 1890, describing the process for the recovery of silver and gold from cyanide of potassium solutions, in which it is stated that, "for precipitating gold, agitate the mixture with zinc dust." Defendant's Exhibit No. 19 is also a German publication, published at Berlin, August 23, 1890, for "the recovery of silver and gold from used cyanide of potassium liquids," in which the use of zinc dust shaken or stirred is described. This article is republished in the Scientific American

Supplement, at New York, January 31, 1891. Defendant's Exhibit No. 21 is another German publication of October 29, 1892, in which it appears that gold may be recovered from cyanide of potassium liquids, with the aid of zinc dust, by repeated shakings.

These various patents and publications clearly show that, long prior to complainant's patent, the process claimed by it was substantially described. It has been argued that the zinc dust named in some of these exhibits was not the article referred to in complainant's patent; but the suggestion is not well supported. Not only was it a well-known article, but in some of the exhibits it was especially described. Moreover, when an article has a known name, why, when that is used, can there be any reason to conclude that something else is meant? Were this the rule, surely there could be nothing in a name. It need scarcely be added that it is immaterial whether or not the patentee knew of these publications, but some of them were made at his own home. The law, however, only provides for the fact of publication, and not for the knowledge of it. Many authorities, in the argument of this case, have been cited, apparently pointing to different conclusions. When all the facts concerning them, and the peculiar questions appertaining to the patent law, are fully considered, the probabilities are that they are consistent with each other; but it may be doubted that it is the province of this trial court, after having carefully examined, to undertake here to fully review, them. The authorities cited by complainant concerning foreign publications are to the effect that they must be so full and clear as to enable any person skilled in the art or science to which they appertain to practice the invention to the same practical extent as they would be enabled to do if the information were derived from a prior patent. These publications seem to me to be so similar to the specifications of the patent that one skilled in the art would readily reach the latter from the suggestions of the former.

After a most careful and laborious examination of this cause, being convinced that the complainant's patent is subject to the defenses that it is an old process applied to a new use, and that it is anticipated by prior publications and patents, without further discussion of the other questions raised, the conclusion is that a decree be, and is, ordered for defendant, with its costs. In the absence of counsel, some of whom reside at a distance, 40 days' time is given them, after notice of this decision, in which to take such further steps in the cause as any of them may desire.

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HARRISON v. HUGHES et al.

(District Court, D. Delaware. September 18, 1901.)

No. 594.

**1. GOVERNMENT CONTRACTOR—NEGLIGENCE—LIABILITY TO THIRD PARTY.**

A contract between the United States and contractors for the erection of a breakwater near the mouth of the Delaware Bay, which provides for the erection of a stake-light on the work in accordance with the instructions of the United States engineer in charge, or his agent, and its maintenance by the contractors, does not relieve the latter from liability

to third persons whose property is damaged or destroyed by reason of the extinguishment of the light during a storm or high wind, where the contractors had knowledge of its liability so to be extinguished, and in the absence of any provision or implication to be drawn from the contract that, when necessary for the protection of navigation, the contractors should not place on the work in course of construction other lights than those mentioned in the contract or prescribed by the government officers in charge.

2. SAME.

The measure of the contractual obligation of the contractors to the government did not necessarily limit or define the precise measure of their duty to third persons whose lives and property would be exposed to extreme peril in case of failure to indicate at night the new construction by the maintenance of the stake-light or some other light at that point or by other means.

3. SAME—ACT OF GOD.

The accident to the steamship through running against the new construction cannot be treated as due to the act of God or vis major, as it did not result from purely natural causes impossible by the exercise of reasonable diligence and circumspection to have been perceived and therefore unreasonable to guard against.

4. SAME—DUTIES—LIGHTS.

Reasonable care and vigilance required the contractors to guard against probable consequences of the extinguishment of the light or its failure to burn at night, and, while owing to the condition of the wind or water it may have been impracticable promptly to re-light the lantern whenever the light was blown out in a storm or high wind, the contractors should, in view of the great danger to life and property resulting from darkness at that point, have either erected an electric light enclosed in a lens similar to that prescribed by the government officers in charge, which could have been operated from shore in case of the extinguishment of the stake-light, or have made such disposition of their floating plant as to warn vessels away from the new construction.

5. PILOTS—CARE REQUIRED.

Pilots whose vocation is to control the course of vessels into and out of the Delaware Bay and river and their anchorage therein, are required to exercise the care and skill of river and harbor pilots, and are chargeable with knowledge of natural objects on shore and the obstacles to navigation, and of the significance of fixed and permanent lights.

6. MUTUAL NEGLIGENCE.

*Held*, that on the facts there was fault on both sides, and the libellant is entitled to recover only one-half of the damages and costs.

(Syllabus by the Court.)

In Admiralty.

John F. Lewis and Francis C. Adler, for libellant.

Harry Emmons, Anthony Higgins, and H. Galbraith Ward, for respondents.

BRADFORD, District Judge. The libel in this case is in personam and was filed by Albert Harrison, master of the British steamship Glenochil, against Eugene Hughes, James Hughes, Charles Hughes and Anson M. Bangs, trading as Hughes Brothers and Bangs, to recover damages for injuries sustained by that vessel through running upon the new breakwater off Lewes, near the mouth of Delaware Bay, about 1 o'clock in the morning of November 30, 1897. At the time of the accident the new breakwater, extension to the breakwater, or harbor of refuge, as it is indifferently termed, was in course of construction by the defendants, under a contract be-

tween Major C. W. Raymond of the corps of engineers of the United States army, acting for and in behalf of the United States, as party of the first part, and the defendants as parties of the second part. The contract was in writing, bore date February 5, 1897, was approved by the chief of engineers February 20, 1897, and provided, among other things, as follows:

"The said Hughes Brothers and Bangs shall furnish the necessary plant and material and do all the work required for the construction of a stone breakwater in Delaware Bay, Delaware, in strict accordance with, and subject to all the conditions and requirements of the specifications hereunto attached and forming a part of this agreement."

Among the conditions and specifications are the following:

"(3) Maps of the localities may be seen at this office. Bidders, or their authorized agents, are expected to visit the place and to make their own estimates of the facilities and difficulties attending the execution of the work, including the uncertainty of weather and all other contingencies."

"(42) Description of the locality. The site of the proposed breakwater is about 2½ miles north of the Delaware Breakwater Harbor, about 3 miles from the government pier at Lewes, Delaware, and about 10 miles from Cape May. \* \* \*

"(56) \* \* \* The work shall be conducted in strict accordance with instructions given from time to time by the engineer officer in charge. \* \* \* All operations connected with the work will be under the immediate supervision of assistant engineers, inspectors or other agents of the engineer officer in charge, and their instructions shall be strictly observed by the contractor and his employes."

"(59) The work will be commenced by the construction of the substructure at the upper or north-west end of the breakwater, where the mound will be raised to the level of mean low water as rapidly as possible, and over a length at mean low water at least 100 feet. Upon this mound a stake-light will be erected which must be thoroughly protected from ice and storms by depositing very large stones around it. This light will be erected and protected in accordance with the instructions of the engineer officer in charge, or his agent, and it will be maintained by the contractor as long as required by the engineer officer in charge."

"(62) Plant. The plant shall be adapted to the work and shall be kept in good condition at all times."

"(65) Lights. During the progress of the work, the contractor must keep suitable lights, every night from sunset to sunrise, upon all his vessels anchored at or in the vicinity of the work. He must also maintain on the work such lights as the engineer officer in charge may direct. These lights will be maintained at the expense of the contractor. The United States will not be responsible for any accident that may occur to the contractor's plant, to passing vessels, or to any property whatever, during the progress of the work."

"(70) Bidders shall further state, on the form hereto appended, and in accordance with the directions thereon, whether they are now or ever have been engaged on any contract or other work similar to that which is proposed, giving the nature and location of the work, the year or years in which it was done, the manner of its execution, and such other information as will tend to show their ability to vigorously and successfully prosecute the work required by these specifications. Any bid not complying with these instructions will be rejected."

The defendants in their proposal for the work, dated November 24, 1896, among other things, said:

"We are now engaged in constructing a stone breakwater at Point Judith, R. I., and a stone breakwater, also at entrance at harbor at New Haven, Conn. Both for the U. S. government. \* \* \* We make this proposal with a full knowledge of the work. \* \* \*

On or about May 3, 1897, work was commenced on the new breakwater and about the same time a stake-light was placed on a mound or stone pile constituting its northwesterly end. On the night of the accident the breakwater had been partially constructed for a distance of about 1925 feet at low water extending from the end provided with the stake-light southeastwardly; no other light having been provided for the work prior to that time. The libel, among other things, contains the following averment:

"That the stranding of the said steamship upon the new breakwater as aforesaid was caused by the carelessness, negligence and recklessness of the said respondents, in that said new breakwater so under construction by said respondents as contractors as aforesaid was at and before the time of the said stranding of said steamship, entirely without lights to mark its position and was, at its then stage of construction, thereby rendered a dangerous obstruction to navigation, which said absence of lights and dangerous obstruction were at the time known, or with proper diligence ought to have been known to the said respondents."

It is admitted that at the time of the accident the stake-light was not burning. The fact that it was not then burning undoubtedly caused or contributed to the disaster. There is, indeed, a conflict of evidence on the question whether the lantern was at that time attached to the stake or mounted on any portion of the breakwater. On careful examination of the evidence I am satisfied that it was at the time attached to the stake, properly trimmed and furnished with oil, but that the light had been extinguished, probably by the strong wind then prevailing from the northwest in connection with the defective and negligent manner in which the lantern was mounted on the stake. It was a Funck lantern, with a red lens from six to eight inches in diameter, calculated to burn, without refilling, from eight to ten days, hung in the open air, by means of a ring at its top to a bracket or cross-piece at or near the top of the post or stake at the height of about twenty-five feet above high water. The lantern was furnished to the defendants for use on the stake directly or indirectly by the engineer in charge. When the lantern was suspended from the bracket or cross-piece its bottom did not rest on any platform, nor was it otherwise prevented from swinging in the wind. When so swinging the lantern was liable to present itself to the wind at such an angle as to allow the wind, through deflection from its dome-shaped top, to blow down against and extinguish the flame. It appears from the evidence that prior to the disaster the lantern was on a number of occasions extinguished, while it should have been burning. The witness Hasskarl who was a government inspector in charge of the work on the new breakwater testified as follows:

"X 87. About how many times did you notice the light on the upper end of the new breakwater out before the Glenochil went ashore? A. I found it out, and noticed it out, but I cannot tell you how often. I do not know that I kept any track of it. \* \* \* X 93. Do you know what the difficulty was with that old lantern? A. Difficulty? X 94. Yes. Didn't it smoke and show very dimly, and sometimes go out? A. Yes, it did all that, I think."

Hasskarl, in an official communication to the engineer in charge, dated October 17, 1898, says of the stake-light in question or a lantern similar to it in position, size, construction and adjustment:

"The light at the upper end of the work frequently goes out, or is blown out during storms, and therefore cannot be considered a reliable light."

The insufficiency of the stake-light as originally adjusted was, after the accident, recognized by the government and steps were taken to remedy the evil. The chairman of the light house board in an official communication to the chief of engineers, dated December 6, 1898, says in part:

"The board then reached the conclusion, after careful examination, that the temporary lights on the extension to the breakwater should be standard lens lanterns of the light house board known as Funck tubular lanterns with pressed glass lens, red in color, and that they should be set upon rigid platforms on posts which should be strongly braced laterally, at the present height of 25 feet."

The engineer in charge December 19, 1898, indorsed the communication as follows:

"The temporary lanterns now and heretofore shown on the extension to the breakwater are standard lens lanterns of the light house board, known as the Funck tubular lanterns with pressed glass lenses red in color as within recommended. It is proposed to set them on rigid platforms as soon as possible."

Hasskarl in an official communication to the engineer in charge, dated January 3, 1899, says:

"I have the honor to report that the lights on the Harbor of Refuge were to-day changed from their former positions on brackets to rigid platforms on posts 25 feet above high water, and their present positions comply in every respect with the recommendations made by the light house board contained in a letter addressed to the chief of engineers under date of December 6, 1898."

All of the correspondence above mentioned was admitted in evidence without objection. There is no evidence that after the lanterns had been attached to rigid platforms the light was extinguished by winds or storms. But the question to be decided on this branch of the case is, not whether the officers of the government charged with the duty of properly lighting the new breakwater during the progress of the work or of furnishing means to that end, were guilty of actionable negligence in failing, before the accident and after Hasskarl had become aware of the liability of the original stake-light to be extinguished during storms or high winds while the lantern was swinging in the open air, to guard against such a result by adopting the obvious precaution, so tardily resorted to, of placing the original stake-light on a rigid platform not subject to lateral motion. Nor is it necessary to go into the vexed question how far contractors, entering into government contracts prescribing or authorizing subordinate officers to prescribe negligent and dangerous methods or instrumentalities for the making of a public improvement, can be held liable by third persons injured by the employment of such methods or instrumentalities. The question now to be decided is whether the defendants were guilty of actionable negligence toward the libellant, causing or contributing to the accident. The new breakwater in course of construction when not properly lighted was an obstruction extremely dangerous to shipping and, in the language of one of the official communications in evidence, "a greater menace to navigation than it can ever be in the future, from the fact that it is unknown to



strangers and not delineated on charts generally of that locality." The defendants, without qualification or condition, undertook in their contract to maintain the original stake-light at the northwesterly end of the work, properly burning. Specification 59 of the contract provides:

"This light will be erected and protected in accordance with the instructions of the engineer officer in charge, or his agent, and it will be maintained by the contractor as long as required by the engineer officer in charge."

Specification 65 also provides with respect to the duty of the defendants, therein termed the contractor:

"He must also maintain on the work such lights as the engineer officer in charge may direct. These lights will be maintained at the expense of the contractor."

Under these provisions the duty of the defendants was not merely to maintain lanterns in the required positions, but lanterns properly trimmed and brightly burning during the hours of darkness. It is contended, however, on the part of the defendants that the extinguishment of the stake-light by the wind on the night of the accident was an act of God for the consequences of which they are in no manner liable. As between the parties to an express contract the act of God or vis major furnishes no excuse for the non-performance of what one has by the contract unconditionally bound himself to do. But the stranding of the Glenochil on the new breakwater was in no legitimate sense attributable to the act of God or vis major. It is true that the stake-light, improperly adjusted, was extinguished by the wind, as a burning and unprotected candle would be blown out in a draught, but it cannot in its relation to the accident be held the act of God. The accident was not "one which could not have been prevented by human effort, sagacity and care" (The Majestic, 166 U. S. 375, 388, 17 Sup. Ct. 597, 603, 41 L. Ed. 1039, 1044), nor was it one arising from purely natural causes impossible by the exercise of reasonable diligence and circumspection to have been perceived and therefore unreasonable to guard against. The contractors were chargeable under their contract with knowledge of "the facilities and difficulties attending the execution of the work, including the uncertainty of weather and all other contingencies", and made their proposal "with a full knowledge of the work." They also had knowledge or are presumed to have had knowledge before the accident that the stake-light was liable to be extinguished during storms or high winds. It had gone out several times during the progress of the work and while it was unquestionably their duty to observe whether it continued to burn. It is further contended on the part of the defendants that they had no authority under their contract with the government to erect and maintain other lights on the work than those directed by the government officers in charge, and that it would have been improper for them so to do. But this court is not prepared to hold that the measure of their contractual obligation to the government necessarily limited or defined the precise measure of their duty to third persons, whose lives and property would be exposed to extreme peril, in case of failure to indicate at night the northwesterly end of the breakwater by the maintenance of the stake-

light, or some other light at that point, or by other means. They owed a duty to such third persons independently of their contractual obligations. They could not in reckless disregard of the lives and property of others shield themselves from accountability for destruction of life or property on the ground that the stake-light was extinguished by a force of nature over which they had no control, if by the exercise of reasonable care and precaution they could have adopted proper means to avert the calamity. There is no provision in or implication to be drawn from the contract that, when necessary for the protection of navigation, the defendants should not place on the work in course of construction other lights than those mentioned in the contract or prescribed by the government officers in charge. Such a prohibition would have been inconsistent with the manifest purpose of the contract that to avoid disaster to persons or property the upper end of the breakwater should be properly lighted. For this purpose the defendants undertook to maintain the stake-light at that point. As before stated, they were before the accident chargeable with knowledge of "the uncertainty of the weather" and of the fact that the stake-light was liable to be extinguished during storms or high winds. Reasonable care and vigilance required them to guard against the probable consequences of the extinguishment of the light or its failure to burn at night. While owing to the condition of the wind or water it may have been impracticable promptly to re-light the lantern whenever the light was blown out in a storm or high wind, no reason is perceived why the defendants should not, in view of the great danger resulting from darkness at that point, have either there erected an electric light enclosed in a red lens which could have been operated from shore in case of the extinguishment of the stake-light, or have made such disposition of their floating plant as to warn vessels away from the new breakwater. In omitting to resort to such or other precautions they failed to exercise the degree of care which the law demanded of them and were guilty of fault proximately causing or contributing to the accident.

The question remains whether the Glenochil was not also in fault. She was in charge of a Pennsylvania pilot for the Delaware river and bay. There is a broad distinction between an ocean pilot, who is compelled to direct the course of a ship mainly by compass, reckoning and astronomical observations, and a river pilot who relies not so much upon the compass as his familiarity with the natural objects and lights along the river. In *Atlee v. Packet Co.*, 21 Wall. 389, 396, 22 L. Ed. 619, 621, Mr. Justice Miller, delivering the opinion of the court, said:

"The character of the skill and knowledge required of a pilot in charge of a vessel on the rivers of the country is very different from that which enables a navigator to carry his vessel safely on the ocean. In this latter case a knowledge of the rules of navigation, with charts which disclose the places of hidden rocks, dangerous shores, or other dangers of the way, are the main elements of his knowledge and skill, guided as he is in his course by the compass, by the reckoning, and the observations of the heavenly bodies, obtained by the use of proper instruments. It is by these he determines his locality and is made aware of the dangers of such locality if any exist. But the pilot of a river steamer, like the harbor pilot, is selected for his personal knowledge of the topography through which he steers his vessel. In the long course of a thousand miles in one of these rivers, he

must be familiar with the appearance of the shore on each side of the river as he goes along. Its banks, towns, its landings, its houses and trees, and its openings between trees, are all landmarks by which he steers his vessel. The compass is of little use to him. He must know where the navigable channel is, in its relation to all these external objects, especially in the night. He must also be familiar with all dangers that are permanently erected in the course of the river, as sand-bars, snags, sunken rocks or trees, or abandoned vessels or barges. All this he must know and remember and avoid. To do this he must be constantly informed of changes in the current of the river, of sand-bars newly made, of logs or snags, or other objects newly presented, against which his vessel might be injured. \* \* \* It may be said that this is exacting a very high order of ability in a pilot. But when we consider the value of the lives and property committed to their control, for in this they are absolute masters, the high compensation they receive, and the care which congress has taken to secure by rigid and frequent examinations and renewal of licenses, this very class of skill, we do not think we fix the standard too high."

This language clearly is applicable to pilots whose vocation is to control the course of vessels into and out of the Delaware bay and river and their anchorage therein. Like river and harbor pilots, they are chargeable with knowledge of natural objects on shore and the obstacles to navigation, and of the significance of fixed or permanent lights. The pilot in charge of the Glenochil had large experience in his calling. For some fifteen or sixteen years he had been engaged in piloting steam and sailing vessels of all sizes into and out of the Delaware bay and river. He was thoroughly familiar with the relative positions of the old and new breakwater, with their distance apart, with the stake-light on the latter, and with the range and other lights visible in that locality. He boarded the Glenochil a short distance outside of the capes about or shortly after midnight; that vessel being bound to the old breakwater for orders and intended to anchor there for that purpose. When the proposed anchorage was reached "just outside of the old breakwater" the master ordered that the starboard anchor be let go. This order was not carried out owing to the jamming, or fouling of the windlass. At this time and until the accident there was a strong wind from the northwest. The night, however, was clear, not only the stars, but the range and other fixed lights capable of being seen in that locality, being distinctly visible. Upon the failure of the starboard anchor to drop, owing to the defective condition of the windlass, the master directed that the Glenochil be put to sea, in order that preparations might be made for the use of the port anchor. The pilot forthwith ordered the helm ported and the Glenochil swung to starboard under a full head of steam; and being light and the direction of the wind being against her starboard bow, she failed to swing to starboard with sufficient speed to clear the new breakwater, with the result that she ran against and on the same, thereby receiving the damage complained of. There is some expert evidence to the effect that, owing to her lightness and the direction and force of the wind, it was impracticable for her to swing under a port helm from the proposed anchorage clear of the new breakwater. If this be a fact, of which I have considerable doubt on the evidence as a whole, the pilot was chargeable with knowledge of it, and, knowing the position of the new breakwater relatively to the old and the distance between them, he should have so regulated her movements as to avoid the disaster, there being

an abundance of sea room for that purpose, as hereinafter stated. Although aware of the fact that the upper end of the work was provided with a stake-light it does not satisfactorily appear from his evidence, or from any other evidence in the case, when he first looked for that light or ascertained that it was not burning. On his own showing the pilot convicts himself of gross negligence or incompetency directly contributing to the accident. He testifies in part as follows:

"Q. Was the place selected by you to anchor the Glenochil a proper place? A. Yes, sir. Q. Was it a place in which you have anchored other vessels? A. Yes, sir, many a time. \* \* \* Q. Well, when he told you to put the Glenochil to sea again, what did you do? A. I put the wheel to port and rung her up. \* \* \* Q. Well, now, then what happened? A. Well, I stranded on the breakwater; I thought I was closer to the old breakwater than I was. \* \* \* Q. Please state whether there was any light on the upper end of the breakwater or not? A. No light at all. Q. Are you positive about that? A. Yes, sir. Q. What kind of a night was it with respect to seeing lights? A. Why it was a right nice night to see lights. \* \* \* Q. Please state whether there was anything in the character of the night, that night, which would have prevented you seeing a light upon the upper end of the breakwater had one been there? A. Nothing at all, sir. \* \* \* Q. Had you been by the new breakwater frequently or not? A. Yes, sir. Q. Did you know where it was? A. Yes, sir. Q. Well, if you knew where the new breakwater was, why didn't you avoid it? A. Well, if there had been a light there, we could have avoided it, but there was no light at all. \* \* \* XQ. Have you any recollection as to how long that light had been showing on the new breakwater before you had this accident? A. Yes, sir. Well, it was there quite a while off and on. \* \* \* XQ. How near to the old breakwater do you judge you were, when you gave the order to let go the anchor? A. About three quarters of a mile, probably a little further I judge. XQ. And it was that distance which you say you were mistaken in? A. Mistaken? XQ. Didn't you say you thought you were mistaken in supposing that you were so close to the breakwater when you gave the order to let go the anchor? A. No, sir. XQ. Then, do you still state you were about three quarters of a mile from the old breakwater when you gave the word to let go the anchor? A. Yes, sir. XQ. That is your present judgment? A. Yes, sir. XQ. That was your judgment at the time you gave the order? A. Yes, sir. XQ. Do you know of any reason to change that judgment? A. No, sir. \* \* \* XQ. Mr. Bennett, how far is it in a straight line from the old breakwater to the new breakwater, as far as the new breakwater was sticking up above the surface at low tide in November last? A. I should judge about two miles. \* \* \* XQ. When you gave the order to port the wheel, I judge from the distance that you have told me that you were off, you had about a mile and a quarter of clear water to turn around in, is that about right? A. Yes, sir; but I was deceived in my judgment. XQ. Now, think about it, and tell me how near you were actually to the new breakwater when you gave the order to port the wheel? A. Well, I couldn't, I judged I was that distance from the old breakwater, and I judged wrong. \* \* \* XQ. That was a mistake, wasn't it, Mr. Bennett, that you had as much as a mile and a quarter of clear water to turn around in? A. Oh, certainly, it was a mistake. \* \* \* XQ. Are you able to make a judgment how far off, in your best judgment, you were from the new breakwater when you gave the order to port your wheel? A. No, sir. I couldn't, because I don't know. XQ. Now, when you heard that hail from the forecabin you didn't suppose you were anywhere near this new breakwater, did you? A. No, sir. XQ. Didn't you think the new breakwater was half a mile or so over to your port side? A. I thought the breakwater was further off, I judged that I could come out clear. \* \* \* XQ. You hadn't any more expectation of hitting the new breakwater, the stone pile, that night than you have to-day? A. No, sir; not a bit. XQ. You didn't suppose that you were within half a mile

of it? A. I didn't suppose I was within a mile of it. XQ. Well, had you been looking for that red light on the stone pile? A. I had been previous. I had been looking for it that night. \* \* \* XQ. Do you recollect looking for that red light on the stone pile? A. Yes, sir. XQ. When did you look for it? A. I looked for it as I was turning the ship around. XQ. You did not see it? A. No, sir. XQ. You didn't think that was anything remarkable? A. Yes, sir; because it was published to be put there. XQ. You didn't see it; didn't that make any change in your navigation? A. No, sir. Why how could that make any change? Then it was too late to make any change. I didn't see it. XQ. You mean it was too late when you thought to look for the light? A. I looked for the light as I tried to turn the steamer. I was too close to the breakwater. XQ. You didn't think to look for the light until you were that near, that it was too late? A. Oh, yes, sir; I looked for the light. If a light had been there, I could have reversed the engines and wouldn't have hit. XQ. Now, Mr. Bennett, what I am asking you is whether you recollect looking for that light when you first started to turn around the Glenochil? A. Yes, sir. XQ. Well, now you told me it was ten minutes before you hit, wasn't it? A. I suppose it was; somewhere around there. \* \* \* XQ. And you didn't see it? A. No, sir. XQ. And it was a good night for seeing lights, and you saw all the other lights around you? A. Yes, sir. \* \* \* XQ. Well, Mr. Bennett, didn't you think your judgment was good enough to keep clear of that stone pile, even if you didn't see the light? A. Well, if I had known there was no light there. XQ. You knew that there was no light there that night? A. I didn't know until I got in there. XQ. You knew that you didn't see any light there that night? A. Yes, sir. XQ. For ten minutes before you hit? A. No, sir; I didn't say that. XQ. Didn't you say that you were looking for that light when you gave the order to port the wheel? A. No, sir; I did not. XQ. You don't remember saying that? A. No, sir. XQ. Well, now, how long after you gave the order to port the wheel do you think, that you did look for that lantern? A. I couldn't tell you. It was before I struck. I know the light was gone. I looked for the light, and I thought I had plenty of room to come around. XQ. Did you look for the light before you heard the hail from the forecabin? A. Yes, sir. XQ. How long before? A. Why, it wasn't no time. I hadn't gotten my glasses down. XQ. You were just looking for the light when you heard the hail from the forecabin? A. No, sir. Hold on, I am going too fast. No, I looked for the light, and afterwards I heard the hail, because I thought I had plenty of room. XQ. You had been looking for the light through your glasses? A. Yes, sir. XQ. And just as you took your glasses down, you heard this hail? A. Oh, no; it was a little while afterwards I heard the hail. XQ. Well as much as two seconds? A. Oh, yes, sir; it was a long while. I couldn't tell you how long it was. \* \* \* XQ. What I understand you to say now, Mr. Bennett, that you looked for the light once, a little or some while before you heard the hail from the forecabin? A. Oh, yes; quite a while before I heard the hail. XQ. And you looked through the glasses? A. Yes, sir. XQ. And you didn't see it? A. No, sir. XQ. But you thought you were giving the stone pile a good berth, anyhow? A. Yes, sir. XQ. So you went ahead? A. Yes, sir. Certainly if the light had been there, there would have been no trouble at all. \* \* \* XQ. How long before you struck the stone pile in your best present judgment, was it that you noticed that there was no light on the stone pile? A. Quite a while as I said before. \* \* \* XQ. Do you think it was as much as three minutes? A. I think it was as much as four minutes. XQ. That is your best judgment? A. Yes, sir. XQ. Four minutes? A. Yes, five minutes. XQ. Will you stick at five minutes? A. Yes, sir. XQ. Then it was five minutes before you hit, that you satisfied yourself that there was no light on that stone pile? A. Yes, sir."

It thus appears from the testimony of the pilot that, notwithstanding the range and other fixed lights which should fully have informed him, he was in substantial error as to the distance of the proposed anchorage from the old breakwater; that, knowing the Glenochil

was light and the wind on her starboard bow, he ported her helm in an attempt to swing her to starboard and clear the new breakwater on his way to sea for the purpose of gaining time to prepare for the lowering of the port anchor; that he knew the distance of the new from the old breakwater; that at the proposed anchorage the stake-light on the upper end of the new breakwater if burning would have been distinctly visible; that had he known at the time that the stake-light was not burning he could have avoided the new breakwater; that he did not look for that light or ascertain that it had been extinguished until several minutes after the helm was ported or until very shortly before the accident; that he knew a light should have been burning there; that if the light had been burning, the *Glenochil* could have been put full speed astern and the accident prevented; and that he had satisfied himself five minutes before the *Glenochil* struck that the stake-light was not burning, yet instead of reversing, kept her on a port helm under a full head of steam. It is difficult to conceive of greater recklessness, incompetency or negligence. Further, there is no evidence that after it was discovered that the windlass was jammed or fouled there was any necessity to put to sea or execute the maneuver attempted. The *Glenochil* at the time in question drew only fifteen feet of water and the tide was about "high water slack." The official charts used in evidence show that for a distance of about three miles west northwestwardly from the proposed anchorage there was an ample depth of water for the navigation of the *Glenochil* even at mean low tide, and that this inner basin had a width of equal depth for about two miles. No reason is disclosed or perceived why the *Glenochil* under these circumstances should have attempted to go to sea. She could, while preparing the windlass for the lowering of her port anchor, have proceeded slowly up this basin and when proper have returned to the proposed anchorage either by going astern or by turning and heading for it. The evidence abundantly shows that there were sufficient range and other fixed lights to enable her to accomplish her ultimate purpose without resorting to the improper movements resulting in the disaster. It was further the duty of those in charge of the *Glenochil* when entering the bay for the purpose of anchoring, with the wind so strong as repeatedly to extinguish her binnacle light, to see to it that she was in proper order to anchor, and guard against the fouling or jamming of her windlass. While the last point may not of itself be sufficient to inculcate the *Glenochil*, I am satisfied by the evidence as a whole that she was in fault, and that it proximately contributed to the accident. Counsel for the libellant have referred to *Casement v. Brown*, 148 U. S. 615, 13 Sup. Ct. 672, 37 L. Ed. 582, as establishing the proposition that there was no fault on the part of the *Glenochil*, and counsel for the defendants have referred to the same case as establishing the proposition that the defendants are not liable. I am satisfied on careful examination that the facts disclosed in that case were so unlike those in this, that it cannot be treated as an authority supporting either proposition. As the *Glenochil* as well as the defendants was in fault she is entitled to recover only one-half of the damages and costs. Let a decree be prepared accordingly.

## THE O. L. HALENBECK.

(District Court, S. D. New York. July 23, 1901.)

**TUG AND TOW—CUTTING TOW ADRIPT IN STORM—LIABILITY OF TUG.**

Evidence considered, and *held* sufficient to establish the claim that the action of an ocean tug in cutting adrift her tow, consisting of a dredge, four scows loaded with coal, and a water boat, during a moderate gale while off Cape Cod, and allowing them to drift on shore without any further effort to save them, was without necessity or justification, and rendered her liable for the loss.

In Admiralty. Proceeding for limitation of liability of tug for loss of tow.

Foley & Wray, for petitioners.

Worthington Frothingham, for damage claimant.

James J. Macklin, for Providence Washington Ins. Co.

BROWN, District Judge. At about half past 8 o'clock in the evening of October 6, 1900, the master of the powerful ocean steam tug O. L. Halenbeck, having in tow the dredge Empire State, four scows and a water boat, bound from New York to Boston, when about six miles south of Highland Light on the northern end of Cape Cod, and being then about two or two and one-half miles off shore, cut the whole tow adrift in a northeast storm, in consequence of which the tow drifted ashore within a couple of hours after, whereby the dredge suffered damages, and the other boats became a total loss. A suit for the damages having been instituted against the owner of the Halenbeck, and other claims existing, the above petition for limitation of liability was filed, and the tug appraised at \$31,327. The petition denies that the loss happened through any negligence on the part of the Halenbeck, while the answers aver that the loss arose from negligence and bad management, and this is the chief issue in the case.

After passing through Hell Gate, the hawsers were all lengthened out, so that the dredge was about 1,000 feet behind the tug, and the other boats behind the dredge, forming a single line, were about 600 feet apart. They were loaded with coal. None had any motive power of their own, and the seven men in charge of them were all upon the dredge. Before leaving New York a code of signal whistles was arranged between the Halenbeck and Keegan, captain of the dredge, for the purposes of communication with each other as might be needed during the trip, the dredge having steam for a dynamo and electric lights and for her steam whistle.

On the evening previous to the loss the tug and tow had gone into Vineyard Haven, and on the next morning left there between 3 and 4 a. m. The weather was then mild and so continued, with light southerly winds and a smooth sea, until about 4 p. m., when the wind hauled to the eastward and northward, with increasing haziness, until at about 6:30 p. m. the wind was fresh from the northeast with a rising sea. At 7 the log says:

"5 miles about N. of Nausett Light; wind N. E., thick and raining; 7:30, wind increasing, making a heavy sea, pulled tow head to wind and sea; 8

p. m. wind increased to half a gale and heavy sea, still thick and raining; 8:15 p. m. got signals from dredge to take them off."

The testimony of Captain Cutler and of Brainerd, pilot of the tug, is, that some time before 8 o'clock they had considered that they might have to lose the dredge on account of the heavy wind and sea; that they thought the dredge would founder, and that it would be better to let her drift ashore, as something might thereby be saved. They also allege that a white light was seen waving on the dredge, which was taken to be a calling signal; other witnesses testify to seeing this, and to reporting it to the captain; one witness says it was seen waving 1,000 times, which, if true, would show that it was not a signal at all. But though alleging this "waving" light to be understood as a signal, it was not until from 15 to 30 minutes afterwards, according to the testimony of the master and pilot, Brainerd says half an hour, that the hawser was cut. Up to that time none of the pre-arranged signal whistles had been given by either the tug or the dredge. The tug on cutting the hawser went on the lee side of the dredge, heading towards her, and took the seven men from the dredge by means of the latter's life boat, and thereafter abandoned the tow. The storm was at its height at about 9 p. m., and was blowing then about 25 or 30 miles per hour, according to the estimate of the witnesses from Cahoon's Hollow life-saving station, and so continued till about 11 p. m., when it somewhat abated, and on the following morning the tug found the boats ashore from two to three miles south of Cahoon's life-saving station, which is about 8 miles north of Nausett Light.

Upon repeated examination of the testimony and consideration of all the circumstances, I am satisfied that the tug's abandonment of the tow and leaving it to drift ashore at that time with no further effort to save it, was neither justifiable nor excusable; and that the excuses given by the tug are without foundation in fact, if not knowingly fictitious.

When the hawser was cut the dredge was in no danger of foundering or of any material injury; no call for aid had been given, no signal lights had been displayed, none had been waved as alleged, nor had any signal whistles been given, as arranged for in case of distress; and when the master of the dredge, on going on board of the tug, requested her captain to put a line on the dredge again, the captain refused to do so, and now says he refused because no one would go aboard the dredge to make the line fast, though he made no request or attempt to have it done, and although the captain of the dredge wished to go again on board to extinguish a cabin lamp, but was not allowed to do so. The dredge was nearly new and one of the staunchest on the Atlantic coast.

The Halenbeck was one of the most powerful ocean tugs, and even assuming, what I cannot fully credit, that the moving white light was misunderstood as a signal, she cannot be justified in making no further attempt to preserve the tow. The master's present statement that the tug and all would in that case have gone ashore, cannot be verified and is without probability. The tug was then, he says, about two miles from shore, which was the usual distance.



There was not, therefore, any present danger of going ashore. The dredge was not beached until at least an hour and a half afterwards, and it would have been time enough to abandon the tow after attempts had been made to keep the tow off shore and after such attempts had been found unsuccessful by some near approach to the beach. The master says that the storm did not endanger the tug; and in pulling off shore the tug would always have been farthest off, her position would be approximately known by soundings, and if unsuccessful in keeping the tow off, which was over half a mile long, the tow could at any time when necessary have been cut loose. I cannot conceive that a master of reasonable prudence and nautical skill, had he been himself the owner of the tow, would for a moment have thought of abandoning it, or of "saving" it by letting it drift on Cape Cod beach, two miles distant, as was done in this case, without any further attempt to save it.

No doubt the northeast storm came on somewhat suddenly after 5 p. m., and at 9 o'clock amounted to a moderate gale, with a high sea lasting for two or three hours. Aside from this, everything material in the tug's story is accompanied by such exaggerations, such inconsistencies and such shifting defenses, as give it throughout an air of unveracity that deprives it of much credit.

The petition sets up, as did the answer in the previous suit, several important facts as alleged defenses, which are shown to be fictitious and false; viz. (a) that the tow by previous agreement was placed under the control of the captain of the dredge; this was disproved, no evidence was given to sustain it; and if true, the captain of the tug disregarded it in refusing to put a hawser to the tow again, as requested by the captain of the dredge after taking off the men; (b) that by previous arrangement the dredge, if in danger, was to signal the tug by displaying a red light, whereupon the tug was to go up and take off her men; there was no arrangement for the display of any signal light, whether red or white, but only for signal whistles; (c) that at about "9 p. m., when the storm had reached its height, the tug was signaled from the dredge" (meaning evidently by a red light) and that it was seen that the dredge and tow would founder and the men be lost "unless immediate action was taken to prevent it"; whereas there was no signal of any red light, the dredge had no red light on board; evidence was then given by the tug of a waving white light; this also was untrue, as there was nothing more than the motion of the dredge's usual and required white light in her rolling and pitching; nor was it "seen" that the dredge would founder; there was not the least indication of foundering, and nothing to see except spray coming over her bow doing no damage; she shipped no seas, and she made no water that the siphon did not empty; and instead of any "immediate action" by the tug on the pretended seeing of a waving light, no action at all was taken in reference to it for a quarter or a half hour afterwards, whereas action would naturally have been taken at once, had it been supposed to be a signal of distress.

The evidence derived from other tows, instead of aiding, weakens the tug's evidence. The tug Wrestler, a much smaller tug with canal

boats in tow bound for Boston, was about two hours in advance of the Halenbeck. She might have put into Provincetown, a safe harbor; but instead of doing so, she kept on throughout the storm, and though driven somewhat out of her course, she arrived safely without any foundering of her tow, or material damage, but with only the loss of some movable articles on deck. The boats of her tow had but two feet freeboard, while the dredge had five feet in the waist and over six feet at each end, with additional stout planking ahead. The petitioner's witness Carlson, who was on the tow Blackbird, an old boat with but two feet freeboard and which put into Provincetown, said his boat "could stand the increased wind and more outside." The dredge was a vastly stronger boat than any boat in the Wrestler's tow.

The evidence as to the Wrestler's towing shows how groundless is the testimony of the master that by going on with the dredge he would have "pulled her under and sunk her, losing both dredge and men." The captain testified that the dredge had only about six inches freeboard, and the above statement may have been based in part upon that supposition. She had in fact, as above stated, over six feet freeboard in front, and the captain's error, if real, was grossly negligent and inexcusable.

The hawser was cut, moreover, without any such signals as had been prearranged, and without any previous attempt at communication with the dredge to ascertain her condition or need; and after the men were taken off, no inquiry of that kind was made, no consultation with the dredge captain was had, and his request to take a line to the tow was unheeded. I discredit the testimony that the dredge captain proposed to go back to set fire to the dredge in order to collect the loss under a fire insurance policy.

Much of the testimony as to the height of the seas, and the force of the wind, are obviously gross exaggerations. The log entry at 8 p. m. showing then only "half a gale," and the statements of the men at the life-saving stations, satisfy me that at its height the wind was but a moderate gale, such as the tow was able to go through without material harm. Up to the time the hawser was cut, men were walking on the deck of the dredge, and loose articles, such as dishes, bottles and a lamp, stood unfastened upon the supper table, and her captain had no fears for her safety. The tow was then about six miles from Highland Light. The tide ran northward about one and one-half miles per hour, and it was at least an hour and a half before the tow drifted to the beach without having any help from the tug against the full force of the wind broadside on; so that had the Halenbeck again put a line on the tow, as requested, and continued pulling as she ought to have done, I think there can be no reasonable doubt, not only that the drifting landwards would have been very greatly delayed, if not completely prevented, but that with the favoring tide the tug would in two hours have cleared Highland Light, only six miles distant, and thereafter have had no further difficulty. It is not necessary for the defense to establish this probable result as a certainty. Even if the tug be justified in first cutting loose in order to take off the men as a proper precaution, this is no justification for

thereupon abandoning the tow, without any reasonable investigation or inquiry into its condition, or any further attempt made to save it during the considerable period available for doing so. The tug is, therefore, answerable for the loss unless she shows that any further endeavors to continue towing would certainly have been useless, which she has not shown, and could not possibly show.

I find, therefore, that the tug is liable to the extent of her appraised value. Beyond that the petitioner appears to be entitled to the usual decree in limitation of his liability.

### SUTCLIFF v. SELIGMAN et al.

(District Court, S. D. New York. July 24, 1901.)

#### 1. SHIPPING—CHARTER OF LAUNCH—DEFECTS IN MACHINERY.

A steam launch was demised by charter to be used on the Hudson river as a coaching launch for college boat crews. It was warranted by the owner to be in good condition, and the charterers engaged to return it in the same good condition, "damage by usual wear and tear excepted." In the course of its use it became necessary to procure a small boat from a former boathouse on the Harlem river, and the launch was sent for it, and while on the trip it was disabled by the breaking of a pin which connected the eccentric with the shaft of the engine. *Held*, that such use of the boat was not a violation of the charter, being germane to the purpose therein specified, and did not render the charterers liable for the damages, which must be regarded as resulting from a defect in the pin or machinery, which showed that the launch was not in good condition as warranted, as well as within the exception of usual wear and tear; it being shown that the engineer in charge was competent, and that the machinery was not subjected to any unusual strain, but was being used in the ordinary manner.

#### 2. SAME—CONSTRUCTION OF CHARTER.

Where a written charter demising a launch contained no stipulation for the employment by the charterer of any particular person as engineer, a parol agreement by the charterer to employ a person requested by the owner did not become a condition of the charter, nor did his employment in accordance with such agreement preclude the charterer from rightfully employing another competent engineer to run the engine on an occasion when the regular engineer was absent.

#### 3. SAME—LIABILITY OF CHARTERER—UNAUTHORIZED USE OF VESSEL.

The fact that a charterer puts the chartered vessel to a different use from that specified in the charter does not render him liable to the owner for an injury to the vessel, if it appears that the unauthorized use certainly did not cause or contribute to the damage.

In Admiralty. Suit for breach of charter.

Hardy & Shellabarger, for libellant.

Seligman & Seligman, for respondents.

BROWN, District Judge. The above libel was filed against the members of the Columbia College Union to recover the damages arising from the alleged misuse in May, 1896, of the libellant's steam launch Sinbad, which was 42 feet long by 8½ feet beam and provided with a compound vertical engine of the Herreshoff type. Only the defendant Seligman was served with process.

The launch was let to the union by a written charter dated April 26, 1896, for two weeks from that day for the sum of \$150, to be used by the union "for a coaching launch for the university and freshman

crews of Columbia College on the Hudson river," to be returned "at the end of the term in as good condition as at the time of the execution of the agreement, damage by usual wear and tear excepted."

The second clause of the charter read: "The party of the second part (i. e. the charterers) engages that the launch is in good condition," etc. The context as well as the testimony makes it entirely clear that the words "second part" were written in this clause instead of "first part" by a clerical mistake; and in accordance with an order made in the cause, the charter should be treated as binding the libellant to the "good condition," that is, seaworthy condition, of the launch when delivered to the charterers.

The charter was a charter of demise, giving the possession and control of the launch to the charterers, whose duty it, therefore, was to provide and pay for the captain and crew. The owner required the charterers, however, to employ as engineer C. L. King, (who had just put in new engines under a guaranty of their sufficiency, and had been but partly paid for them) so that any defects might be supplied by him; and at the time of the charter, it is apparent, from King's own testimony, that the engines had not been sufficiently used to bring them into assured perfect running condition. The boat was accordingly used under King as engineer for coaching purposes, from the new Columbia boathouse at 116th street and North river, the hours arranged for King's attendance being from 3 p. m. to 8. On the 8th day of May, the 10th day of the charter, the union being in want of a small boat and oars remaining at its former boathouse at 125th street and Harlem river, the captain went there with the launch to bring them around to their new quarters at 116th street and North river; and King not being present to act as engineer, the captain employed one Crimmins as engineer for the trip. After obtaining the small boat and oars, the launch not being able to return to 116th street via Spuyten Duyvil, by reason of an accident to the bridge there, was obliged to return via Harlem river and the Battery, and when opposite 90th street, the pin connecting the eccentrics with the shaft suddenly broke, rendering the launch's engine incapable of running either forward or back. There is a conflict as to the size and strength of the pin. King says it was about one and one-half inches long by three-fourths or five-eighths of an inch in diameter with a screw thread turned upon it. The respondents' witness says it was three-eighths of an inch in diameter and too weak. After some examination by the captain and engineer, no means of repair being at hand, and efforts to bring the launch to shore being ineffectual, she was taken in tow by a steam tug and brought first to Astoria ferry, and afterwards to her previous moorings near King's office at the Atlantic basin, whence she was first taken and where she had been several times sent for repairs during the charter. A claim for salvage was made upon the owner, to avoid which her agent sent the launch to New Jersey, but she was there attached and a decree for \$30 salvage and \$227.50 costs was subsequently rendered against her. The present libel claims payment of these damages, as well as additional sums for counsel fees and marshal's fees, repairs and demurrage, amounting in all to \$1,136.50.

Upon all the evidence and circumstances, I do not think the libellant is entitled to recover. I regard the weight of proof as establishing insufficiency or defects in the machinery as the cause of the breakdown on the 8th, as well as of the repeated repairs to the engine that were required during the previous eight days' use of the launch under the charter; and that there was no negligence or misuse of the launch, or of her engines, on the trip to the Harlem river on the 8th day of May, and that the breakdown was not caused by any fault for which the respondents are answerable. The inconsistencies and contradictions in the testimony of Sutcliff and King, the latter's grossly different statements on the present trial and in the salvage suit, and his evident interest in the result, detract very greatly from the credit to be given their testimony when contradicted, as it is here, on almost every material point.

There was no requirement in the written charter that King should act as engineer, and no stipulation, therefore, can be ingrafted upon the charter by parol, as a condition or as a warranty; and if King was employed as the regular engineer, in accordance with an outside request or agreement, that did not exclude the rightful occasional employment of any other competent engineer when King was not present.

The trip to the former boathouse at 116th street and Harlem river in order to procure the small boat and oars needed for coaching purposes, was so germane and incidental to the express purpose of the charter, as to constitute no violation of its general provision. The evidence also shows conclusively, as it seems to me, that the breakdown arose from causes having nothing to do with the locality where the breakdown occurred; but that it arose, as I have said, from insufficiency or defects in pin or machinery, and that the same result must have soon occurred on the Hudson river, had it not occurred on the Harlem. See *Strong v. U. S.*, 154 U. S. 632, 14 Sup. Ct. 1182, 24 L. Ed. 664; *Lilley v. Doubleday*, 7 Q. B. Div. 510; *Maghee v. Transportation Co.*, 45 N. Y. 514, 6 Am. Rep. 124; *Lewis v. Smith*, 107 Mass. 334; 5 Am. & Eng. Enc. Law (2d Ed.) 422-424. No doubt the burden of proof would rest upon the respondents to show this satisfactorily, if the trip in the Harlem river were deemed to be a breach of the charter. But I think he has sustained this burden. Crimmins was a perfectly competent engineer for this trip. He understood the engine and its working; and nothing occurred on the trip to require special expert work. The evidence is also explicit and uncontradicted that the machinery on this trip had been working smoothly for two hours; that there was nothing unusual in the circumstances, and that the machinery had not been meddled with in any way, and that there was no strain of any kind to cause the sudden breaking of the pin, although about two miles above the engine was slowed to allow another boat to pass.

King testifies:

"The only thing that I could say that could have broke that engine was reversing the engine under full head of steam \* \* \* very bad practice. In cases of collision we do it, but not otherwise."

Later he testified that dropping a tool in the machinery might cause it. Both those causes are, however, clearly negatived by the

testimony. Nothing was dropped in the machinery, and the engine was not reversed at all. Twiggs, a licensed marine engineer, moreover, testifies that reversal causes no strain on that pin. King testifies that in ordinary use for coaching, the engine has constantly to be started suddenly at full speed, which is a strain on the machinery; and this testimony, with the testimony as to the lightness of the pin, the previous frequent need of repairs and the absence of any strain or specific cause at the time of the accident, convince me that the breaking of the pin arose solely from its own insufficiency in connection with the other machinery, and not from any improper use of the launch in the Harlem river. In other words the launch was not "in good condition," nor sufficient or seaworthy for the purposes for which it was chartered, and this was the only cause of the accident. This was a breach of the libellant's obligation, and also brought the damage within the charter exception of "usual wear and tear," since the launch had nothing but the usual wear and use; and breakage from insufficiency while in only ordinary use, is within that exception. *Hess v. Newcomer*, 7 Md. 325, 339.

King testified that he examined the broken pin and that it had no flaw; but it appeared that this examination was but for a moment and of the most cursory character, and not at all sufficient to be accepted as a test. The pin itself has not been produced as an exhibit, as is commonly done in such cases; if it was not preserved, the failure of King to keep it, if of doubtful soundness or sufficiency, would not be unnatural.

On the original argument the hearing was suspended, and permission was given to take further testimony as to seaworthiness, etc.; the witness King gave further testimony denying the competency of ordinary engineers to handle the Herreshoff type of engine, and stated some alleged instruction of the Herreshoff firm on that subject. He was contradicted by two witnesses on the former point; and the latter testimony was incompetent, and should be disregarded, and the motion submitted on the argument for a commission to examine the Herreshoff firm for the purpose of contradicting King's statements on the latter point, supported by their letter to the contrary, submitted as part of the motion papers, is accordingly denied, as unnecessary.

Libel dismissed, with costs.

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THE ELY.

(District Court, S. D. New York. August 8, 1901.)

1. SHIPPING—SUBCHARTER—DEVIATION FROM CHARTER—LAWFUL EMPLOYMENT.

March 1, 1898, a British steamship was chartered for six months, to be employed in carrying "lawful merchandise and passengers" between American ports, not further south than the river Plate, South America, the owner to provide officers and crew. May 31st she was subchartered to a newspaper company for one month, "to be employed in carrying lawful merchandise (excluding all injurious and unlawful cargo) within the United States, West Indies, and Central America. It is understood boat is to be used as a dispatch boat, and to follow the fleet of the U. S. navy as closely as prudent and safe." There was no provision in the original charter forbidding a subcharter. *Held*, that the subcharter

was valid, and one which the charterer was authorized to make; the use of the vessel contemplated thereby being within the terms of the original charter, lawful in itself, and not in violation of the neutrality laws.

**2. SAME—RIGHTS OF CHARTERER—RISES INCIDENT TO WAR.**

The liability of a time charterer of a ship to the owner is no different because by reason of the breaking out of a war after the execution of the charter the risk to the vessel is increased, such risk being that of the owner; nor is the charterer bound to employ the vessel in the safest business, but he may employ it in any business which is lawful, and not in violation of the charter.

**3. SAME—LIABILITY OF CHARTERER—LOSS THROUGH SEA PERILS.**

The fact that a time charterer of a vessel subchartered her, to be used as a newspaper dispatch boat in time of war, such employment being lawful, and within the terms of the charter, does not render him liable for a loss or injury arising from sea perils, merely because in such service she was subjected to different perils from those she would have encountered if she had been employed in the carrying of cargoes.

**4. SAME.**

As between owner and charterer, the charterer's violation of the terms of the charter does not make him responsible for damages by marine perils in no way brought about by such violation.

**5. SAME—VIOLATION OF NEUTRALITY LAWS.**

A time charterer of a British steamer, on the opening of the Spanish-American war, subchartered her for use as a newspaper dispatch boat; the subcharter providing that she should carry only lawful merchandise. She was at all times in charge of officers and crew supplied by the owner. She took on board a number of reporters, with supplies, and cruised off the south coast of Cuba among the American naval fleet, making occasional voyages to Jamaica and other points to send dispatches, and on other lawful business of the subcharterer. On her return from one of such voyages, she was stranded, solely by reason of negligent navigation, and sustained great injury. Previously, by the conjoint action of the master and reporters on board, several small services of accommodation and courtesy had been rendered to officers of the American fleet and to its hospital ship, such as taking letters to mail, supplying ice to the hospital ship, and on one occasion transporting a small quantity of provisions to some uninformed Cubans on shore. *Held* that, conceding such acts to have been in violation of the neutrality laws, being unauthorized by the subcharter and unknown to the charterer or subcharterer, and having no connection with the stranding of the steamer, they did not render the charterer liable for the loss.

In Admiralty. Libel by charterer to recover unearned charter hire paid in advance, and cross libel by owner for damages for breach of charter.

Butler, Notman, Joline & Mynderse, for charterers.

Convers & Kirlin, for owners.

BROWN, District Judge. The above libel, filed October 12, 1899, and the cross libel, filed February 1, 1900, grow out of a charter of the English steamship *Ely* for six months from time of delivery, to the above libelants Bowring & Archibald, made at New York on March 1, 1898, and a subcharter by the latter to the New York Journal for one month, made May 31, 1898. On the evening of June 29, 1898, while in use as a press dispatch boat under the subcharter, the steamer was stranded on the south coast of Jamaica on a coral reef near Rocky Point and the voyages broken up. On the next day, the libelants, in ignorance of the loss, paid to the owners on account of

hire, in advance, the sum of \$1,371.34, which the libel seeks to recover back, together with \$1,120 for 110 tons of coal on board at the time of the loss, and other items, making in all \$3,132.39.

The cross libel seeks to charge the charterers with the owner's damages from the stranding of the steamer, to the amount of \$64,784.70, in consequence of an alleged deviation from the charter party through the alleged unauthorized and unlawful employment of the vessel in a business outside the scope of the charter, by sending her with newspaper reporters as a dispatch boat to follow ships of war of the United States, then at war with Spain, to visit blockaded ports in Cuba, and to carry dispatches from the ships of war, animals and goods contraband of war, and to deliver supplies to the armed forces of the United States and also in Cuba.

The Ely is a steamer 200 feet long by 29 $\frac{1}{4}$  feet beam and 873 gross tons. The original charter was written upon a form headed "Fruit Time Charter," and provided that the steamer was—

"To be employed in carrying lawful merchandise, including petroleum or its products in cases, and passengers so far as accommodations will allow (accommodations for six cabin passengers) between ports in Canada \* \* \* and or South America not south of the river Plate; \* \* \* the owners to pay for provisions and wages of officers and crew, for engine room and deck stores, and to provide victualing for passengers, \* \* \* charterers paying therefor at the rate of four shillings per day for each passenger \* \* \* steerage or deck passengers at 35 cts. per day.

"The charterers to pay for all coal, port charges, &c. \* \* \* and for the use of the vessel £580 sterling per month, in half monthly payments in advance; \* \* \* if vessel lost, hire not earned to be returned.

"The owners on expiration of the charter to pay for all coal left in the bunkers at the market price of the port where she is re-delivered to them.

"The captain shall prosecute the voyages with the utmost dispatch."

The steamer was delivered to the charterers for service at Kingston, Jamaica, on April 15, 1898. Under a subcharter for a single voyage, she took a cargo of sugar from Guantanamo to New York; next a cargo of coal from New York to Vera Cruz, and thence she went to Montego Bay, Jamaica, where she arrived on June 2, 1898. On May 31st she was subchartered to the New York Journal for one month at the rate of \$200 per day,

"To be employed in carrying lawful merchandise (excluding all injurious and unlawful cargo) within the United States, West Indies and Central America. It is understood boat is to be used as a dispatch boat, and to follow the fleet of the U. S. navy as closely as prudent and safe."

No copy of the charter was sent to Capt. Pearn, the master, or to the owner or its New York agent; but Bowring & Archibald telegraphed the following instructions to the master:

"Ely chartered time charter New York Journal for newspaper dispatches; delivery arrival Jamaica. Telegraph arrival to Dana H. Carroll, Kingston. Follow his orders. Do utmost give reporters comfortable quarters. Spare no efforts getting news and satisfactory service generally. We have two English boats chartered other newspapers giving splendid satisfaction. Have assured Journal you likewise. If satisfactory your gratuity fifty pounds monthly. Show this Carroll."

Carroll, at that time in Jamaica, was a correspondent of the New York Sun, with which the Journal had an arrangement for the joint use of the Ely. Capt. Pearn on June 2d telegraphed Carroll accord-



ingly and was instructed by him to proceed to Anotta Bay, a port on the north coast of Jamaica opposite Kingston, but to clear for Key West, as other dispatch boats had previously done. At noon of June 3d the steamer reached Anotta Bay, took Carroll on board, and by his directions proceeded, as the log states, "off Santiago de Cuba for war news."

At 5:30 a. m. of June 4th the Ely, according to the log, "Arrived off Santiago amongst the war ships. Being a stranger several blank shots were fired at us. Noon, amongst the fleet cruising around—6 p. m. off shore, (7 miles says the engineer's log), for the night and lying to."

The American fleet was at that time blockading Santiago, and Guantanamo was in occupation of our military forces under Capt. McCalla, and used as a coaling station. On explanation of her business in collecting war news, the Ely had permission from Admiral Sampson and Capt. McCalla at both places to come and go as she liked. No Cuban telegraph offices being available, the Ely was obliged to go to other ports in order to cable the information she collected. To report her first dispatches, she returned to Kingston on June 6th, where Langdon Smith, a reporter for the Journal, joined her. From that time Smith, rather than Carroll, was recognized as the representative of the charterers in directing the ship.

From June 3d until she stranded on June 29th, the Ely was diligently engaged in the collection of war news along the south coast of Cuba for the Sun and the Journal. Mr. Carroll remained on board of her until three or four days before she stranded. Her movements, he says, depended "altogether upon the information we succeeded in collecting and the time necessary to reach a cable office."

To forward dispatches she went three times only to Kingston, and two or three times to Mole St. Nicholas, Hayti. No news was allowed to be forwarded which it was important to withhold; nor was the Ely the bearer of any public dispatches, although for the accommodation of the officers or men of the fleet and of the hospital ship Olivette, she received and mailed private letters to their friends or families.

Some other occasional acts, aside from her intended business were done as favors to the officers, or as a charity to the wounded in the hospital ship, such as bringing them bananas, limes and pineapples, as requested, which were obtained by the captain of the Ely and paid for by the officers. Once or twice he let them have a couple of barrels of potatoes from his own stock, and once sent ice to the hospital ship Olivette, specially for a wounded correspondent. On one occasion also Mr. Carroll reported to Capt. McCalla seeing persons not in uniform on shore west of Guantanamo raising and lowering a Cuban flag; and on Capt. McCalla's request, the Ely took them some bags or cases of provisions from Capt. McCalla with an officer to identify them.

During all this time there were numerous other reporters and from six to eight other dispatch boats engaged in similar work at Siboney, and others elsewhere. The Sun alone maintained two others, the Journal two or three others, and the World, the Herald and the Associated Press, one each.

In the latter part of June, Mr. Hearst, the proprietor of the *Journal* was off Siboney, where the U. S. military forces under Gen. Shafter had landed, about 12 miles east of the blockading fleet at Santiago. Mr. Hearst had several of his editorial or reportorial staff with him, but had not been able to obtain passage from Key West for the horses needed by them, and he consequently directed the *Ely* to obtain at Kingston four horses or mules for their own use in following the army inland at Siboney. Four horses were accordingly obtained and shipped on the *Ely* at Kingston on the 29th of June, together with blankets, saddles and bridles for them, and also some ice, wines, liquors and provisions, all for Mr. Hearst's own use. They were all manifested as "stores," and, clearing for Key West as before, the *Ely* at 5 p. m. sailed to the eastward, intending to land the horses at Siboney. The log entries are:

"5 p. m. steamed away for off Santiago; 6:05 pilot left; 8:15 p. m. spoke S. S. Premier, also press boat bound to Santiago. At 8:45 full speed ahead. Set Co. E. N. E. compass. At 10:20 felt the ship's bottom pounding heavily. The engine was immediately full speed astern, but too late to avoid stranding on Folly Reef, working continuously to turn ship around, but being aground aft failed."

The place of stranding was about six miles westerly from Morant Point Lighthouse, and a mile or two nearer the shore than the usual course of vessels bound around Morant Point. From Yallah Point, which the *Ely* passed at 8:20 p. m. four miles from land, she had set her course E. N. E., whereas the usual course from that point is east until Morant Point bears north, in order to get a good offing on account of reefs and currents. The master had gone below an hour before stranding, and the mate in charge of the navigation was not called as a witness. There is no doubt that the stranding was due solely to negligent navigation in setting a course running too near the shore. On an inquiry by a marine board at Kingston, the master was suspended for three months.

The owner tendered an abandonment of the ship to its insurers, which they refused to accept. She was afterwards got off by the owner on September 4th, temporarily repaired at Kingston, taken thence to Newport News, and after surveys there, to Baltimore, where her repairs were completed on December 24th, more than two months after the original charter had expired. She was insured against both marine risks and war risks by separate policies, and the loss, adjusted at £8,990-6-9, was all, except about £540 collected by the owner from the former policies.

The charterers' claims for reimbursement of the last payment of charter hire in advance, and for the coal and provisions, were promptly presented to the owner in July, 1898. Various items were objected to, and delay asked until an average adjustment was had. This was completed August 31, 1899, upon data supplied by the owner, and was introduced in evidence upon the testimony of the owner's manager. From this it appears that there were 112 tons of coal remaining in the *Ely's* bunkers at the time of the loss, which was partly subsequently used by the *Ely* and partly thrown overboard to lighten the ship, and that the owner collected insurance on that basis.

In the adjustment all the items claimed in libelants' Exhibit 2, making £53-2-9, were also allowed, most of which had also been approved by the master. There being still items in dispute, the libel was filed in October, 1899, and the cross libel in February, 1900, as above stated, and it was not until the latter date, nearly 20 months after the loss, that any claim was made that the charterers were responsible therefor.

1. The principal items of the libelants' claim are abundantly proved viz.:

(a) For advance hire.....	\$1,371 34
(b) For coal on board at time of stranding.....	1,120 00
(c) The charterers advances as per Ex. 2 stated in the Gen. Ave. a/c p. 171.....	257 63
(d) Same, as per Ex. 3, except the items of two and six shillings..	199 63
	<hr/> \$2,948 60

The items of two and six shillings do not seem to be proved.

The charter required the owner to pay for all shippings fees and repairs, and to keep the steamer in an efficient condition, and to prosecute voyages with "the utmost dispatch." To secure efficiency against all causes of delay, the subcharterers gave the master the unusually large gratuity of £50 per month. The charges for additional firemen and for scaling the boilers were evidently to secure this same "utmost dispatch," which the charter promised, and being needed for that purpose, those charges should be borne by the ship. The item of £3 for water on June 29th, the master suggests was for the horses and hence chargeable to the subcharterers. But evidently the master does not testify from positive knowledge, and the evidence does not show any probability that he is correct, first, because the water required for four horses for one or two days would be very insignificant in amount, and also because on the call at Kingston the week before, there was the same charge of £3 for water obtained at that time of the same company, when there were no horses on board; and that charge in Exhibit 2 was allowed in the average adjustment as a proper charge against the owner.

The claim for two days' delay in scaling the boilers from June 22d to June 24th, is not I think established. It was not a case within the literal terms of the charter, nor is it within its spirit, unless the delay caused by that work exceeded 24 hours; and no such delay appears. On the 19th at 6:30 p. m. the Ely left the Mole for Guantanamo where she arrived at 5:30 a. m. of the 20th. At 2:30 she was off Santiago; at 8 a. m. of the 21st she was "steaming west along the coast"; at noon, "back amongst the fleet and troop ships;" and at 6 p. m. "steamed away for Kingston," where she moored at 1 p. m. of the 22d and left at 10 a. m. of the 24th. There was therefore no interruption of the steamer's work by putting back in order to have the boilers scaled; and she was in port only 45 hours. In her other visits to Kingston, her stay was from 22 to 32 hours. On this occasion she took in stores, coal and water as before, and there is no proof, nor is it probable upon the preceding facts, that her stay in Kingston was delayed by scaling nearly as much as 24 hours. The

master testifies that the delay caused by scaling was only 12 hours. The scaling was needed at that time, as appears from the master's letter to the owner. Mr. Carroll denies that it was done on the charterers promise to pay the expense. It was a proper charge against the ship, as well as the painting.

Three countercharges are to be allowed to the owner, viz. \$45 collected by the charterers for the board of 32 passengers for two days; \$74.50 for victualing various pilots and passengers brought on board by the reporters in June; and \$20 for fitting up stalls for the horses shipped on the 29th, making in all \$139.50, deducting which from the charterers' claims as above allowed, leaves a balance in their favor on these accounts of \$2,809.10.

As the cabin could accommodate but six passengers, the rest of the 22 must have been substantially deck passengers, and the ship cannot collect the full pay of one dollar per day for them as for cabin passengers. The sum of \$45 actually collected by the charterers was much in excess of the rate of 35 cents per day allowed by the charter for deck passengers, and the steamer cannot therefore claim more than was collected. The other small items claimed for the owner are not established as debts of the charterers.

2. The principal claim of the owner viz. for the damages caused by the stranding, is I think also not established. The damages claimed are \$14,032.88 for the loss of the use of the Ely till December 21st when her repairs were completed, and \$50,751.82 for the cost of the repairs. These claims rest, as I understand, upon the contention (a) that the collection of news by hovering about the American fleet and along the coast of Cuba, was a deviation from the scope of the charter, involving greater risks, and that this, being outside of the contract, made the charterers responsible for any subsequent damage to the vessel however caused; (b) that the prosecution of the voyages for that purpose was a breach of neutrality and unlawful; (c) that the incidental acts above specified, in supplying articles of food and ice to the naval officers and hospital ship, taking horses on board and landing some provisions on the Cuban shore, were specially breaches of neutrality and unlawful.

The employment of the ship authorized by the original charter was without any restriction except that the cargo must be "lawful merchandise." It authorized the carriage of any lawful merchandise, passengers, and even live stock on deck. The heading of the form used, "Fruit Time Charter" is of no importance on this point. That form was probably selected because it contained in print many of the stipulations desired by the parties. The employment specified was, moreover, in the nature of a privilege and a restriction as respects cargo; not an obligation to carry anything. The charterers might have carried passengers only; or if circumstances prevented any use of the vessel at all, that would not have constituted a breach of the charter. The reporters received on board and provisioned by the ship were not members of the crew, and were therefore "passengers," for whom the ship was entitled to be allowed, and as I understand, has been allowed, the stipulated compensation of one dollar per day for victualing.

The subcharter itself was lawful and no violation of the terms of the original charter. There was no stipulation in the latter forbidding a subcharter, and it was therefore valid. The subcharter was made after the declaration of war between the United States and Spain, and its additional express stipulation, "excluding all injurious and unlawful cargo," was naturally more specific than the usual restriction to "lawful merchandise" contained in the original charter made before the war. The gathering of news for the press, was a perfectly lawful purpose; and the provision that this was to be done by following "the fleet of the U. S. navy as closely as prudent and safe," was equally lawful. It contemplated no violation of neutrality and no unlawful trade. The newspaper dispatches, and even the private letters of men and officers that were mailed, were not contraband, nor any violation of the Queen's proclamation of neutrality. The trips between Jamaica, Hayti, and the coast of Cuba, were within the geographical limits authorized by the original charter, and so far there was neither "deviation" from the charter, nor violation of neutrality.

Numerous cases of "deviation" are cited holding insurance policies thereby invalidated; also instances of misuse or excessive use in cases of bailments. But all of these present a distinct breach of an essential condition of the contract. In policies of insurance, a certain specified risk is assumed by the insurer and no risk beyond. That is the essential substance of the contract; and consequently the moment that risk is changed by the ship's taking a different route, or another trip, the insurance ceases and the contract ends. In bailments, the misuse or excessive use is a technical conversion, but even in these cases there is no liability, if it appears that the unauthorized use certainly did not cause or contribute to the damage. 5 Am. & Eng. Enc. Law (2d Ed.) 422-424; 3 Kent, Comm. \*210; *Maghee v. Transportation Co.*, 45 N. Y. 514, 6 Am. Rep. 124; *Hastings v. Pepper*, 11 Pick. 41; *Lewis v. Smith*, 107 Mass. 334; *Sutcliff v. Seligman*, 110 Fed. 560. But this charter was not a contract of indemnity against a specific risk, like insurance, nor was it even a bailment. The charter was not a demise of the vessel. The owner all the while remained in possession by the captain, officers and men who were appointed and paid by him and who managed her navigation; the charterers had only the right to the use of the vessel in making lawful voyages within the authorized geographical limits, which were never exceeded. The cases cited, therefore, have no true analogy to the present.

It is no doubt true that the risks attending these trips were somewhat different from those attending ordinary voyages in times of peace. But the subject of the charter contract was not sea risks, but sea voyages. Marine risks are an incident of all sea voyages, and it is immaterial, as respects the lawfulness of the voyage, whether these risks are altered or not, so long as the voyage and the use of the vessel actually made, are no violation of the charter. Whatever new and increased risks of the ship arise merely from new circumstances or conditions in the prosecution of lawful voyages under the charter, are risks of the owner. For the charterer does not warrant that the

risks shall not be increased. It was never supposed that a charterer must bear war risks of the ship, merely because war broke out after the charter was executed. Daily trips among the West India Islands would have been authorized by this charter; yet the marine risks of such trips would be much greater than in longer voyages. So all voyages with cargo not definitely contraband in time of naval warfare, are attended with greatly increased risks through the liability to seizure, though the seizure may be mistaken and temporary. These increased dangers and risks in no way diminish the charterers' rights, so long as he pursues his voyages within the chartered limits with lawful cargo, and attempts no unlawful acts.

The outbreak of the war after the original charter was made, gave new opportunities for the use of the steamer. The charterers had the right to make the most of their opportunity, so long as they did nothing prohibited by the charter or unlawful. Whether the risks of the ship or cargo were increased or not, was immaterial. In fact, both the owner and the charterers covered their own increased dangers by special policies against war risks. The owner makes no claim for the premiums paid for this insurance, and has no such right.

The only material questions on this branch of the case are, therefore, whether the charterers' use of the ship was lawful, and if not, whether that would make them answerable for a marine loss arising solely from negligent navigation. That the declared purpose of the subcharter and the general business of the Ely on these trips were in my opinion lawful, I have already stated. The several protesting letters of the owner to its New York agents after receipt of the master's telegram of June 8th, were evidently based upon a misapprehension naturally caused by the brief terms of that telegram, which was as follows: "Sail to-night Santiago. What about war risks?" The owner cabled on the same day in reply: "Refuse unlawful business." On the 10th the owner wrote to the master to the same effect (Exhibit 31) and also to its New York agent, protesting against any use of the steamer "in any way that could be construed as a breach of the neutrality laws, or trying to run the blockade," i. e. at Santiago. On June 21st the owner again wrote its agents:

"We gather from captain's cable the charterers are keeping her trading between Jamaica and Santiago. We have therefore to confirm our letter of the 10th," etc.

In all the protests the owner's evident supposition was that the charterers were engaging in an unlawful trade, in violation of neutrality, or running the blockade at Santiago; although in the letter of June 24th the owner mistakenly claimed more than that, viz. that the charterers had no right to "recharter" (subcharter) the steamer at all.

On the 28th of June the owner wrote Capt. Pearn that his letters of June 2d and 7th had been received. Those letters informed the owner of the subcharter to the New York Journal, of the Ely's cruising among the fleet off Santiago, of her return to Kingston, and of increased expenses. The owner made reply in respect to the expenses, but made no further objection as to the ship's business.

The master, however, as the representative of the owner, and being

in possession and control of the ship, understood perfectly that no unlawful trade or breach of neutrality was intended. There was never any trade or attempted trade with Santiago, or with any enemy port, nor any running of the blockade, or intention to do so. The steamer's trips near or among the fleet were only such as were permitted by the naval commanders. There was no danger from the fleet or the shore, except the marine risks of navigation. The only shots fired toward the ship were one blank shot on two occasions only, to stop her approach before she was known, or her lawful purpose understood. She never received any damage from those risks; and had any unlawful business been intended, the master could, and from his telegrams and letters evidently would, have refused to make any such voyages.

On June 23d he writes the owner, referring to its previous telegram, and says:

"I received your cable to-day, we to do nothing unlawful in this business, which I will strictly adhere to" (Exhibit A 36).

On the 29th of June he wrote to the charterers:

"I am sailing to-night for the high seas. You will please note that I am taking mules (horses) and a large quantity of ice on board. I am trying to oblige all I can, and on the other hand to keep within the limits of neutrality. The a/c for ice in my provision a/c should be charged against the newspapers, as the hospital ships were out of ice for the wounded and I supplied them with this, and this quantity I have taken to make up for it" (Exhibit 7, February 14, 1901).

On July 24th he wrote the owner:

"The employment I was doing was steaming to and fro on the south side of Cuba, picking up news of the war and bringing same back to Kingston to be cabled to New York. \* \* \* I have had, I must say, a great difficulty in keeping the ship employed as a dispatch boat, having been frequently watched and cross questioned by officials at Kingston as to my movements. I did all I could to please the charterers and keep within bounds" (Exhibit A 46).

And again on the 26th of August he writes the owner:

"Your letters dated May 20th, 24th, June 3d, 7th, 10th and 17th were received by me to-day. Regarding the trade in which the ship has been engaged since June 2d, I deny that any business of an unlawful character has been carried on. I was well aware of the state of things outside St. Jago not to attempt anything like blockade running, nor were there any neutrality laws infringed. I went into no ports from leaving Jamaica until I returned."

Accordingly, in the master's numerous letters to the owner and to Bowring & Archibald, the charterers, he never addressed any protest or objection to either, as regards the character of the business of the ship or of her voyages, except only as respects some increased expenses for provisions occasioned by the war, which would equally affect any other voyages with passengers. The fact also that the owners made no claim of this kind during upwards of a year while negotiations were pending for the settlement of the mutual claims between them and the charterers, nor until the filing of their cross libel and answer nearly two years after the loss, shows that no such claim as is now made was then supposed to exist.

As respects the incidental acts (c) above referred to, in supplying some fruit, and a few barrels of potatoes to the naval officers, and ice

to the hospital ship *Olivette*, as well as some provisions to Cubans on shore not in uniform, it is to be observed; (1) that none of those acts were authorized or contemplated by the subcharter; they formed no part of the business of the ship or of the intent of her voyages; they were in themselves trivial and unimportant, and in the nature merely of personal courtesies to the officers, or charity to the wounded, and not sufficient in amount or importance to give any character to the voyages or the employment of the ship; (2) that if regarded as of any importance, or as technically irregular, such acts were wholly unauthorized by the owner, or by the charterers or the subcharterer; they were done by the conjoint action of the master and the reporters, outside of the ship's business, and as personal favors; in doing them, the master represented the owner as much as the reporters represented the charterers, or the subcharterer; but as neither the master nor the reporters had any authority whatsoever from their respective principals for those acts, which, if unlawful, were in violation both of the charter and of the subcharter, they bound nobody but themselves. The direction to follow Carroll's orders, had reference only to orders connected with the authorized business of the ship. (3) Though this want of authority might not be material in an action upon a policy of insurance, it is otherwise in an action on a charter party, in which it is impossible to hold that individual unauthorized acts of this nature, outside of the business of the ship, could make the charterers responsible for a subsequent stranding to which the unauthorized acts in no way contributed. It might as well be claimed that the unlawful smuggling of some cigars by the master and reporters in their individual capacities, would make the charterers answerable for stranding through careless navigation on a subsequent voyage.

In reference, moreover, not only to these personal courtesies, but to the regular employment of the steamer as a press dispatch boat on all the trips prior to that on which she was stranded, the decision in the case of *Strong v. U. S.*, 154 U. S. 632, 14 Sup. Ct. 1182, 24 L. Ed. 664, seems applicable, to the effect that in an action between owner and charterer, the charterer's violation of the terms of the charter does not make him responsible for damages by marine perils in no way brought about by such violation; so that whatever was done on voyages prior to that of the stranding, would be immaterial, and unauthorized acts on the same voyage would entail no responsibility except for some loss proceeding from those acts themselves, and none for losses by marine perils of navigation. See, also, *White v. U. S.*, 154 U. S. 661, 14 Sup. Ct. 1192, 26 L. Ed. 178; *Carrington v. Insurance Co.*, 8 Pet. 520, 8 L. Ed. 1021; *The Joseph*, 8 Cranch, 451, 455, 3 L. Ed. 621.

The four horses and accouterments shipped on the last voyage, as well as the liquors and ice, were all ordered for the use of the subcharterer and his correspondents alone; they were not connected with the army or navy and the articles were therefore neither contraband nor unlawful. One ton of the ice was for the steamer herself, and, as appears by the master's letter of June 29th above quoted, was taken to replace what he had previously given to the hospital



ship on the prior voyage. It does not appear from the evidence that any of the articles taken aboard on the last voyage were designed for any of the officers or men of the navy, whether as personal favors or otherwise.

On this branch of the case, therefore, I find that the business and employment of the steamer as a news-gatherer for the press, was neither unlawful nor in violation of any of the provisions of the charter or of the Queen's proclamation; and that the trifling personal courtesies and favors as between the master, the reporters and the naval officers, whether the acts were technically lawful or not, involved no responsibility on the part of the charterers for the subsequent damage to the steamer by stranding, to which those acts did not contribute; and that the same rule applies to the last trip also.

There should be decrees dismissing the cross libel with costs, and in favor of the original libelant for \$2,809.10, with interest and costs.

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#### HENNINGSSEN v. WATKINS.

(District Court, E. D. Virginia. June 4, 1896.)

##### 1. SHIPPING—DEMURRAGE—EVIDENCE OF WAIVER.

Where a charter expressly provides the lay days for loading and discharging, and fixes the amount of demurrage to be paid for overtime consumed by the charterer, the owner cannot be held to have waived such provision, except upon clear evidence.

##### 2. SAME—LIABILITY OF CHARTERER—DELAY IN LOADING.

Evidence held to sustain a claim for demurrage under the terms of a charter because of the failure of the charterer to have the cargo ready and to load the vessel within a reasonable and customary time.

In Admiralty. Suit for demurrage.

Wm. & Henry Flegenheimer, for libelant.

R. L. Montague, for respondent.

WADDILL, District Judge. This is a libel filed for demurrage, and the question for the determination of the court is whether the libelant is entitled to such demurrage for the detention of the vessel as mentioned in his libel, and, if so, by whom the same should be paid. The libelant relies upon his charter party upon which his vessel contracted to take a cargo of railroad ties from the ports of Richmond and Bermuda Hundreds, Va., to South Amboy, N. J., as the basis of his claim for demurrage. The particular clause in the charter party is as follows:

"The party of the second part [B. T. Watkins] doth engage to provide and furnish to the said vessel a full and complete cargo of oak railroad cross-ties, under and on deck, and to pay to said party of the first part or agent, for the use of said vessel during the voyage aforesaid, thirteen and one-half cents per tie for each tie delivered. It is agreed that the lay days for loading and discharging shall be as follows: If not sooner dispatched, commencing from the time the vessel is ready to receive or to discharge cargo, and notice thereof given to parties of the second part or their agents, that is to say, as customary, and that for each and every day's detention by the fault of the said party of the second part or agent \$50.00 per day, from day to day, shall be paid by the said party of the second part or agent

to said party of the first part or agent. The cargo or cargoes to be received and delivered as per usual custom."

The respondent, in effect, admits the detention of the vessel during the period charged for, but insists that he is not responsible, because the libelant waived the clause in the charter party aforesaid, and agreed, instead of taking cargo, as therein provided for, at the ports of Richmond and Bermuda Hundreds, that if he could be loaded at Richmond he would wait for the ties to be shipped to Richmond by Messrs. W. L. Mason and R. H. Price, who furnished respondent with ties, and that the said Mason and Price agreed to ship the ties promptly if the weather permitted; said ties being at the time in the woods in Amelia county, several miles from the railroad, from which place they were to be hauled in vehicles to the station on the Southern Railroad, and shipped from there to the railroad company's wharf at Richmond.

The question involved is largely one of fact, and turns upon whether or not the waiver in question was made, and a new contract entered into for the loading of libelant's vessel, as claimed by respondent. There is a sharp conflict in the evidence, but, after careful examination of the same, I am convinced that the libelant never for a moment contemplated waiving his contract of affreightment, whereby his cargo was assured, and the loss for demurrage agreed upon, and, in lieu thereof, agreed to accept the hazard of two strangers to the contract getting from the woods, and hauling for the distance of several miles to the depot, the ties in question. The uncertainty of promptly loading was still further increased by the fact that the new arrangement was made dependent upon the failure of rains in the spring season of the year, whereby prompt hauling would have been practically impossible. The proposition upon its face is too unreasonable to be readily accepted, and a critical analysis of the evidence satisfies me that neither party at the time of the transaction contemplated what was said and done having the effect claimed. The respondent chartered libelant's vessel, and it was his duty to have provided a cargo, and when, confessedly, he has failed and neglected to do this, as I think this evidence shows, he should not, except in a perfectly clear case, be allowed to escape responsibility by transferring it to others who ship through and work for him; nor should he be held blameless on a claim for demurrage when he has chosen to contract for and order more vessels than he has either berth room at the wharf for, or cargoes to place upon them. Libelant, after the lay day had expired, had the right to expect his vessel to be loaded in a reasonable time, and respondent assumed the risk of a failure so to do. From the whole evidence (the fact of the absence of the cargo at Richmond for the vessel of the libelant; the failure to provide berth room for her to load; the manner in which the ties were placed on board at Richmond,—only 1,672 in 2 days; the fact that no ties were actually at Bermuda Hundreds, and that after reaching there, although a great delay had occurred at Richmond, 2 days were then frittered away because of the lack of ties; the fact that 18 days in all were consumed, 10 of which were spent at Richmond, when, as a matter

of fact, not more than 7 or 8 days should have been taken in loading), I think the libellant should be allowed demurrage; and the amount named in the charter party, \$50 per day, for 6 days, is a reasonable allowance therefor, and a decree may be entered for that amount, to wit, \$300, and costs.

**McKEEN v. DAVIS COKE & COAL CO.**

(District Court, E. D. New York. July 23, 1901.)

**SHIPPING—BREACH OF CHARTER—DELAY IN REACHING PORT OF LOADING.**

A schooner chartered for loading at Baltimore, with privilege of taking a part cargo at New York, for ballast, to Baltimore, took on two kinds of cargo at different places, amounting in all to 432 tons, her cargo capacity being 900 tons. Owing to delay in obtaining part of the cargo, and to bad weather, she did not leave New York until 12 days after the charter was signed, and prior to her arrival in Baltimore the charterer gave notice that he would not accept her, claiming that she had violated the charter by delay to load more cargo than was required for ballast. *Held*, that under the terms of the charter she was entitled to a reasonable time, no time being stipulated, and that the amount of ballast required was a matter within the discretion of her master, having regard not only to her safety, but to her sailing qualities; that, in the absence of evidence showing that he had abused his discretion, or that there had been unreasonable delay, there was no breach of the charter which justified the charterer in refusing to accept the vessel.

In Admiralty. Suit to recover damages for breach of charter.

Wilcox, Adams & Green, for libellant.

Wing, Putnam & Burlingham, for respondent.

**THOMAS**, District Judge. On January 3, 1901, a charter was concluded at New York City for the schooner *Thackara* to carry a cargo of coal from Baltimore, Md., to Port of Spain, Trinidad, which contained the following stipulation:

"It is understood that vessel is now at New York, ready, and has privilege of taking part cargo at New York for ballast to Baltimore before entering upon this charter."

The schooner was unable to obtain certain cement—a portion of the cargo taken by her as ballast—until January 7th, and she finished loading the same at Weehawken on January 11th, between which dates she completed her crew, and went to an anchorage at Red Hook. There she was detained by bad weather until the 14th of January, when she went to Barren Island, and took on 175 tons of fertilizer, which, with the 257 tons of cement, constituted the cargo that she assumed to carry as ballast. On January 15th she went to sea, arrived at Baltimore January 28th, and discharged so as to be tendered to the charterers on February 4th. Meanwhile, after her arrival, her master received a letter, written by the charterers in New York to the vessel's agent, as follows:

"New York, Jan. 16th, 1901.

"Mr. Henry P. Havens, Agent, 85 West St., City—Dear Sir: Referring to our charter of the schooner *Adele Thackara*, dated Jan. 3rd, I beg to advise that the vessel has violated the terms of the charter in so much as she has not proceeded direct from New York to Baltimore. We learned to-day that she has reported at Barren Island for cargo in addition to the ballast which she was to take at New York. In view of this violation, we cannot accept

the vessel for loading under the terms of the present charter. Since our arrangement with you, rates on vessels from Baltimore to Trinidad have declined materially, and, unless you are willing to make concession on this rate, we must decline to load the vessel. Please acknowledge receipt, and advise what you propose doing. We are offered another vessel, which we shall take unless we have material concession from the rate named in the charter above referred to.

"Very truly yours,

F. Moore, Manager."

Thereafter, without waiver of right, the schooner, under another charter, and at reduced rates, carried the cargo to Port of Spain. The breach of the charter party by the schooner is pointed out in the ninth and tenth subdivisions of the answer, as follows:

"Ninth. As this respondent has since been informed and believes, the Adele Thackara, under said privilege, did take on board in New York, to carry to Baltimore, about 1,800 barrels of cement, weighing upwards of 256 tons, which weight of cement was ample for ballast of a schooner like the Thackara of 515 tons register. The Thackara was ready to leave New York harbor on January 14th, having all cement on board, which was sufficient cargo for ballast. She delayed in the harbor, while her agents, without the consent of this respondent, were negotiating for additional cargo, which they finally received in the shape of phosphate to be loaded at Barren Island, in Jamaica Bay, Queens county, Long Island. The vessel was still further detained awaiting the services of a tug to tow her to the place where phosphate was to be loaded, and did not finally leave New York harbor until on or about January 18th, proceeding thence to Barren Island, and there loading about 240 tons of phosphate, after which she proceeded for Baltimore. Having, by means of the ship news columns, ascertained this unauthorized deviation, this respondent immediately notified the libellant's agents thereof, and stated that thereby the terms of the charter had been infringed, and therefore the respondent would not load said vessel. Tenth. The Thackara, on reaching Baltimore, had first to unload this quantity of phosphate, which was being discharged on the 29th, 30th, and part of the 31st days of January, after which he discharged cement for ballast, which took to and including the 4th day of February. On tendering the schooner to the respondent on February 4th, the libellant was informed that respondent declined positively to load the schooner, which position it has always maintained."

It will be observed that the schooner was privileged from entering upon the charter party until she had taken part cargo at New York for ballast. There was no limitation of time, and so a reasonable time was allowable. Arrangements for the two items of cargo were perfected at about the time the charter was made. The time for securing and taking the cargo on board is not shown to be unreasonable. The cement could not be taken before January 7th, and the loading is not shown to have proceeded with culpable delay. Meantime, while waiting, the schooner went on dry dock, and was painted, and completed her crew. The answer does not allege lack of necessary painting or incompleteness of crew as breaches of the stipulation that the schooner was ready. When a party relies upon the breach of a condition of warranty, he usually must plead it. There is no evidence that the painting or procurement of crew was a cause of delay. The real question is whether there was a breach of the charter party in taking the cargo at Barren Island. That place is within the city of New York, and is regarded as within the description of the port of New York. There is more question concerning the reasonable necessity of taking the two lots of cargo. The schooner's capacity was 900 tons, and she took 432 tons of cargo for the purpose of

ballast. Therefore the libellant's contention is that she could take 46 per cent. of her full tonnage under the provision of the charter party. The evidence shows that she could have gone with probable safety with either the cement or fertilizer, but that, being a dull sailer, she would sail poorly without the cargo taken. It is understood that the necessity for ballast has not only relation to the safety of the ship, but also that fitness for her due navigation is involved. In *Weir & Co. v. Union S. S. Co.*, 9 Asp. (N. S.) 112-114, it is said:

"One ship will require more ballast and another less, and it is for the master to judge whether any, and what, ballast will be required by his ship during a proposed voyage, having regard to the nature of the proposed cargo."

The master would not be allowed to abuse his discretion. But it is not clear that he has done so in the present instance, and a breach of his contractual duty is not proven satisfactorily. It is considered that the schooner made suitable haste, in view of the detention necessitated in obtaining the ballast, and of the condition of the weather. The master stated that stormy weather prevented him from going to Barren Island, and the report shows that the wind reached far beyond a gale on January 12th and 13th. Much latitude must be given to the master's judgment; and the courts may not too nicely criticise his conclusions. It is difficult to escape the inference that the fall of rates influenced the charterer to accuse the schooner of delay and deviation. The libellant should have a decree for such damages as may be shown before the commissioner.

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#### THE HENRY STEERS, JR.

#### THE SCOW NO. 46.

#### THE TWO BROTHERS.

(District Court, E. D. New York. June 20, 1901.)

#### 1. SALVAGE—SKILL AND CARE REQUIRED OF SALVOR.

While a salvor should exercise the skill and care that a man of ordinary prudence and capacity in the same business would be expected to use, yet in case of necessity a person without ordinary nautical skill may undertake a rescue on the sea, not assuming a knowledge which he does not have, but using in good faith such ability as he possesses.

#### 2. SALVAGE—COMPENSATION—NEGLIGENCE OR LACK OF SKILL.

A salvor may be found guilty of misconduct, or gross negligence tantamount thereto, which may result in forfeiture of the claim for salvage; and lack of skillful operation, with or without injurious results, may diminish the award, while the presence of such skill may increase it.

#### 3. SAME—INJURY TO SALVED VESSEL—DAMAGES.

Specific negligence proximately resulting in distinguishable injury to the vessel may be used in an action for salvage either to diminish or defeat compensation; and in an action by the owners of the property, when culpable negligence is established against the salvor, resulting in injury, damages therefor may be recovered.

#### 4. SAME—GROUNDS FOR COMPENSATION—BENEFITS.

Compensation may not be given unless a benefit is conferred by the saving of property, but any person whose aid has tended to this result may be compensated, although he was compelled by prudence or necessity to discontinue his assistance and leave the final rescue to others.

#### 5. SAME—REQUEST FOR AID.

A request for aid by a vessel in distress does not authorize compensation therefor unless the aid rendered was helpful in the final saving of property.

In Admiralty. Suit to recover for salvage services, and cross libel for damages.

Henry W. Goodrich, for White and others.

Charles Thaddeus Terry, for the Henry Steers, Jr.

Foley, Wray & Taylor, for scow No. 46.

THOMAS, District Judge. This action is for salvage services. The tug Henry Steers, Jr., is 100 feet long, and her draft is  $11\frac{1}{2}$  feet. At about 4 o'clock in the afternoon of November 21, 1900, she, with mud scow No. 46 in tow, was bound for the North river. When between the black buoy and the bell buoy in Coney Island channel, the breaking of the tug's propeller left her without means of propulsion. This disablement was opposite a long stretch of sandy shore known as "Coney Island Beach," and probably within a thousand feet of the same. The wind was from the southwest, blowing towards the beach with a velocity which shortly approximated 60 miles per hour, and a strong flood tide, the precise set of which is in dispute. In such situation the tug was in danger of finally going upon the beach, and in that case she would have received some injury. To guard against this result the Steers had certain resources. She could have anchored, being equipped for this purpose with two anchors, one of 350 pounds, and one of 450 pounds, together with lines and chains. She was near and in the sight of the usual course of outgoing and incoming craft bound to and from the city of New York, and had frequent opportunity of obtaining adequate aid. This is a valuable, but not conclusive, consideration. The Monticello (D. C.) 81 Fed. 211, 214. The Steers appreciated that, from the nature of her condition, removal by the aid of another steam vessel would be ultimately necessary, and that her unsafe proximity to the beach demanded early assistance. She gave a signal of distress, to which the Two Brothers responded. This vessel was a steam lighter, 120 feet in length, with a draft of 10 feet and 2 inches aft and  $2\frac{1}{2}$  feet forward when light; she was used to carry offal from the city to Barren Island, from which latter place she was returning. The mate of the Steers requested the Two Brothers to aid him, which the latter attempted to do; and the captain of the Steers called out to the tug Ariosa, who had slowed down in view of the Steers' situation, that he had engaged the Two Brothers, and that he would not need the Ariosa. The tug Charles Runyon, with a tow, also was in sight. After taking the Steers and her scow in tow on a hawser the Two Brothers conducted them with difficulty, owing to an increasing wind, and later to the consumption of fresh water, and the necessary use of salt water, and after several hours, and after the night had come on, hauled them alongside the westerly breakwater of the Erie Basin. There the Steers took the bottom. The Two Brothers could not drag her along to the gap of the Erie Basin, as her master states that he intended to do, but, having received injury herself, such master threw off the hawser, passed a line to one of the Steers' crew on the dock, and departed, and no more was heard of him. The Steers, thus abandoned where the incoming and receding waves dashed her against

the breakwater and ground her bottom on the hard bottom, was after an hour or more of violent effort by her crew brought into Gowanus creek. The injuries received at the breakwater by the Steers were about \$2,850; the demurrage value by reason of repairs was \$500; the scow was injured to an extent not stated in value; and the Two Brothers was injured to the extent of \$1,200, and the demurrage value was about \$500. The alleged reason for leaving the Steers at the breakwater was the lack of fresh water. She had been using salt water for at least half the service, and claims that, through sheer lack of power from this cause, she was unable to continue her service. She had filled her tank at Barren Island, and at the time she took the Steers in tow had a good supply of water, which was exhausted by the time she reached Ft. Hamilton.

The state of facts to this point is this: A steam lighter undertook to save a tug, with her tow, at the latter's request, from going ashore on a sandy beach, where some injury would be expectable, and, after carrying her forward for several hours, landed her on the same shore, against a dangerous breakwater, where she was ground and injured upon a hard bottom, and there left her. The object of the service was to save the vessels from the sandy beach, yet the salving tug hauled them upon the same shore, and practically beached them. The Two Brothers undertook to make the Steers' situation better by keeping her from shore. She made her situation as bad as or worse than it was at the outstart, by casting her on the same shore several miles away in the dark, in a locality notoriously dangerous during the prevalence of westerly winds, and condemned as such by the admiralty court. *Phoenix Towing & Transportation Co. v. City of New York* (D. C.) 60 Fed. 1019; *Hastorf v. The Governor* (D. C.) 77 Fed. 1000. This is an action for salvage, and is based upon benefits alleged to have been rendered. What good did the Two Brothers do to the Steers and her tow? To take in broad daylight from proximity to a sandy shore, in the full view and presumable assistance of the tugs, and drag her in the night to the same shore, and leave her to be dashed by a furious wind against a breakwater, to be ground on the bottom by the waves, was not a benefit. To save from a sandy shore, drag on a harder bottom, and then abandon, presumptively saves nothing. By reason of her total failure, the Two Brothers saved nothing, and can be awarded nothing. *The Ann L. Lockwood* (D. C.) 37 Fed. 233, 238. She did not bring the Steers and her tow into greater comparative safety. If anything, she brought her into greater comparative danger. In view of this conclusion, the respondents ask from the libelants compensation for the injuries to the Steers from her delivery and abandonment at the breakwater. It does not logically follow that such damages should be given. The salvage award is denied, because, in view of the whole service, the Two Brothers rendered no net benefit, having placed and abandoned the tug and her tow in a place more dangerous than that where she found her. But, if the court were inclined to conclude that this was such culpable negligence as should render the Two Brothers liable for the consequent

injuries, there is another part of the history that should at least neutralize such consideration. At Ft. Hamilton, where the Two Brothers found her water substantially exhausted, her master proposed to dock the vessels at a wharf; but the master of the Steers refused to be moored there, and insisted upon being carried across the bay to the anchorage at Tompkinsville, Staten Island. This was rendered difficult by the direction of the wind, and the master of the salving vessel explained that he could not deliver his charge at that point, by reason of the necessary use of salt water for his boilers, but acceded to the wish of the tug's master to proceed in expected aid from vessels seen to be approaching, but such vessels were found unable to assist. Had the tug and scow been moored at Ft. Hamilton, as they might have been with reasonable safety, a salvage award would have been due; and such an award would be allowed even now, if the court were not constrained to consider the salving vessel's later conduct, which effected injury more than counterbalancing the value of the service rendered. That is, the service is considered as a whole, and the whole service conferred no benefit. It is urged further that the Two Brothers negligently undertook the rescue, inasmuch as she had not the capacity to succeed. By such a rule a vessel would not venture to aid another in distress unless she was sure of herself. The Two Brothers had good power. She had water enough for usual purposes. But the task became more difficult by reason of the increasing violence of the wind, and the exhaustion of the water stored for her boiler.

In view of the earnest and helpful briefs submitted by the parties, it is proper that the law applicable to the questions discussed should be stated. Two questions by the conclusions above reached have been answered in the negative, and to such questions the law is applicable. The first question is this: Is an award for salvage service due a steam lighter who upon request of a disabled tug with a scow in tow undertakes to prevent the same from going ashore on a sandy beach, where some injury would be expectable, and, after towing for several hours, drags and leaves, after night has set in, the crippled vessels on the same shore, against a breakwater, dangerous during the prevailing wind, where they are injured seriously by the violent action of the water, and where they are comparatively in as great or greater danger than in their first position? The second question is this: Are the owners of the vessels attempted to be saved entitled to recover from the steam lighter compensation for the injuries received in the manner stated?

What care or skill should a person attempting a salvage service exercise? The rule of general application in cases of salvage is that he should use the care and skill that would be exercised by persons of ordinary skill and prudence in the business undertaken. The *Mulhouse*, 17 Fed. Cas. 962 (No. 9,909); *The Neptune*, 1 W. Rob. Adm. 297; *The Cape Packet*, 3 W. Rob. Adm. 122. In the last case Dr. Lushington said:

"I do not mean to say that they must be finished navigators; but they must possess and exercise such a degree of prudence and skill as persons in their condition ordinarily do possess, and may fairly be expected to display."



A person without knowledge of navigation might not be justified in undertaking the rescue of a ship, where nautical skill was required, if other persons with the adequate skill were at hand. It was for this reason that in *The Dygden*, 1 Notes of Cases, 116, Dr. Lushington refused salvage award to fishermen who undertook to handle a ship in distress, and, as found by the *Trinity* masters, took erroneous steps from the beginning to the end. It must be noticed that the fishermen put themselves forward to extricate a ship from a critical peril, where a knowledge of seamanship not possessed by them was demanded, and there were others ready to render the needed aid, that did have the proper skill and resources. But in the opinion it was said:

"When persons offer their services to vessels in distress, and there are no other individuals on the spot capable of rendering more efficient assistance, this court must look with considerable indulgence at their efforts, because, being the only aid that can be procured, and offered in a state of great exigency, every allowance must be made if they are not possessed of adequate knowledge to perform the duty they had undertaken. But different considerations will apply to the conduct of individuals who assume the character of salvors, when there are persons competent to discharge those duties."

Care was taken to suggest that inexperienced persons were not precluded unconditionally from attempting rescues. The fishermen took charge of the ship, and assumed unpossessed knowledge, when others near by actually had and were willing to use such knowledge. Whenever there is a signal of distress upon the sea, anybody in position to do so should respond and render all possible aid, but the aid should be tendered in its true character; and one unskilled should not assume a capacity not possessed and step in before those skilled in a necessary maneuver, and ready to execute it. It would be a hurtful rule that a person willing to save an imperiled ship, and men crying to him for aid, must fear to give it lest he be mulcted in damages, or go entirely uncompensated, for lack of proper skill. Nevertheless, where skill and prudence are required, the failure to use them, under a proper state of facts, may be deemed negligent. Negligence thus established may be used by the court in two ways. One consideration present in fixing a salvage reward relates to the promotion of intrepidity, skill, and promptness in rescuing imperiled property. Hence the skillfulness of the rescue influences the award by increasing it. *The Sandringham*, 10 Fed. 556, 573, 575, 577; *The Blackwall*, 10 Wall. 1, 14, 19 L. Ed. 870. When these qualities save the ship and cargo with slight loss, a higher award is due. *The Sandringham* (D. C.) 10 Fed. 556. So injury to the salvaged vessel during the service may diminish the award, although no negligence be found. *The Haxby*, 28 C. C. A. 33, 83 Fed. 715. But the results of the salvor's negligence may be offset specifically against what would be otherwise due. So the salvors must respond in a direct action for negligence resulting in injury to the salvaged property. Negligence might occur under two prominent conditions: First, while the salvaging vessel is herself imperiled or is acting under peculiar difficulties, in rescuing another vessel from danger; second, in the disposition of the salvaged vessel after the immediate peril of rescuing her is at an end. It should be borne in

mind that negligence will be ascribed more reluctantly to a salving vessel when alleged negligent acts or omissions must be looked for in the very midst of the peril in which either or both vessels are involved. But even in that case negligence may diminish or defeat a recovery, as was held in *The Dygden*, 1 Notes of Cases, 116; *The Neptune*, 1 W. Rob. Adm. 297. It is not improper to state in this connection that such condemnation for negligence should be made sparingly when the peril is great and the demand for instant aid is imperative, and especially when it is rendered under conditions of danger by one whose assistance is needed, or where such assistance is asked. In such case fear of legal consequences should not interpose to impair the vigor of action. In short, the law should not scrutinize too narrowly services rendered to persons or property exposed to destruction by one asked or welcomed to share the jeopardy and give relief therefrom, when such person acts in good faith. It is very well understood that even now the anticipation of reward does not tempt from their courses certain classes of vessels to save property exposed to destruction, and a rule that would hold scrutinizingly a salving vessel to the exhibition of high skill would increase a growing aversion to salvage services on the part of those best able to render them. But negligence may occur in the disposition of the vessel after she has been secured from the danger, or while ordinary towage services are rendered her. Although a vessel be saved from imminent danger, the salvor's duty arises to place her in such safe position as opportunity and the exercise of ordinary care will permit. An unreasonable termination of the service by either party is not encouraged. *The Veendam* (D. C.) 46 Fed. 489, 495. If in the course of ordinary towage, anchorage, or dockage, the salvaged vessel meets with disaster through the negligence of the salving vessel, there is no adequate reason for exempting the offending vessel from accountability therefor, but what would constitute negligence would depend upon the facts present. If the injury to the salvaged vessel is the proximate result of the salvor's culpable negligence, there is no reason precluding its ascertainment and reduction to judgment. Whether the salvor was negligent and was the proximate cause of the injury must be established. But, when these facts are found against the salvor, there is no occasion for exempting him from liability. It is considered that the true rule is that negligence or skill, irrespective of resulting damage, must always influence the award; and, where the salvor's act or omission amounts to culpable negligence proximately resulting in separable and distinguishable injury to the property, then the salvage compensation may be diminished pro tanto or totally extinguished; and if the owners of the property injured ask in suitable form a recovery may be allowed, if the salvor's negligence proximately caused the damage. In *Serviss v. Ferguson*, 28 C. C. A. 327, 84 Fed. 202, the circuit court of appeals of this circuit decided that salvors were liable in damages in an action against them by the owners of a vessel picked up adrift without persons aboard, and thereafter so negligently placed in a slip that she was sunk and rendered worthless. The decree was for the value of the scow, less one-third thereof deducted for salvage compensation. The action was specifically for damages for the salvor's negli-

gence. Usually the question has arisen in fixing the award, which has been resisted upon the ground that the salvor's negligence or misconduct should defeat any recovery. Here the action was based upon the negligence, and damages lessened by the value of the salvage service given. In *The Neptune*, 1 W. Rob. Adm. 297, the court dismissed the salvage suit on account of the negligent handling of the ship. This amounted to a holding that either no benefit was conferred, or the benefit was wholly offset by the results of the negligence. In *The Duke of Manchester*, 2 W. Rob. Adm. 471, the claim of the alleged salvors was dismissed and they were condemned for the costs of the proceedings upon the ground that by their own misconduct they had run the vessel into difficulty and danger by towing her aground upon the Sandwich Flats. In the course of the opinion Dr. Lushington said:

"Salvors may be curtailed or even deprived altogether of their salvage remuneration through error, misconduct, or want of skill and capacity in the performance of a salvage service. Even where essential services have been rendered to a vessel, the subsequent misconduct of the salvor may not only diminish the amount of his reward, but his entire claim may be forfeited. This doctrine was distinctly laid down by Lord Stowell in the case of *The Medina*, which was cited by the queen's advocate; and in the case of *The Neptune*, 1 W. Rob. Adm. 297, which came before me, and in which I was assisted by two gentlemen of the Trinity board, I myself acted upon this doctrine, and declined to give any salvage at all, the Trinity masters having pronounced that the asserted salvors had been guilty of gross negligence, if not of willful carelessness, in allowing the anchor to be let go, and in keeping the course of the ship to the north, when they should have gone to the south."

In *The Cape Packet*, 3 W. Rob. Adm. 122, it appeared that the *Cape Packet* had suffered damage from tempestuous weather, and had lost nine of her crew overboard, when she was, at the request of her master, taken in charge by the master and crew of the *Rose*, who undertook to carry her into Dartmouth. In making for that harbor the salvaged vessel was steered to the northward of the Eastern Blackstone Rock, and, on attempting to pass between the rock and the mainland, struck the rock, and, beating violently, was damaged to the extent of £500. It was urged that this negligence entailed forfeiture of the salvage reward. Dr. Lushington stated in his opinion:

"I need scarcely point out to you that, where the neglect or the misconduct is willful, it entails an entire forfeiture of the whole claim to salvage remuneration. This is not attributed to the salvors upon the present occasion. There may again be instances of such gross negligence, independent of any willful inattention, as would debar all claim for salvage recompense. \* \* \* There is also another kind of negligence, the effect of which is to diminish the amount of salvage reward, not to take it entirely away. The extent of this diminution, I may further state, is not measured by the amount of loss or injury sustained, but is framed upon the principle of proportioning the diminution to the degree of negligence, not to the consequences."

After submitting the question of negligence to the Trinity masters, and receiving their reply, this conclusion was stated:

"Having considered in my own mind what I should have awarded in this case if there had been no misconduct on the part of the salvors, and having made what I consider a proper deduction therefrom in proportion to that misconduct, I shall award the sum of six hundred pounds only."

It has been urged in the action at bar that the words used by Dr. Lushington, "The extent of this diminution, I may further state, is not measured by the amount of loss or injury sustained, but is framed upon the principle of proportioning the diminution to the degree of negligence, not to the consequences," preclude the court from determining the damages resulting approximately from the negligence, but that in some way the detrimental influence of the negligence is to be determined independently of the harm wrought by it. Such was not the holding of the circuit court of appeals in *Serviss v. Ferguson*, nor is such an indefinable mental process within the possibility of practical application. In *The Cape Packet* it appears that the judge considered what he would have given had it not been for the misconduct of the salvors; that he had made what he considered a proper deduction therefrom for this misconduct, and thereupon awarded the sum stated. It might very well be that in a certain instance the court could not distinguish the specific damages, but would be obliged to make some more definite general estimate of the influence of the salvor's negligence or misconduct. In such a case the court proceeds upon the general principle of equity, and makes the best ascertainment possible. It should be observed that in the case last cited there was no cross claim against the salvor, so that it became merely a question of considering the influence of the salvor's negligence upon the amount of the award.

In *The Algitha* (D. C.) 17 Fed. 551, it was concluded, where a disabled steamer made signals of distress, which were observed by another steamer, which took her in tow, and, after towing her 12 hours, voluntarily cast off the hawser, without communication with her and under no stress of weather, and left her in no better position in any respect than when she found her, that the vessel attempting the labor was not entitled to compensation either for salvage or towage service. The learned judge stated:

"The conduct of Capt. Nickerson, upon observing the signals of distress, in going out of his course, and in lying by the *Algitha* during the night, evinced a highly commendable spirit, and it is with hesitation that I deny all compensation for their delay, and for the twelve hours' towing; but as the *Algitha*, without any stress of weather, was left by him as helpless, and in at least as unfavorable a position, as where he found her, if not in a worse one, and as he abandoned her without any communication or consultation with her master, and as I find that the contract, regarded simply as a towage contract, was not performed, I do not think it is a case in which there should be any recovery. Services to vessels in distress should be encouraged, but not such as voluntarily leave the disabled vessel in the same plight."

In the opinion there is language peculiarly appropriate to the present case:

"It is apparent that there is in the case no element of a salvage service. The disabled vessel was not taken to a place of greater safety, but rather the contrary, nor was she left where her chance of meeting another steamer was better, but rather worse; and the distance accomplished, although in the desired direction, was insignificant."

In *The Katie Collins* (D. C.) 21 Fed. 409, it was decided that where salvors, having the management of the business, fail to get a stranded vessel afloat at the first high water at which she might have been floated had they employed the proper means, they must be considered

as having failed in point of skill and energy, and must suffer the just and legal consequences of such failure, notwithstanding they may have saved the vessel and cargo. Wells, J., said:

"If, in consequence of want of skill in sounding out channels, carrying out anchors, or navigating the vessel, or from any other omission of proper care or skill, the salvors incur unnecessary delay in extricating the vessel from its perilous situation, or get it ashore a second time, the salvage ought to be reduced in proportion to the degree of negligence or want of skill; and, when the negligence is gross or willful, it should be wholly forfeited. *Marv. Wreck. & Salv.* §§ 106, 108, 219; *The Blackwall*, 10 Wall. 14, 19 L. Ed. 370."

In *The Mulhouse*, 17 Fed. Cas. 962 (No. 9,909), it was held that slight negligence in taking care of the property saved diminishes the amount of salvage; gross negligence works a total denial or forfeiture of salvage. An indispensable element of salvage compensation is that the service shall be to some degree beneficial. That is, even if the effort of the salvor was not the sole cause of the rescue of the endangered vessel, it must have contributed to that result. A beneficial service may be rendered by one person, although the final rescue be due to the efforts of another. *The Joseph C. Griggs*, 1 Ben. 81, Fed. Cas. No. 6,640. So merely towing a disabled vessel on her course and bringing her nearer thereto, and thereupon necessarily leaving her, may justify compensation. *The Camellia*, 9 Prob. Div. 27. The saving of property is the most important consideration. *The Gallego* (D. C.) 30 Fed. 271; *The Huntsville*, 12 Fed. Cas. 996 (No. 6,916). In the case last cited it was held that a tug which floated a burning vessel and towed her to a place where other people put out the fire rendered a meritorious service. In fact, it is not unusual to make an award to the first set of salvors, where the final act is done by a second set. *Muntz v. A Raft of Timber* (C. C.) 15 Fed. 555; *The Melpomene*, 29 Law T. (N. S.) 405; *The Neptune*, 1 W. Rob. Adm. 297. But there must be something done by the salvors which as a whole amounts to a saving of property, or to assistance in the saving of property. It has been already held that the libelants in the case at bar effected no such result, and on that account salvage compensation is denied them. But the libelants are understood to urge that, even if no benefit was conferred, libelants are entitled to compensation because the service was requested by the tug. This would introduce into the law of salvage this principle: that a request for aid by a vessel in distress is in itself tantamount to salvage service, if such service be undertaken, whether the result be beneficial or not. The suggestion seems to find encouragement in the holding in *The Melpomene*, 29 Law T. (N. S.) 405. There it was decided that where a vessel makes a signal of distress, and another vessel responds to the call and attempts the relief, and gives such aid as she is able, but is prevented by accident from making her services as effectual as she intended them to be, without blame attaching to her, a court of admiralty will not allow her to go entirely unrewarded, but for the interests of commerce and navigation, and as an encouragement to perform salvage services, will give some reward, if the property is saved by other means. A careful reading of the case indicates that the salving vessel did actually confer some benefit, although it fell short of what was desirable. Sir R. Phillimore,

who made the holding in this case, expressed similar views in *The Aztecs*, 21 Law T. (N. S.) 797, where it was held that where salvors enter into an agreement to take a disabled vessel into harbor for a specified sum, and do all in their power to perform their engagement, but, in consequence of an adverse change of wind, fail to fulfill it, they are nevertheless entitled to salvage reward. It is obvious that a beneficial service was rendered, for in the opinion it is stated:

"It has not been contended before me, as I have already observed, that no salvage service was performed by the smacksmen, but that, inasmuch as the conditions of the agreement had not been fulfilled, they were disentitled to all salvage remuneration. It was also, however, argued, though I think with less confidence, that the salvors were disentitled to reward because their efforts had been unsuccessful; and the case of *The Edward Hawkins*, 1 Lush. 517, was mainly relied upon. \* \* \* The main facts of that case were that the salvors left the vessel 'in a position of extreme peril,' from which she was saved by her own exertions. In this case it is admitted that the salvors did their utmost, and did not leave the ship in a position of peril without the consent of her master, or without having rendered certain services."

This question is of sufficient importance to justify a somewhat extended reference to *The Camellia*, 9 Prob. Div. 27. There a salvage award was given, inasmuch as the salvor brought a vessel in distress several miles nearer her proper course, and towed her 85 miles on her course, thereby bringing her into greater comparative safety, when the hawser broke, and, owing to prudence on her part, the salvaging vessel ceased her aid. The opinion states:

"Several cases were cited in support of the defendants' contention that the plaintiffs were entitled to nothing. There can be no doubt that services, however meritorious, which do not in any way contribute to the ultimate safety of the ship, are not entitled to salvage reward. Such was the case of *The Edward Hawkins*, 1 Lush. 515. There the vessel taken in tow was, after the parting of the hawser, driven away by a gale towards a dangerous coast, from which she was saved by her own anchors. The towing in no way assisted her, and therefore no salvage was earned. On the other hand, in *The E. U.*, 1 Spinks, 63, Dr. Lushington puts the case of a vessel in a disabled state being brought on its way and then abandoned by the salvors in consequence of tempestuous weather or other circumstances, and afterwards being saved by other salvors, and he says 'that it is by no means to be laid down as clear law that the original salvors are not entitled to some reward.' And in *The Killeena*, 6 Prob. Div. 193, Sir R. Phillimore says: 'Now, there is no doubt that, where a set of salvors have done some acts which tend to the ultimate salvage of a vessel, they are usually entitled to some remuneration;' and he then proceeds to consider the facts which he considered showed that the alleged salvors had improperly abandoned the ship in danger. In the case of *The Nellie*, 29 Law T. (N. S.) 516; 2 Mar. Law Cas. 142, Sir R. Phillimore held that where, in consequence of a bona fide mistake, towing was not resumed after the hawsers had failed, yet, as beneficial services had been rendered, the salvors were entitled to be paid. And in *The Melpomene*, L. R. 4 Adm. & Ecc. 129, Sir R. Phillimore says: 'There are no cases which stand in the way of my adopting as a principle this, which appears to me of considerable importance to the interests of commerce and navigation, namely, that where a vessel makes a signal of distress, and another goes out with the bona fide intention of assisting that distress, and, as far as she can, does so, and some accident occurs which prevents her services being as effectual as she intended them to be, and no blame attaches to her, she ought not to go wholly unrewarded.' In *The Yan-Yean*, 8 Prob. Div. 147, I was of opinion that the salvors had by negligence brought the salvaged vessel into as great peril as that from which they had rescued her, and therefore that no claim for salvage existed. I am of opinion

that the principle laid down by Dr. Lushington and Sir R. Phillimore in the cases I have referred to, namely, that services which have contributed to the ultimate safety of a vessel, if interrupted before completion, without default of the salvor, are entitled to some remuneration, is applicable not only to the case of a vessel saved from imminent risk of wreck, but also to a case like the present, where the vessel is brought into a position of greater comparative safety than that in which she was when she asked for assistance."

From a review of the previous holdings it is concluded that, while a request for aid by a vessel in distress should preclude her from thereafter denying her danger (*The Huntsville*, 12 Fed. Cas. 996 [No. 6,916]; *Stone v. The Jewell*, 41 Fed. 103), and might have influence upon the question of propriety of the persons undertaking the service, it cannot supply the necessity of proof that the service was beneficial.

By the foregoing discussion of the law a conclusion has been reached: (1) While a salvor should exercise the skill and care that a man of ordinary prudence and capacity in the same business would be expected to use, yet in case of necessity a person without ordinary nautical skill may undertake a rescue on the sea, not assuming a knowledge which he does not have, but using in good faith such abilities as he possesses. (2) A salvor may be found guilty of misconduct, or gross negligence tantamount thereto, which may result in forfeiture of the claim for salvage; and lack of skillful operation, with or without injurious results, may diminish the reward, while the presence of such skill may increase it. (3) Specific negligence, proximately resulting in distinguishable injury to the vessel, may be used in an action for salvage either to diminish or defeat compensation; and in an action by the owners of the property, when culpable negligence is established against the salvor, resulting in injury, damages therefor may be recovered against him. (4) Compensation may not be given, unless a benefit is conferred by the saving of property; but any person whose aid has tended to this result may be compensated, although he was compelled by prudence or necessity to discontinue his assistance and leave the final rescue to others. (5) A request for aid by a vessel in distress does not authorize compensation therefor, unless the aid rendered is helpful in the final saving of property.

These views lead to the conclusion that the libel in the action of White and others against the tugboat *Henry Steers, Jr.*, and scow No. 46 should be dismissed, with costs, and that the cross libel be also dismissed, with costs.

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#### THE DEVONIAN.

(District Court, D. Massachusetts. July 15, 1901.)

No. 1,233.

#### 1. COLLISION—STEAM AND SAILING VESSELS—DUTY OF STEAMER.

While the statutory rule requiring a steam vessel to keep off the course of a sailing vessel is modified where the steamer cannot obey it without serious peril to herself or other vessels, she is not justified in disobeying it until she has resorted to all other practicable means, not only to escape the danger after it is known, but to anticipate and provide against it.

**2. SAME—STEAMSHIP IN NARROW CHANNEL.**

A large steamship entering Boston Harbor accompanied by a tug, owing to her draught, was obliged to pass through a narrow channel, some 2,000 to 2,500 feet in length, in which she could not well maneuver. The weather was fair, with a light wind, and there were a number of sailing vessels anchored to the south of the channel. When partly through, a schooner was seen coming from among the anchored vessels on a course which crossed the channel. The steamer's engines were reversed, and the tug was sent ahead, but did not succeed in getting the schooner out of the way, and, owing to the lightness of the wind, she was drifted by the ebb tide against the bow of the steamer and injured. *Held* that, conceding that the steamer was the privileged vessel, owing to the narrowness of the channel, the claiming of such peculiar privilege imposed on her the duty, under the circumstances, of taking the precaution of sending the tug ahead to give warning before she entered the channel, and that because of the failure to take such precaution, as well as of improper steering, and other errors in navigation, she was liable for the damage to the schooner.

**3. SAME—CONTRIBUTING FAULT—FAILURE TO MAINTAIN LOOKOUT.**

The fact that a schooner kept her course up to the time of a collision with a steamer does not excuse her failure to maintain a proper lookout, since she is not under all circumstances justified in keeping her course, and such failure will be deemed a contributory fault, notwithstanding her privilege and the fault of the steamer, where if such lookout had been maintained the collision might probably have been avoided by prudent navigation.

In Admiralty. Suit for collision.

Carver & Blodgett, for libellant.

Lewis S. Dabney and Frederic Cunningham, for claimant.

LOWELL, District Judge. This was a collision between the English steamer *Devonian*, on a voyage from Liverpool to Boston, and the three-masted schooner *Perry*, proceeding from Boston to Rockport. It occurred on April 29, 1901, at about 10:20 a. m. The weather was clear, the water smooth, the wind light from the south-east. The place was between buoys 9 and 11 in Boston Harbor, the tide not quite half ebb, and running about a knot and a half. The *Perry* was 122 feet long, drawing 9 feet without her center board, and about 15 feet with it. The *Devonian* was 570 feet long over all, and drew nearly 24 feet. As the schooner kept her course, the steamer was at fault unless special circumstances be shown.

The steamer's theory of the collision is this: She was coming up the harbor, slowly stopping from time to time to let vessels pass. Just below the Gas buoy she stopped to let a tug and tow go by. Then she started, and at the Gas buoy entered a passage very narrow for vessels of her size. The original ship channel at this place is of considerable width, but there were dredges and drill scows placed near its middle by the United States government, in order to deepen it. The steamer could not pass safely except to the south of the dredges and scows, and so the passage, as indicated by temporary buoys, was no more than from 300 to 500 feet wide. The length of this narrow passage was from 2,000 to 2,500 feet. Just as the steamer had entered upon it, passing the Gas buoy, those on board her perceived the schooner coming out on the south side of the channel, from a fleet of vessels moored there with sails hoisted. Imme-



diately the engines were stopped, and immediately afterwards were reversed. A tug in attendance on the steamer was sent ahead, to get the schooner out of the way. The tug failed to do this, and, as the vessels approached, the steamer's starboard anchor was let go. The reversed engines of the steamer were throwing the steamer's head to starboard and her stern to port, until the latter almost took ground on the south side of the channel. The steamer's bow passed over the chain, so that the anchor's hold was on the port side of the steamer. The steamer was brought to a stop by the anchor and reversed engines, just as the schooner, moving very slowly through the water, and drifting with the tide, struck broadside amidships against the steamer's stern. The steamer immediately went ahead, to keep its stern clear of the flats on the south side of the channel, thus deepening the cut in the schooner's side. Soon afterwards the schooner was hauled out of the way by the tug. As soon as the schooner was seen on the starboard tack, the tug started ahead, hailing the schooner to drop her anchor. When the tug came nearer, a heaving line was thrown, which reached the schooner, but to which, through the clumsiness or indifference of those on the schooner, no hawser was attached, so that the tug could not carry out its intention of hauling the schooner backwards. Nothing was done on the schooner until the last moment, when the helm was put up without effect, owing to the lightness of the wind. The steamer claims to bring itself within the opinion rendered by this court in the case of *The Marguerite* (D. C.) 87 Fed. 953, 956, 957:

"The rules require a steamer to keep off the course of a sailing vessel if it is practically possible for the steamer to do so; that is to say, if she can do so without accident, such as collision with another vessel, running aground, or the like. \* \* \* In case of the manifest inability of the steamer to give way, therefore, and in that case only, does she have the right of way over a sailing vessel."

Even if we assume, as the steamer contends, that, after the schooner was seen, neither the steamer nor the tug could have done anything more to avoid the collision, we must still ask, ought not the steamer to have done something else before seeing the schooner? It was approaching a narrow passage, from which it could not back out,—a passage which sailing vessels were likely to cross, and in which on that morning they could not readily maneuver, owing to the lightness of the wind. If its size and the dangerous narrowness of the channel gave to the steamer peculiar privileges, as I think was the case, they imposed upon it peculiar duties. If it had the right of way in that passage against a sailing vessel properly warned, there was the greater need of giving the fullest possible warning. That a sailing vessel might at any moment emerge from the anchored fleet was manifestly possible. That there would be danger if this happened was plain. To guard against this danger was easy. A steamer, which is ordinarily bound to avoid a sailing vessel, ought not to enter upon a narrow passage, where it cannot avoid a sailing vessel, and where a sailing vessel very probably cannot avoid it, until it has done its best to ascertain that the passage is and will remain clear. The steamer might have waited below the Gas buoy until the

tug had gone ahead, and made proper report. Had this precaution been taken, the collision would not have happened. Doubtless a steamer is not ordinarily required to be preceded by a tug, even when maneuvering in a crowded harbor, but where such peculiar privileges are claimed as here, there is no injustice in the requirement. That the attendance of a tug in some capacity was needed, those on the steamer appear to have recognized. Captain Brittain said: "We have a contract to escort these ships and convey [convoy?] them up and down the harbor." Again, there is no doubt that the steamer was going much more than two and one-half knots over the ground when the Gas buoy was passed. Mr. Crosby, an intelligent and disinterested witness, estimated the speed at from four to five knots. Even if the collision took place but 1,300 feet from the Gas buoy,—the lowest place given by any witness,—and even if six minutes were taken in covering the distance,—the longest estimate,—the average of the steamer was over two knots; and this, if she was stopped at the time of the collision, would imply a speed of about four knots at the beginning. In fact, I think the collision was several hundred feet higher up. It is not clear that from four to five knots over the ground—say six knots through the water—is too high a speed at which to pass the Gas buoy, if proper care be taken that the channel above shall remain clear. Under these circumstances, a less speed might even be undesirable, but this considerable speed emphasizes the danger of attempting to pass the channel until after more complete warning than was given here. Again, there is contradiction between Captain Muir and the pilot regarding the orders given on the steamer just before the collision. The former testified that the engines were not started ahead until after the collision; the latter directly to the contrary. "The schooner kept approaching. I stopped the engine in the meantime, and the schooner was coming right across our bow, and was falling off. When she was coming across the ship's bow, and a minute before she touched, I stopped the ship's engines, and sung out, 'Hard a-starboard,' and then, 'Full speed ahead.' The ship's stern was getting onto the mud, and I had to go ahead with the ship. I was afraid of being hung up with these dredges, and so I gave the order 'Full speed ahead.' The ship started ahead. Then I sung out to let go the anchor, which was done, and after the chain took her, and the ship straightened out, I sang out, 'Get a rope over the schooner's bow, and turn her out from under our bow.' As soon as the rope was fast, I stopped the engines. The ship had not gathered much headway. The tug was pulling the schooner away, and when she was pulled away the engines were started, and then we proceeded further up the harbor."

It is true that the pilot testified that the steamer was not moving at the time of the collision, but, if her engines had been going full speed ahead for a minute, or even for half a minute, I do not think the steamer could have been absolutely stationary. Mr. Crosby says she was not. Perhaps she had been stopped by her anchor before she was started ahead, and the pilot's observation may have been made at that time. This order of the pilot was doubtless given in extremis, but it not only discredits the testimony of Captain Muir

and others, but illustrates the danger of the whole proceeding on the steamer's part, and the wisdom of sending a tug ahead to give warning of the steamer's approach. As was said by the circuit court of appeals for the Sixth circuit in *Squires v. Parker*, 42 C. C. A. 51, 53, 101 Fed. 843, 845:

"We concede that, as urged by counsel for the respondent, the governing rule is modified when the steamer cannot obey it without getting into serious peril, and there is no other way to avoid it but to disregard the rule. The *Marguerite*, 87 Fed. 953. But in such case it is obvious that the steamer is bound to resort to all other practicable means before she can be justified in violating the statutory regulation."

Again, the helmsman of the steamer testifies that he put the steamer's wheel hard a-port before the collision, and with him agrees the statement of Captain Muir. Apparently this maneuver was improper, as, if the steamer's head had been only a little more to port, the collision would not have happened. Still, again, if the hole in the schooner's side was deepened by the steamer going ahead after the collision, and if the necessity for the steamer's going ahead was caused by its bow being to starboard, then increased damage may have been caused by improper steering. As other faults have been found on the part of the steamer, it is not necessary to discuss this question further.

The court has next to consider if the schooner also was at fault. She had no lookout. Her counsel contended that the want of a lookout did not contribute to the collision; that she kept her course, and that this was her only duty; but the privileged vessel has no right to keep her course with her eyes shut. The rule requiring a lookout is imposed alike upon the burdened and privileged vessel. The duty of the privileged vessel is to hold her course; the duty of the burdened vessel is to keep off that course. But the privileged vessel is to hold her course, constantly observing the burdened vessel, in order to notice if the latter fails in her duty. When the failure of the burdened vessel becomes apparent, the privileged vessel must change her course as prudence commands. If she thereafter keeps her course by reason of failure to observe the fault of the burdened vessel, she is at fault. Want of watchfulness on the part of the privileged vessel does not altogether excuse the burdened vessel, but it is none the less a fault. In this case the schooner saw the steamer when the former was on the port tack. The schooner then knew that the steamer was large, and would have difficulty in maneuvering in the narrow passage it must shortly enter. The schooner ought not to have lost sight of the steamer, especially while tacking in an anchored fleet, and considering her own slight maneuvering power. Yet, after losing sight of the steamer, the captain of the schooner did not again notice her until his attention was attracted by the tug's whistle. The want of a lookout was a plain fault, which probably contributed to the accident. It is at least doubtful if the schooner could have anchored in time to do any good. Perhaps the failure to catch the tug's rope was a mere accident, though the whole conduct of those on the schooner savors of negligence amounting almost to recklessness. As both vessels were at fault, the damages must be divided.

CUMBERLAND TELEPHONE & TELEGRAPH CO. v. LOUISVILLE  
HOME TEL. CO.

(Circuit Court, W. D. Kentucky. July 20, 1901.)

## TELEPHONES—RIGHTS UNDER CONFLICTING GRANTS—PRIORITY OF OCCUPATION.

Where a city has granted to each of two telephone companies the right to construct its line on the same side of the same street, neither grant being exclusive, in the absence of any statute or ordinance regulating the construction and operation of such lines the company which is prior in grant and in occupancy has the superior right, and the second company is not entitled to plant its poles within the space previously occupied by the first company, so that they will extend up through its wires, or to occupy with its own wires the space beneath them, where it will impair the safety or interfere with the efficient operation of the first line.<sup>1</sup>

In Equity. On motion for preliminary injunction.

Fairleigh, Straus & Eagles and Humphrey, Burnett & Humphrey,  
for complainant.

Helm, Bruce & Helm, for defendant.

EVANS, District Judge. The facts are not disputed that for as many as 12 years the complainant, under a contract with the municipality, has had its telephone line and system constructed and in operation along Preston street in this city; that its poles have been standing for that purpose on the west side of that street as far out as the crossing of the Louisville & Nashville Railroad Company's track, and thence on the east side of the street to the city limits; and that upon its poles were several crossbars upon which the complainant's wires were strung. The city having sold it the franchise therefor, and having accordingly given to the defendant a permit, as it is called, to construct a telephone line along the east side of Preston street to the city limits, a few days before the bill was filed in this case it attempted to construct its line practically on the territory and in the space already and long previously occupied by the complainant; the poles of the defendant, when put in, being in many instances thrust up between the wires of the complainant, and through the space already occupied by it for the operation of its system. Upon the filing of the bill a restraining order was granted, forbidding further proceedings in that direction by the defendant until a motion for a temporary injunction could be heard and disposed of. In view of the possibility of many conflicts of a similar character between the parties to this suit, and in order, if possible, to settle definitely the grounds upon which all such disputes should be determined, the court has devoted much time to the hearing and consideration of this motion.

The streets of a city are almost exclusively under its control, and it was surprising to find that no regulations had been adopted by the proper authorities of Louisville for the wise and just regulation

<sup>1</sup>Rights of telephone and telegraph companies to use of streets, see note to Southern Bell Telephone & Telegraph Co. v. City of Richmond, 44 C. C. A. 155.

of telephone companies, and for the construction and operation of their lines. If such course had been pursued by the city, it would be a rare instance, perhaps, in which the courts would be called upon to interfere. Telephones are most important factors in the business of the community, and withal are conducted through agencies which are somewhat dangerous to life and property, and there are many reasons why their construction and operation should be most carefully and wisely regulated, and probably upon scientific principles, for the public safety and the good of the community. In the exercise of its power over its streets the city granted a permit to the defendant for the construction of its line along the east side of Preston street. This it had the right to do, as the older right of the complainant, though also secured under contract with the city, was expressly not exclusive. I do not find it necessary to express any opinion upon the question of whether the city had the lawful power to authorize the defendant to take any part of the space occupied by complainant without its consent or without just compensation, because there appears to have been in fact ample room on the east side of the street for the defendant's lines, without actually interfering with the space occupied by complainant. But, even if the city had the power, it did not in terms nor in fact authorize the defendant to occupy any part of the space already appropriated and occupied by the complainant under its agreement with the city, and we think the permission given the defendant, when properly and fairly construed, does not bestow upon it any such right. Neither party to the suit having an exclusive right, though each party has a contract right, we think the only intelligible principle upon which the case can be determined is that of prior occupancy, and the resultant equitable rights. Priority in time, upon familiar principles, ordinarily gives the superior equitable right, and certainly it must be manifest that there is no equitable consideration upon which it can be justly and fairly held that the complainant shall be turned out of what it has appropriated, and of which it is in lawful possession, in order that the defendant shall be permitted to occupy the same thing. It seems to us clear that to allow the defendant to thrust its poles up through the lines of the complainant, to have its employes pass and repass through those lines at will, and to require that the complainant's wires shall thereby be subjected, and that the complainant's employes, to say nothing of other people, shall also thereby be subjected, to any dangers that might result from the electric fluid, would be a conflict and menace to both to which no just principle would require any of them to be subjected, unless under stress of a much greater necessity or upon a much more urgent demand, based upon the public needs, than appears in this case. Indeed; it seems to us, though it is not necessary to decide the question, that there was no reason of any great weight why the defendant could not have crossed over to the west side of Preston street at the railroad crossing, and have proceeded on that side to the city limits. It would probably have been quite as well for it to have applied for permission to do that, and probably it would have been quite as easily obtained. There are many instances where numerous persons have equal rights in a given locality, and yet where the law,

good manners, and common sense equally require that the old maxim, "First come, first served," shall be observed. Every individual in the community has an equal right upon the public streets, and to occupy space thereon necessary for his legitimate purposes there, and yet, from the necessity of the case, any part of the street occupied by one person may not be taken from him by another while he is not in any fair sense obstructing the highway. He cannot properly be shoved out of the place he first occupies in order that another who would like to have it may take it instead. Any other rule would tend to many breaches of the peace. Suppose a crowd should gather in a public place to witness some spectacle. One person first occupying a place of vantage could not rightfully be displaced by any one else without his consent. By a parity of reasoning, in the absence of statute or lawful regulation, if a second telephone company finds the most eligible lines and places already occupied by another company in the same business, it may be its misfortune, but it does not have any right to displace the previous occupant in order to benefit itself. An electric light company ordinarily occupies a space for overhead wires much less wide than does a telephone company for the same purpose, and while its side of the street may not be as desirable, on account of its presence, as the other side, still, if the other side is already occupied by one telephone company when a second desires to do so, and if one or the other must go to the side where the electric light company is located, it must be the latest telephone company. These are among the natural and necessary disadvantages of a late start in the business. They cannot be avoided by a forcible occupation of the space already fairly appropriated and occupied by an earlier claimant. First occupancy, indeed, is the original foundation of title to all property. But, at any rate, we think the applicable and controlling principle is well stated in the following language from the opinion of the Texas court of civil appeals in the case of *Paris Electric Light & Ry. Co. v. Southwestern Telegraph & Telephone Co.* (decided in 1894) 27 S. W. 902, 5 Am. Electrical Cas. 262, where it was said that "the telephone company's franchise being superior in point of time to that of the appellant, and having exercised its right under its franchise, appellant, in the absence of a superior right, could not interfere with the use and enjoyment of that privilege by stringing wires in such close proximity to those of appellee as to impair the efficiency of appellee's telephone service." This statement of the doctrine is satisfactory to the court, as it seems to be based upon facts similar to those here, and is also well supported by the following authorities: *Consolidated Electric Light Co. v. People's Electric Light & Gas Co.*, 94 Ala. 372, 10 South. 440; *Rutland Electric Light Co. v. Marble City Electric Light Co.*, 65 Vt. 377, 26 Atl. 635, 20 L. R. A. 821, 36 Am. St. Rep. 868; *Joyce, Electric Law*, §§ 495, 515; *Bell Tel. Co. v. Bellville Electric Light Co.*, 12 Ont. 571. It has been shown that in certain cities in Ohio a second system of telephone wires had been constructed in the manner attempted in this case, but we are without light as to whether there was an agreement between the companies there, or whether it was done under a contract to that effect between the city and

the original company, or whether some statute of the state, subject to which both companies held their franchises, permitted or required it. In the absence of any light upon those matters, we are only called upon to ascertain the general principles which must control this case, and which may not be affected by anything that took place in Ohio.

The court is therefore of opinion that the evidence shows and established the facts to be that for many years the complainant has occupied on the east side of Preston street, south of the crossing of the Louisville & Nashville Railroad Company's track, the line shown to be where complainant's old but short poles are now set up; that it has occupied a space some distance from the ground, about 8½ feet in width, reasonably needed therefor, and where its wires are now strung on said poles; and that to permit the defendant to occupy any portion of that space, or any part of the space between that and the ground, would be injurious to the complainant and its system, and would injuriously conflict and interfere with the operation of its lines. These being the facts as established, it follows that the temporary injunction should be granted to the extent of prohibiting the defendant from occupying or attempting to occupy any part of the space indicated, and from so constructing its line on the east side of Preston street as to touch or interfere with complainant's line or wires in that space. Of course, nothing in this general ruling should prevent the reasonable use of parts of the space above or below that used by the complainant where necessary crossings are to be made. In such instances the crossings should be effected in such manner as not to intermingle the wires of the respective companies, and so as to interfere as little as may be practically possible with the occupancy of that company which first came upon that particular locality.

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CUMBERLAND TELEPHONE & TELEGRAPH CO. v. LOUISVILLE  
HOME TEL. CO.

(Circuit Court, W. D. Kentucky. July 31, 1901.)

TELEPHONES—RIGHTS UNDER CONFLICTING GRANTS—PRIORITY OF OCCUPATION.

Complainant constructed and had maintained and operated for several years a telephone line along the streets of a city under a grant which was still subsisting when the city granted to defendant a franchise to construct and maintain a line on the same side of the same streets. Neither grant was exclusive, and there was no ordinance of the city regulating the construction and operation of such lines. *Held*, that complainant by its prior lawful occupancy had acquired the superior right, and that defendant was not entitled to so construct its line as to interfere with the safety or efficient operation of complainant's system.<sup>1</sup>

In Equity. On motion for preliminary injunction.

Humphrey, Burnett & Humphrey and Fairleigh, Straus & Eagles, for complainant.

Helm, Bruce & Helm, for defendant.

<sup>1</sup>Rights of telephone and telegraph companies to use of streets, see note to Southern Bell Telephone & Telegraph Co. v. City of Richmond, 44 C. C. A. 155.

EVANS, District Judge. A case between these parties which involved precisely the same questions as this one was before the court a few days ago, and was very carefully considered. 110 Fed. 593. I reached the conclusions stated somewhat at large in the opinion then delivered, and I need not repeat what was there said. There was a total failure upon the part of the city to regulate the manner of constructing telephone lines along its streets, especially where more than one company claimed the privilege. The city seems to give a general permit to do so, and then turns the company loose to do the best it can. In the absence of any specific regulation by the city, we have here the case of two telephone companies, each one of which is a private corporation operating its business exclusively for private gain, and only to a certain extent having any function properly called public, but each one of which has a franchise to build a telephone line on certain sides of certain streets, though one of them has the equitable and legal advantage of several years' prior occupancy of certain space in the most eligible positions, but from which the other desires to remove it or else to divide the occupancy; and the court is called upon to say whether the right to do so exists. I believe there is no break in the long line of authorities which hold that priority in time of occupancy in such cases gives priority and superiority in right, and that the first occupant cannot be ousted, shoved aside, or interfered with by a later claimant. In the former opinion I stated generally the grounds upon which I not only followed, but altogether concurred, in the views expressed in numerous cases. Much of the matter contained in the elaborate and possibly somewhat argumentative affidavits read by the defendant might be very persuasive if presented to the legislative department of the city government in an effort to induce it to devote the streets of the city to certain uses, and to settle the terms upon which such devotion should be made, but, when addressed to the court in an action inter partes which seeks to determine the rights of mere litigants, they do not seem to have much bearing upon the question of the rights of the complainant growing out of its prior lawful occupancy of certain parts of certain streets under a license from the city, which I think is the one point upon which the pending question must be decided. We are concerned only to ascertain whether the complainant has any lawful rights in the premises which have been unlawfully invaded by the defendant. If the complainant has rights superior to those of the defendant, the latter must yield. Abstractly the rights might have been equal, but concretely it may be that priority of appropriation of certain space gives priority of right therein. By its general grant to the complainant, the city, in contemplation of law, gave the necessary space over the street and in the street for the construction and operation of complainant's telephone system. When this space was afterwards appropriated and occupied by the complainant its title thereto became complete and exclusive as to everybody, unless it might be the city, and the permission given to defendant in general terms to use the street did not revoke, and was not intended by the city authorities to revoke, any right of the complainant thus acquired, but was necessarily subject to the previously acquired right. Principles



somewhat similar to those which govern in cases of conflicting land warrants and entries might be applied. See *Atherton v. Fowler*, 96 U. S. 515-519, 24 L. Ed. 732; *Mower v. Fletcher*, 116 U. S. 385, 386, 6 Sup. Ct. 409, 29 L. Ed. 593. The court by no means says that the defendant may not occupy either or both sides of Park avenue or of Hill street. With those matters as abstract propositions we have nothing to do. All the court says is that, in its opinion, the defendant should not be permitted to invade the space on either street previously and lawfully appropriated and occupied by the complainant. What has been done between other companies in Ohio and other states, as shown by the evidence, does not seem to have been resisted by the earlier occupant, and we must assume that there was either actual or tacit consent upon some ground, the nature of which can only be conjectured; but, at all events, those matters cannot have force here, where the lawful and first occupant does, as such, vigorously resist any invasion of its rights, and asks the court to protect its superior equities as such occupant,—equities which arise out of that occupancy, considered in connection with the absence of any regulation by the city government. If I am wrong in supposing that previous lawful occupancy cannot be interfered with in the absence of statute or city regulation governing the right of interference as one of the terms or conditions of the user, then there should be no injunction; but as I am clearly of opinion that prior appropriation and occupation of necessary space by the complainant under the authority of the city does give it superior equities and rights as to that space as against all mere competitors, whatever might be the case as to the city, I think the complainant is entitled to an injunction pendente lite to prevent any interference by the defendant with the operation of the complainant's lines within that space, and from any attempts by the defendant to enter that previously appropriated space by any intrusion therein of any of its poles or any part of its outfit, and, indeed, into any part of the space below that actually occupied by the wires of the complainant. A temporary injunction similar to that in the former case is granted.

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#### UNITED STATES v. WHITE.

(District Court, D. Montana. August 30, 1901.)

No. 47.

#### PUBLIC LANDS—UNLAWFUL INCLOSURE—SUIT TO ENJOIN.

A bill against a defendant, under the statute for unlawfully fencing in portions of the public domain within a state, is not sustained by evidence showing that the land inclosed when surveyed will fall within section 15, which is within a railroad grant, and section 16, which is a school section owned by the state.

In Equity. Suit to compel removal of fence from public lands.

Wm. B. Rodgers, U. S. Atty.

F. Adkinson, for defendant.

KNOWLES, District Judge. In this case it appears from the evidence that a large portion of the land inclosed by the defendant was parts of section 16, or what will be section 16 when surveyed, and section 15 when surveyed. The first mentioned section is a school section, and the latter is a section of land embraced within the grant to the Northern Pacific Railroad Company. Neither of these two sections can be classed as a part of the public domain. The complaint, therefore, that the defendant had unlawfully inclosed or fenced up portions of the public domain cannot be sustained. The judgment of the court is that the bill herein be dismissed.

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CHICAGO, R. I. & P. RY. CO. v. HANNIBAL & ST. J. R. CO.

(Circuit Court, N. D. Illinois, N. D. April 23, 1901.)

No. 24,819.

CONTRACTS—CONSTRUCTION—TOLLS FOR USE OF RAILROAD BRIDGE.

The complainant acquired from defendant, by lease for a term of 25 years, the right to run its trains over some 50 miles of defendant's railroad track, and also the bridge owned by defendant across the Missouri river at Kansas City, together with the use of terminal facilities in the city. The lease provided for the payment of rentals for the use of the track and terminal property, and for the payment of tolls for passengers and freight transported over the bridge, in accordance with a schedule of rates therein contained; and further provided "that, if any other railroad company or common carrier shall, after the commencement of this lease, be permitted to transport freight or passengers over said bridge upon the payment of tolls lower than those above specified, the tolls above named shall be reduced to correspond with such reduced rates, but this proviso shall not apply to the existing contract between the party of the first part and the K. C., St. J. & C. B. Railroad Company." The latter company was then using the bridge under a contract requiring the payment of fixed annual rentals. Another company was also at the time running its trains over the bridge under a similar contract, which had just expired, but proceedings were pending before the governor for renewal, by reason of the failure of the parties to agree upon the terms, in accordance with a provision of the statute under which the bridge was constructed. Such renewal was made upon the same basis as before, requiring the payment of a fixed annual rental. The amounts paid as rentals under such contract were at all times smaller than the tolls paid by complainant, taking into consideration the number of trains run, and the passengers and freight transported, over the bridge by the respective companies, which facts were at all times known or accessible to complainant, which, however, continued to use the bridge, and to pay the stipulated tolls, without objection, for 18 years, when it made the claim that its tolls, both future and past, should be reduced to correspond with the amounts paid by the second company. *Held* that, inasmuch as the payments by complainant under its contract were to be made upon an entirely different basis from those under the other contracts, the one being determined by the amount of traffic, while the others were fixed without regard to the use made of the bridge, and in view of the practical construction placed upon the contract by the parties for so many years, the proviso for the reduction of tolls could not have been intended to apply to rentals paid by other companies under the other class of contracts, which would have required defendant to keep accounts, otherwise unnecessary, and which were not in fact kept, for

the purpose of reducing such rentals to a toll basis; and this notwithstanding the express exceptions from the proviso of one of such contracts, which must be presumed to have been inserted from an excess of caution.

### In Equity. On final hearing.

The bill of complaint is founded on a contract made December 4, 1879, whereby the Hannibal & St. Joseph Railroad Company, defendant (hereinafter mentioned as the "Hannibal Company") granted to the Chicago, Rock Island & Pacific Railway Company, complainant (hereinafter mentioned as the "Rock Island Company") the right to use for the term of 25 years (1) a section of 52 miles of its railroad, and (2) its bridge at Kansas City, with certain terminal facilities; and the relief sought is (1) an accounting to ascertain the rates of toll or compensation for which like use of the bridge has been granted to other railroads during the continuance of this contract; (2) to obtain a reduction of the complainant's rates, in conformity with a provision of the contract, to the alleged lower rates which have been accepted from such other companies; and (3) to recover the amounts paid by the complainant, in excess of such lower rates, during the intervening time, in ignorance of the reduced rates, and through the defendant's concealment of the facts. The controversy relates only to the bridge toll, although the terminal facilities in connection with that branch of the contract must be taken into the account. The provisions of the contract, so far as are material, are as follows:

"(1) A sum equal to 7 per centum on the valuation of \$10,000 per mile, estimated to be one-half the value of fifty-one miles of railroad, the distance between Cameron Junction and Harlem; that is to say, a sum equal to 7 per centum upon \$510,000.

"(2) A sum equal to one-half of all taxes legally assessed and levied upon the right of way, road, tracks, and station houses of the railroad hereby let and demised between Cameron Junction and Harlem, inclusive.

"(3) Tolls for all passengers and freight which the party of the second part shall transport over the railroad bridge of the party of the first part, at Kansas City, as follows:

Articles.	Rates.
Merchandise .....	5c. per 100 lbs.
Merchandise, car loads, 12,000 lbs. and over.....	\$6 00 per car.
Carload Shipments:	
Cement, lime, railroad iron, salt, stucco, wood.....	\$4 00 per car.
Brick, coal, hay, hogs, sand, stone, ties, and piling.....	\$3 00 per car.
All freight not enumerated above.....	\$5 00 per car.
Railway Equipment:	
Freight cars, as freight.....	\$ 4 00 each.
Passenger coaches, as freight.....	\$ 6 00 each.
Locomotive engines, as freight.....	\$10 00 each.
For each passenger.....	20 cents.

"Provided, that if any other railroad company or common carrier shall, after the commencement of the term of this lease, be permitted to transport freight or passengers over said bridge upon the payment of tolls lower than those above specified, the tolls above named shall be reduced to correspond with such reduced rates; but this proviso shall not apply to the existing contract between the party of the first part and the Kansas City, St. Joseph and Council Bluffs Railroad Company.

"(4) A sum equal to the proportional share of expenses actually incurred in repairing, renewing, and maintaining the roadbed, tracks, and bridges (excluding the bridge over the Missouri river, and appurtenant structures), stations, buildings, water stations, and side tracks between Cameron Junction and Kansas City, inclusive, which share shall bear the same proportion to the whole amount expended for said purposes as the train miles run over said road by the lessee shall bear to the mileage of all trains operated thereon.

"(5) A sum equal to a proportional share of the expenses actually incurred in paying reasonable salaries to switchmen, telegraph operators, train dispatchers, and such other employes as may be employed in the performance of duties incident to the joint use and occupation of said railroad, as well as a like share of expense for water supply; the proportion of such share to be ascertained in the manner provided in the last paragraph.

"(6) A sum equal to the proportional share of all expenses incurred in switching cars (both passenger and freight) in Kansas City, and in the loading, unloading, and transfer of freight at the same place, which share shall bear the same proportion to the entire expenses incurred for such purposes which the number of cars switched, loaded, unloaded, and transferred for the party of the second part at said place shall bear to the whole number of cars which may be switched, loaded, unloaded, and transferred by the party of the first part at said point; but it is understood and agreed that each party shall pay in full all charges for trackage of its own cars out of the yard of the party of the first part in Kansas City.

"(7) A sum equal to 7 per centum of the amount expended in the construction of additional stalls in the engine house and tracks and freight houses and offices in the yard at Kansas City.

"(8) If the tolls for the use of the bridge of the party of the first part at Kansas City shall ever be reduced as provided in the third paragraph of this section, a reasonable rental, not exceeding the amount of such reduction, shall be paid by the party of the second part for the use of the yard of the party of the first part in Kansas City. If the amount of such rental cannot be agreed upon by the parties, it shall be fixed by reference, as provided in the seventh section of the third article hereof. Said rental shall be paid in monthly installments on the fifteenth day of the month following that in and for which it accrues, upon presentation of a statement by the party of the first part to the party of the second part showing the amount due, accompanied by copies of pay rolls and vouchers showing the payment of the expenses mentioned in the foregoing paragraphs numbered two (2), four (4), five (5), six (6), and seven (7), certified by the general manager or superintendent of the party of the first part."

And the Rock Island Company further agrees "to transport all passengers and freights which it can legally and legitimately control between Kansas City and points on its own line between Cameron and Chicago, inclusive, over the railroad which is hereby let and demised." Also that it "shall do no business as a carrier of freight or passengers to or from any point between Keystone (a station next west of Cameron) and Harlem, inclusive. It will give reasonable notice to prevent the entry of any passengers into its trains, and if, despite such notice, passengers do enter such trains, it will account for and pay to the party of the first part all fares which may be collected from them." The contract contained a further provision that it "shall be construed liberally, so as to protect and secure to each party the privileges and benefits herein provided or manifestly intended."

At the time this contract was made, the Kansas City, St. Joseph & Council Bluffs Railroad Company (hereinafter mentioned as the "Kansas City Company") was operating under a contract with the Hannibal Company, dated September 1, 1871, which granted to the former the use of the bridge, depot, and station grounds at Kansas City for 10 years for an annual payment of \$20,000 in monthly installments; and such contract is mentioned in the proviso of the contract in controversy as excepted therefrom. This contract was subsequently renewed upon like terms. Moreover, the St. Louis, Kansas & Northern Railroad Company, subsequently known as the Wabash, St. Louis & Pacific Railroad Company, and later as the Wabash Railroad Company (hereinafter referred to as the "Wabash Company"), was operating its trains over the same bridge under a contract with the Hannibal Company made December 1, 1869, for a term of 10 years, providing for an annual payment therefor of \$55,000. This contract expired on December 1, 1879, and, negotiations for renewal having failed, proceedings were then pending to fix the terms of renewal in accordance with the legislative grant under which the bridge was authorized; and the facts of such

prior contract and controversy over the terms of renewal were well known. The renewal was finally arranged through arbitration, and was made, by contract entered into June 1, 1880, to date from December 1, 1879, fixing the compensation at \$48,000 per annum, payable in monthly installments, together with one-third of the expenses incurred by the Hannibal Company in maintaining the bridge. On September 1, 1888, this contract was modified so as to reduce the annual rental from \$48,000 to \$30,000, and the share of expenses for maintaining the bridge was changed to "a wheelage proportion," instead of "one-third thereof." The aggregate amount paid by the complainant each year under its contract for tolls largely exceeded the amount paid by the Wabash Company for the same period under either of its contracts, while the actual traffic of the Wabash Company over the bridge was of like class, and greatly exceeded that of the complainant. A dispute arose between the parties in 1886 respecting the rate upon lumber, but having reference only to an "equitable charge,"—whether it should be four dollars or five dollars,—and this remained an open question for several years, until a final adjustment was reached with no allusion to the present subject of controversy; and monthly settlements have continued throughout the term, aside from the pendency of that adjustment. The controversy in suit was initiated by a letter of Mr. Cable, president of the Rock Island Company, dated February 3, 1898, addressed to Mr. Perkins, president of the Hannibal Company, calling attention to information, which had then reached the company for the first time, that the Wabash Company had the use of the bridge at lower rates than those paid by the Rock Island Company, and asking for copies of the contracts with the Wabash Company, and statements showing the tolls, rentals, or charges paid by them for the freight and passengers actually carried. Such contract was thereupon furnished, and the following correspondence ensued; the letter of Mr. Cable bearing date February 28, 1898, and the reply by Mr. Perkins, March 8, 1898:

"Mr. C. E. Perkins, President H. & St. J. R. R. Co., Burlington, Ia.—Dear Sir: In response to my letter to you of the third instant, Mr. J. W. Blythe called on me at my office, and left with me copies of contracts between your company and the following companies, relating to the use of your bridge across the Missouri River at Kansas City: Wabash, St. Louis & Pacific R. R. Co., date June 1, 1880; modification of same, date Sept. 1, 1888; Kansas City, St. Jo. & Co. B. R. R. Co., date Sept. 1, 1871; same, date Sept. 1, 1881. Mr. Blythe suggested, without however definitely taking the position, that the proviso in paragraph 3 of section 1 of the contract between your company and this company, dated December 4, 1879, to the effect 'that, if any other railroad company or common carrier shall, after the commencement of the term of this lease, be permitted to transport freight or passengers over said bridge upon the payment of tolls lower than those above specified, the tolls above named shall be reduced to correspond with such reduced rates,' would not apply to the case of a contract such as those named, permitting another railroad company to transport freight and passengers over the bridge on the payment of a fixed annual rental, instead of on the payment of tolls, such as those specified in our contract. I cannot agree with this proposition. It certainly is not in accordance with the understanding with which the contract was entered into on our part, which was, to my recollection, that we were to have the right to use the bridge on as favorable terms as any other railroad company; the then existing contract with the Kansas City, St. Joseph and Council Bluffs R. R. Co. being excepted. Besides, Mr. Blythe's position has had the careful consideration of our legal department, and I am advised that our right, under the contract, to a reduction of the tolls provided for therein, cannot be affected by the circumstance that the tolls paid by the other companies for transporting freight and passengers over the bridge are paid in an agreed annual sum, instead of being computed on the basis of the amount of traffic over the bridge. A further suggestion made by Mr. Blythe, to the effect that the other contracts guaranteed to your company fixed annual sums for the full terms of the contracts, does not seem to be strengthened by the provision in the Wabash contract of

June 1, 1880, for a readjustment of the compensation every five years; still less by the provision of the modified agreement of September 1, 1888, giving either party the right to terminate the contract on eighteen months' notice. It seems clear to me that we are entitled to a reduction of the tolls, under the terms of the contract, not only for the present and future, but also for the past. May I ask you again, therefore, to give me a statement of the amount of traffic, both freight and passenger, carried over the bridge each year during the term of our contract, by the Wabash Company and its predecessors under the contracts of June 1, 1880, and September 1, 1888, and by the Kansas City, St. Joseph & Council Bluffs R. R. Co. under the contract of September 1, 1881? Thanking you in advance for your compliance with this request, I remain,

"Yours, truly,

R. R. Cable, President."

"Mr. R. R. Cable, Prest. C., R. I. & P. Ry. Co., Chicago, Ill.—Dear Sir: I have delayed answering your favor of February 28th, about the bridge contract, in order to post myself more fully with regard to the facts. I am unable to comply with your request for statements of the traffic, for the reason, if there were no other, that no such statements have been made to or kept by the Hannibal Company, nor has that company in its possession data necessary for making them. It keeps accounts of cars and engines going over the bridge, but nothing more. This alone would seem to me to show that no such plan as the one you suggest for ascertaining the tolls your company should pay could have been made in the minds of the parties who made the agreement. The contract throughout carefully discriminates between the words 'tolls' and 'rentals,' and they are nowhere in it used as synonymous or interchangeable. There is not only no requirement that we should commute rentals paid by others into tolls, in order to find the measure for tolls to be paid by your company, but it is, to say the least, difficult to see how it could be done. To do it would certainly involve elaborate accounting for specific periods, and the tolls so ascertained could not be the same for any two periods. It is impossible to suppose that the parties to the contracts had any such plan in mind, and yet that they not only said nothing about it in the agreement, but went immediately to work, and gave a practical contemporaneous construction of an entirely different nature to the agreement they had made. Of course, if a rental contract is to be taken now as the measure of your tolls, it should have been taken as such in the beginning, when the parties who made it were in control to construe it. It seems to me perfectly clear that the parties understood from the beginning that tolls were not to be measured by fixed rentals. To adopt your construction of the contract would involve, first, finding out what the fixed rental paid by the Wabash would amount to in tolls, if that could be done, and then applying these tolls to your traffic, without any guaranty on your part to pay anything. I do not believe that the agreement can be so construed. I think, where one party pays a fixed, guaranteed sum, and takes all the risks, and another pays tolls on the business which it actually transacts, leaving the lessor to take all risks, the circumstances differ so essentially as to make it impossible to find any adequate standard of comparison; and it seems to me plain that the parties who made the contract had this distinction clearly in mind, for the reason, as stated above, that they studiously discriminated between the words 'tolls' and 'rentals,' not once using them as meaning the same thing, and carefully abstained from providing for any of the elaborate machinery which would be necessary to carry out your idea. My conclusion is, and I am so advised, that you could not, as of right, demand statements of the business done by other roads over the bridge, even if we were able to furnish them.

"Yours, truly,

O. E. Perkins, President."

Other facts and circumstances affecting the issue are mentioned in the opinion.

Robert Mather and John S. Miller, for complainant.

Chester M. Dawes and J. W. Blythe (O. M. Spencer and John J. Herrick, of counsel), for defendant.

SEAMAN, District Judge (after stating the facts). The controversy in this case is important, both for the amount involved and for the novelty of the single question presented, namely, whether the rate of tolls which the Rock Island Company contracted to pay for the use of the bridge is governed by the subsequent grant to the Wabash Company of like use for a fixed annual rental. Solution of this inquiry depends upon an interpretation of the terms of the contract with the Rock Island Company for its use of the bridge, and to that end it is "the fundamental rule in the construction of all agreements" to ascertain what was "the substantial intent of the parties" in making the provision in question. *Canal Co. v. Hill*, 15 Wall. 94, 100, 21 L. Ed. 64, 67. The agreement is to pay "tolls for all passengers and freight" which the Rock Island Company "shall transport over the railroad bridge," in accordance with classification and rates therein specified, with this proviso however: "That if any other railroad company or common carrier, after the commencement of the term of this lease, be permitted to transport freight or passengers over said bridge upon the payment of tolls lower than those above specified, the tolls above named shall be reduced to correspond with such reduced rates; but this proviso shall not apply to the existing contract between the" Hannibal Company and the Kansas City Company. On the part of the complainant it is contended that the term "tolls" is here used in the sense of "compensation" for passage over the bridge; that, so considered, the proviso is applicable to any form of compensation for like privilege which may be adopted by the licensor, and thus embraces the arrangement with the Wabash Company for a fixed annual sum or rental, and that the specific exception from the proviso of the existing annual rental contract with the Kansas City Company "shows conclusively that the parties used the words in that broad sense." If the sense in which the term was employed by these parties were ascertainable only from the language of the contract, unaided by the surrounding circumstances and conduct of the parties, these propositions would seem to be both tenable and decisive. But the word "tolls" is of flexible meaning, as indicated in the diversity of interpretation by the authorities cited in the briefs of counsel on one side and the other, according to the various circumstances under which it is used; and its interpretation as found in this contract cannot rest alone upon general definitions,—for instance, as "a tribute or custom paid for passage, not for carriage,"—but calls for an understanding of the circumstances attending its adoption to ascertain its meaning as adopted. In this view the exception from the proviso of the contract with the Kansas City Company fixing the compensation in gross at a yearly sum is an important factor for construing the general term under the well-settled rule that an exception so made strongly implies the understanding that such contract would otherwise be included, and raises a presumption that the term "tolls" was thus used in the broad sense; but this is a rebuttable presumption, and must not override the true intention, if that appears from other legitimate evidence; as such clauses are often introduced from excessive caution, and for the

purpose of preventing a possible misinterpretation by including that which was not intended. *Baggaley v. Iron Co.*, 33 C. C. A. 202, 90 Fed. 636; *Tinkham v. Tapscott*, 17 N. Y. 141. I am of opinion, therefore, that the language of the proviso requires other light for its interpretation, and that this is furnished through the well-recognized sources of explanation: (1) The circumstances under which the contract was entered into, and (2) the subsequent conduct of the parties by way of practical construction.

1. The bridge of the Hannibal Company was constructed under both state and congressional authority, and subject to the conditions imposed by the acts, respectively, that a right of passage be granted to the trains of other railroad companies when the roads or branches thereof terminated at or near the bridge, upon terms prescribed as follows: (1) By the state act, to be agreed upon between the parties, and, if they failed to agree, to be fixed by the governor of the state; (2) by the federal act, to be "for reasonable compensation." At the time the contract in suit was made, the Kansas City Company and the Wabash Company were running over the bridge under pre-existing contracts; but the contract of the last-mentioned company had expired by limitation four days previously, and proceedings were pending before the governor for renewal by reason of failure of the parties to fix the terms. The Rock Island Company had no terminus at the bridge, but was contemplating an extension to it, and by the arrangement in suit obtained such access over the Hannibal road for the intervening 52 miles, at an annual rental, together with the use of the bridge, under a separate provision, for tolls to be paid in accordance with schedule of rates. This method of providing compensation for the traffic over the bridge was obviously a radical departure from that of the prior contracts, as it involved no promise of an aggregate amount to be paid, or assumption of risk in the amount of business for any period during the long term of the contract. It was distinctively an arrangement on one side and the other that compensation should abide the actual volume of the business, thus sharing pro rata in the profitableness of the new traffic; and the testimony shows no such prior arrangement for the use of this bridge, but indicates that the plan and schedule were those of the toll system which prevailed at the neighboring railroad bridges of Atchison and Leavenworth. On the other hand, there was no such mutuality in the undertaking of the fixed rental contract. The amount was named in advance, was payable absolutely in monthly installments, without reference to the amount of traffic, and required no accounting for the business done. The two systems were distinct and well known, and the contract made choice of the one which was based on the extent of business. Construction of the proviso, therefore, rests on the choice of system, and not on the mere use of a word; the inquiry on the defendant's contention is not the narrow one stated in one of the briefs, whether the "proviso secures to the Rock Island nothing more substantial than an interest in the use of a word." If the Rock Island contract had stated the toll basis alone in its terms, with the Kansas City and Wabash contracts



then in the hands of the parties as arrangements to be continued on the fixed rental basis, but without mention of either in the new contract, it is probable that this distinction would have been deemed sufficient to show the true intention, and that the proviso for the reduction of the toll rate was not to be affected by the annual rental contracts or any bona fide renewals thereof made on a like basis. The difficulty, however, in the contract as made, arises from the fact that the Kansas City contract was expressly excepted from the proviso, while that of the Wabash Company was not mentioned. The testimony leaves no room for doubt that the parties to this agreement understood the character and status of the arrangement with the Wabash Company; that proceedings to enforce a renewal were pending, and that the right thereto upon reasonable terms was secured by the charter; and that they must have contemplated the continued use of the bridge by that company, subject only to readjustment of the terms. The contracting parties were railroad companies, entering into an important arrangement to continue for 25 years, and doubtless advised by able counsel. Why the contract thus prepared excepted the Kansas City contract from the proviso for reduction of rates, when it was not within the literal terms, and omitted mention of the Wabash situation of kindred nature, is unexplained; and so occurring in the face of the presumption which was liable to arise in such case, the circumstances attending the execution, taken alone in connection with the instrument, do not furnish satisfactory evidence of the intention of the proviso.

2. The potent element of practical construction by the parties remains for consideration, and I am of opinion that the testimony establishes a mutual understanding of the proviso which must be accepted as decisive of its meaning. This was my impression at the close of the oral arguments, but the importance of the issue and force of the contentions on behalf of the complainant have called for careful examination both of the testimony and the elaborate briefs submitted by counsel, and my deductions thereupon are summarized as follows: Operation under this contract has continued without interruption since the year 1879, with the tolls paid monthly in accordance with the schedule, and with no claim or suggestion at any time prior to 1898 that ground existed for reduction of the schedule rates on the basis of the proviso, or that the Wabash traffic was to be taken into consideration for that purpose. A single instance of dispute arose over the tolls fixed by the contract, and that related to rates which were "equitably chargeable" for shipment of lumber, and this remained an open question for years,—the Rock Island Company claiming that lumber was not specifically within the classification of the schedule for the five dollar rate asserted on the part of the Hannibal Company, and that a four dollar rate, which they were conceding, should be accepted as reasonable; and there is strong significance in the undisputed proof, by correspondence between both officers and attorneys, throughout the negotiations, extending from 1886 to the adjustment in 1893, that the claim of the Rock Island Company to the lower rate was predicated alone upon general equities, with no allusion to the provision upon

which the present claim hinges, and no suggestion that the company was entitled to any reduction of tolls within the specific terms of the contract. For 17 years the business was thus carried on under the toll basis of the schedule, with monthly accountings between the parties, and no testimony in the case tends to impeach the good faith of the defendant in acting upon such basis in the accountings; no conduct or efforts appear on the part of the defendant for concealing the arrangement with the Wabash Company, or the earnings of the bridge thereunder; and, so far as the evidence discloses, that transaction was ignored by both parties as foreign to their accountings. This course of conduct is utterly inconsistent with an understanding that the rates of toll were contingent upon the pro rata benefits derived by the Wabash Company under its contract as made, and, unless the complainant was excusably ignorant of the substantial facts of that transaction, it is obvious that its conduct and interests are not reconcilable with the view now asserted. For the inquiry thus remaining the test is not one of strict performance of a duty under the assumed construction, but whether sufficient information appears of a state of facts of such direct bearing and interest to the complainant, on the assumed construction, that its possession and the attending conduct are not consistent with an understanding of right to the reduction of tolls on the basis of the Wabash arrangement. In that view I am satisfied, from the undisputed testimony and circumstances, that the complainant is chargeable (1) with ample information of the nature and substantial terms of the Wabash contract, and (2) with information, which was both patent and in its hands, of the general excess of the Wabash traffic over its own across the bridge, while detailed information was readily obtainable, if not in its possession.

First. The Wabash contract was adjusted June 1, 1880, and readjusted September 1, 1888. The proceedings, final arbitration, and terms of adjustment were matters of notoriety in railroad circles. The substantial facts, including the terms as settled, were widely published in newspapers and railroad journals, of which extracts are in evidence,—several of the last-mentioned publications being received at the general offices of the Rock Island Company; and the exact terms were repeatedly stated in "Poor's Manual," a well-known publication of railroad statistics. Mr. Riddle was president of the Rock Island Company when its contract was made, and so continued until 1884. He signed the contract as such officer, and personally conducted much of the correspondence leading up to it, which is in evidence. He was requested to act as one of the arbitrators for the Wabash adjustment, and testimony of his conversation in the matter clearly indicated that he then had full information, and further conversations after the adjustment disclose that he was fully acquainted with the terms as settled. It is true that Mr. Cable (who subsequently became president) states that he was the assistant to Mr. Riddle, and was charged with the active work in arranging and carrying out the bridge contract; that he was not acquainted with the terms of the Wabash contract, and believes they were unknown to Mr. Riddle from the fact of their relations

in the office, and of no mention being made of its terms by him. But this mere inference can have no weight against the positive testimony of Mr. Easley and Col. Blodgett, and various corroborating circumstances, showing that Mr. Riddle had the knowledge; and this knowledge must be deemed that of the corporation, for the purposes of the present inquiry at least. So considered, it is of special importance for its bearing on the practical construction during the initial years of the contract, when the participants in the making were active in the performance. Furthermore, Mr. Withrow was general counsel of the Rock Island Company when the contract was made, had part in the making, and continued as counsel for several years thereafter. He was present when Mr. Riddle was discussing the Wabash arrangement, and was evidently acquainted with its features, both then and subsequently when he participated in the suggestive negotiations for settlement of the lumber-rate controversy between these parties. Other officers and agents of the Rock Island Company are shown to have had like knowledge at various times after the contracts were made; and during the same period annual reports were filed by each of the railroad companies with the railroad commissioners of Missouri and Iowa, as required by law, wherein the substantial terms of their respective contracts for use of the bridge at Kansas City were stated, including that of the Wabash Company; each being well known as a public record, and appearing annually in a publication which came to the general office of the complainant. On the evidence as a whole, information of the annual sum paid by the Wabash Company as an entirety for the use of the bridge was clearly within the possession of the complainant at the outset, and was constantly at hand thereafter.

Second. The volume of the Wabash traffic, generally speaking, was open to the constant observation of the officers and agents of the Rock Island, as a competitor for business, and a joint user of the bridge as well. Its excess over that of the Rock Island was well known to the officers of the latter, as disclosed by the testimony of Mr. Seger, Mr. Pickering, and Mr. Boynton, witnesses produced on its behalf; and their testimony shows that "statistical reports" were prepared from time to time, for the information of the Rock Island, in reference to competitive business, giving the aggregate of passengers and freight carried by each of the companies to and from Kansas City over this bridge, so that a comparative measure was constantly in the hands of the complainant. Moreover, from 1880 to 1895 the Rock Island and the Wabash were members of the "pool" called the "Southwestern Railway Rate Association," and Mr. Cable was the representative of the Rock Island therein throughout that period. Reports were made and furnished to the companies, showing the volume of the business of each company in "competitive territory," and included an exhibit of the business to and from Kansas City of each of the companies; such reports being made for the purpose of regulating their percentages in the "pool," and thus furnished a constant standard for comparing their respective volumes of business over the bridge. The tolls paid by

the Rock Island in each year are stated in the bill at varying annual amounts, the minimum being \$63,156 and the maximum \$130,603; and the potent fact appears that these payments were made in monthly installments, greatly exceeding in every instance the rate paid by the Wabash,—and this during the initial years when Mr. Riddle was in office,—showing that the tolls paid in September and October, 1880, were each nearly double the Wabash rate, and during 1882 and 1883 the excess was invariably more than two-fold. Competition for traffic exacts the utmost vigilance on the part of railroad managers, and a saving in fixed charges of this nature must have been regarded as an element of primary importance. With a standard in mind for reduction of the rates paid for bridge toll, and information so clearly open to that end, the reasonable inference is that the licensee would move for the reduction thus assumed to be his right, rather than keep up his excessive payments for years, to abide a tender of reduction and repayment on the part of the licensor; and surely this is the only reasonable course to be inferred from such view by the one party where the obligation of the other to make a reduction on the assumed basis is neither settled nor distinctly specified in the contract. The constant accountings between the parties under the circumstances shown, supplemented by their treatment of the single dispute over the lumber rate, lead to the conclusion that contracts for a fixed annual sum for the use of the bridge were not within the intention of the proviso; and, so interpreting the contract, the bill must be dismissed for want of equity, without passing upon other objections raised on behalf of the defendant. The decree will be entered accordingly.

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## UNITED STATES v. HIGGINS, County Treasurer.

(Circuit Court, D. Montana. August 30, 1901.)

No. 575.

## INDIANS—TAXATION.

One whose father is a white person, and a naturalized citizen, is not an Indian for purpose of taxation, though his mother is a half-breed Indian, and when he is 17 years old goes with her children to an Indian reservation, and has granted her application to be admitted as a member of the tribe, and thereafter lives on the reservation.

Wm. B. Rodgers, U. S. Atty.

Marshall, Stiff &amp; Ranft and Denny &amp; Nolan, for defendant.

KNOWLES, District Judge. This is a suit brought by the United States against George Higgins, the treasurer and tax collector of Missoula county, Mont., to enjoin him from collecting a tax from one Oliver Gibeau. It appears from the evidence in this case that said Gibeau is the owner of a number of horses and cattle ranging upon the Flathead Indian reservation, sometimes called the Jocko Indian reservation, in the state of Montana; that in the year 1897 one W. R. Hamilton, the then assessor of said Missoula county, listed the said property as that of said Gibeau for taxation, and that state and county

taxes were assessed upon the same. Said assessment was duly returned upon the proper assessment roll of said county for said year to the then tax collector of said county. Said Gibeau refused to pay said taxes, and after the same became delinquent said George Higgins, as the then treasurer and tax collector of said county, seized certain live stock, the property of said Gibeau, and advertised the same for sale at public auction, with a view to realizing sufficient money to pay said taxes, penalty, and the costs of collection. The government brought this suit for the purpose of enjoining this sale, alleging that said Gibeau is an Indian, and its ward. No contention has been made that the United States cannot maintain this suit if such is the fact. The defendant contends that said Gibeau should be classed as a white man, and not as an Indian, and, as that part of the Flathead Indian reservation where said Gibeau resides lies within the exterior boundaries of Missoula county, he should list his property and be taxed in and by that county. It appears from the evidence in this case that Oliver Gibeau was born in Missoula county, Mont., in the year 1866; that his father was a white man, and a native of Canada, who, in 1877, became a citizen of the United States by naturalization. It also appears from the evidence that Oliver Gibeau's mother was a half-breed Indian woman; her father being a white man, and her mother a Spokane Indian. The father of Gibeau settled upon public land of the United States near Frenchtown, in said Missoula county, and afterwards entered the same in the proper land office of the United States. The mother resided with the father upon this land until 1883, when, with her children, she went to the Flathead Indian reservation, and made application to be admitted as a member of the Flathead Indian Nation. This application was granted. Gibeau was about 17 years of age at the time of going upon the reservation with his mother, and has grown up to manhood there, and has become the chief of the Indian police on that reservation. The father went to live upon the reservation a year after his wife had removed there. The question is presented as to whether or not Oliver Gibeau should be classed as an Indian or a white man. Had he lived in the county of Missoula up to this time, I think he would certainly have been classed as a white man. He would have been entitled to the status of his father. He could have inherited, acquired, and held property. He could have located mining claims. Did the fact of his going upon the reservation with his mother, and adopting the habits of the Indians, change his status? I think not. While there are cases in which quarter-breed Indians have been recognized as Indians by the laws of congress and by the action of the executive department of the government, I cannot refer to any case where a person possessing but one-fourth Indian blood, and who was born among the white people, and lived among them until almost a man grown, has been classed as an Indian. If he had acquired real property, it would have been assessed for taxation and taxed. The fourteenth amendment to the constitution of the United States provides: "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside." Section

1992 of the Revised Statutes also provides: "All persons born in the United States and not subject to any foreign power, excluding Indians not taxed, are declared to be citizens of the United States." It is stated by Mr. Justice Story, in his work on the Constitution, in regard to Indians:

"When, however, the tribal relations are dissolved, when the headship of the chief or the authority of the tribe is no longer recognized, and the individual Indian, turning his back upon his former mode of life, makes himself a member of the civilized community, the case is wholly altered. He then no longer acknowledges a divided allegiance. He joins himself to the body politic. He gives evidence of his purpose to adopt the habits and customs of civilized life. And, as his case is then within the terms of this amendment, it would seem that his right to protection in person, property, and privilege must be as complete as the allegiance to the government to which he must then be held; as complete, in short, as that of any other native-born inhabitant."

In the case of *U. S. v. Hadley* (C. C.) 99 Fed. 437, it is held that a half-breed Indian, raised among the white people as a white man, could not be classed as an Indian, although he had gone upon an Indian reservation to live, and had received an allotment of land in severalty. It has been held that a white man adopted into an Indian tribe by the rules and regulations thereof did not lose his status as a white man, or acquire that of an Indian. The mother of Oliver Gibeau could not, by taking him with her to an Indian tribe, and securing his adoption into the same, deprive her son of the rights of a white man and of a citizen. By Indian polity he might, by them, be classed as an Indian, but not by the constitution and laws of the United States. In the case of *U. S. v. Higgins* (heretofore decided) 103 Fed. 348, in which it was sought to enjoin said Higgins from collecting taxes from one Alexander Matt, the facts presented were essentially different. Matt was born in the "Indian country." His people never assumed the habits of civilization. It was not shown that his father ever was or became a citizen of the United States. He was one of the class recognized and treated as an Indian in the orders of the executive department of the government to the Flathead Indians to remove from the Bitter Root Valley to the present Flathead or Jocko Indian reservation. For these reasons the injunction heretofore issued should be dissolved, and the complainant's bill dismissed, and it is so ordered.

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TROWER BROS. CO. v. HANSON et al.

(Circuit Court, W. D. Missouri, W. D. May 20, 1901.)

No. 2,516.

**1. COLLATERAL SECURITY—EXPENSES IN ENFORCING.**

As against the indorsers of a note primarily liable therefor, the payee, holding a chattel mortgage as collateral, having instituted suit for and recovered part of the mortgaged cattle sold by the mortgagor, is entitled to credit for expenses of the recovery; but he is not entitled to credit for the expenses of another and unsuccessful suit against other parties for part of such cattle, nor for expenses of sending a man to the mortgagor's premises to see that the security was intact.

**2. SAME—JUDGMENT.**

The payee of a note is entitled to judgment for the full amount thereof against the indorsers thereof, notwithstanding he has a chattel mortgage on cattle as collateral security, and on instituting replevin therefor, and giving a bond, has obtained possession thereof, the final judgment being against him for the value of the cattle; and this though he has appealed from the judgment, though, if he succeeds on the appeal, they will have a claim against him.

Alden, McFadden & Alden and Lathrop, Morrow, Fox & Moore, for plaintiff.

Cook & Gossett, for defendants.

PHILLIPS, District Judge. The court will briefly state the grounds of its conclusions on the facts of this case. The chattel mortgage was collateral security for the payment of the note sued on. The defendants were primarily liable on the note, and the plaintiff had the right, upon the maturity of the note, to have brought suit thereon directly against the defendants for the whole sum of the note. The pursuit of the property under the chattel mortgage was entirely optional with the plaintiff as the mortgagee. In pursuing the property under the mortgage, while doubtless acting for the preservation of a greater security than the personal liability of the makers or indorsers of the note, it was in the interest of the indorsers that the mortgaged property should be recovered by the mortgagee, as the proceeds thereof would inure to the benefit and protection of the indorsers. And while it may be said that the pursuit of the cattle under the mortgage by the mortgagee was optional, and at its own instance, yet it stands both to reason and authority that, if the makers of the note would avail themselves of the fruit of the mortgagee's pursuit of the mortgaged property, they could only claim the net proceeds after the deduction of the necessary and reasonable expenses of the recovery and sale. *Laughlin v. Barnes*, 76 Mo. App. 258. Accordingly, the court has credited the amount recovered in the pursuit of the cattle to Illinois, deducting the expense of that pursuit, including attorney's fees and traveling expenses of the plaintiff and his attorneys, and the expense of obtaining testimony and the like. The court excludes as a proper reduction from the amount of money realized by the plaintiff on the sale of the 29 head of cattle the item of \$11.75, expense of Trowbridge, which was incurred voluntarily by the plaintiff in sending this man down to the farm where the cattle were kept by the mortgagor to look after the security. That was nothing more than a voluntary act on the part of the mortgagee in seeing that its security was intact, which could not be the basis of a charge against the mortgagor. The court also excludes as a credit to the plaintiff the item of \$50 advanced by a member of the plaintiff's firm to the defendant Kerr while in St. Louis. Under the evidence, that was nothing more than a loan of \$50 by the plaintiff to Kerr in his individual capacity. It could not be regarded as a partnership transaction, nor an expense necessarily incurred in the pursuit of the cattle.

In respect of the transaction in pursuing the 67 head of cattle to Nodaway county, Mo., and the replevin suit instituted therefor, a different question is presented. As already stated, it was entirely op-

tional with the plaintiff whether or not it would pursue the mortgaged property, or rely upon the personal security on the note. Electing to pursue the cattle as an additional security, it took the chances of any recovery therein. If it recovered anything in that litigation, it would have inured to the benefit of the indorsers on the note; and, if they had sought to avail themselves of the fruit of the plaintiff's pursuit, justice would demand that they must bear the burden of the necessary expenses incurred therewith; and, on the other hand, if the plaintiff failed, by its voluntary pursuit and litigation, to yield any fruit for the benefit of the indorsers, it ought not to be allowed to charge up against the indorsers the expense of the fruitless expedition. The position of plaintiff's counsel in respect of this litigation in Nodaway county is not a consistent one. While insisting that they should not be charged up as a payment on the note with the \$1,120.91 realized on the sale of the 67 head of cattle after possession taken in the action of replevin, on the ground that in point of fact and law it is not yet a permanent, realized fund, they yet claim in this suit that they should charge up to the defendants the expenses connected with the pursuit of these cattle and the replevin suit therefor. If this be a correct proposition, it would have resulted that, if the expenses attending that transaction had been, say \$1,000, it should have been deducted from the amount realized on the sale of the cattle recovered in Illinois, and the money collected from Muir in St. Louis. The argument advanced in support of this proposition is that the pursuit of the different lots of cattle under the mortgage should be regarded as a unit. This, to my mind, is not tenable, as it is not justice. The court has already allowed the plaintiff all the expenses incident to the pursuit of the cattle to St. Louis and the discovery of their whereabouts. The lot of cattle, under the mortgage, was segregated by the mortgagor. Twenty-nine head were sold to the party in Illinois, and 67 head were sold to the party in Nodaway county, Mo. These were separate transactions between the mortgagor and the two purchasers, and the right to recover depended upon the separable rights of the two purchasers. The suits instituted were entirely independent of each other, and in different jurisdictions, and, as the sequel proved, depended upon different evidence and different defenses. In determining to enter upon the litigation respecting the 67 head of cattle in Nodaway county, the plaintiff acted at its own peril as to the results. On the other hand, the position of defendants' counsel is, to my mind, equally untenable. While claiming that the defendants should have credit for the sum of \$1,120.91, realized on the sale of the 67 head of cattle, after possession taken under the delivery order of the court in the replevin suit, they insist that they should not be charged with the necessary and reasonable expenses incident to this caption. As already stated, the defendants could not gather the fruit without its thorns.

The position of defendants' counsel in respect of the insistence that the note should be credited with said \$1,120.91 is that it was received as a conditional credit upon the note, and that plaintiff cannot recover the balance on the note until the condition has fully matured upon which the credit was made. In the first place, this sum of \$1,120.91



was not placed as a credit upon the note, but, as a matter of book-keeping on the part of the plaintiff, in order to preserve the items of collections and expenditures connected with the transactions between the plaintiff and defendants, it entered upon its books the amount realized on the sale of the 67 head of cattle, and then, as a result of that litigation, in which the defendant therein recovered against it the value of the cattle, amounting to \$1,400.80, it charged back that sum to the defendants. The defendants cannot accept the credit side of this system of accounting on the books and at the same time reject the debit side. If, in this suit on the note, the defendants should receive a credit for \$1,120.91, what would be the attitude of the plaintiff in the event the judgment of the circuit court of Nodaway county should be affirmed by the supreme court? The plaintiff would then have to account to the defendants in the replevin suit for \$1,400.80, with interest thereon, so that it would be loser in the transaction by about \$300, in addition to the costs and expenses, for which it would have no recourse upon the defendants, unless based upon some independent obligatory contract.

In considering the effect of the value of the property taken into possession by the plaintiff in the replevin suit, it must be looked at in the light of the character of the proceeding. In the action of replevin under the state statute, on executing the proper bond, by the plaintiff, the clerk of the court issues what is called a "delivery order," which authorizes the sheriff to take possession of the specific personal property sued for, and turn the same over to the plaintiff. The obligation of the bond given by the plaintiff is for the forthcoming of the property to abide the result of the litigation. If the plaintiff, at the conclusion of the litigation, has the property in kind, and the defendant prevails in the suit, he has his election to take the property, with the damages resulting from the taking and detention thereof by the plaintiff; or he may elect to take the value thereof as found by the trial court; or, if the plaintiff has not the property on hand at the time of judgment, the defendant is entitled, of course, to a judgment for the value thereof against the plaintiff and his sureties in the replevin bond. So that the possession of the cattle, or the proceeds thereof, by the plaintiff, were all the time subject to the contingency of the result of that litigation; and until the rights of the parties therein are determined by the adjudication it cannot be said that the plaintiff had collected anything on the mortgage in respect of these cattle. The plaintiff merely holds the proceeds of the sale of the cattle for its protection, pro tanto, against the amount of the judgment rendered against it in favor of the defendant in the replevin suit. In principle this ruling is little different from that established in *Howell County v. Wheeler*, 108 Mo. 294, 18 S. W. 1080, in which it was held that a levy on land, even when consummated by a sale thereunder, amounts to nothing unless the proceeds therefrom are realized to the benefit of the judgment creditor. Until the fruit of the litigation is realized, the matter "remains in fieri, and no satisfaction of the debt to the amount has occurred." In answer to this it is suggested by counsel for defendants in the form of a query: "What would be the attitude of the parties in the event the supreme

court should reverse the judgment of the state circuit court, and the plaintiff should ultimately prevail in that litigation?" It is said the plaintiff would then have the sum of \$1,120.91, less expenses incurred in the litigation, in its possession, in addition to its recovery on this note. The plaintiff, at the hearing, in answer to this suggestion, proposed to give to the defendants an indemnifying bond to account for the proceeds of such recovery to the defendants, or to enter into any other like arrangement. But, as this is simply an action at law for the recovery on the note, the court does not feel authorized to enter such stipulation or condition in the judgment herein rendered. The judgment must be one way or the other, unless by consent. But I take it that, if the defendants should satisfy the judgment rendered against them herein, they would be clearly entitled to be subrogated to the rights of the plaintiff in the replevin suit; or that they would have a clear right of action against the plaintiff as for money had and received to their use in the event the plaintiff there ultimately prevailed in the replevin suit. Why could they not, in such state of the case, intervene in that action after a reversal of the case by the supreme court, and have the proceeds of the cattle awarded to the plaintiff adjudged to them, as also any damages which the plaintiff would be entitled to recover for the wrongful taking and detention of the cattle? Most certainly the law would not permit that the plaintiff should recover from the defendants the amount of the note, and at the same time obtain the proceeds of the mortgaged property which inured to the benefit of both the maker and the indorsers of the note. I have not taken into account any consideration of the contract of indemnity mentioned in paragraph 8 of the special findings, for the reason that it is an independent subsequent contract, not pleaded or counted on by either party. It was introduced in evidence by plaintiff solely on the issue tendered by the answer respecting the authority to indorse the note as a partnership transaction, and to show its recognition by both of the partners. When it becomes the subject of a separate suit between the parties thereto, its effect and compass can be determined. Possibly, in an action thereon, an accounting might properly be had respecting any fund realized by plaintiff in the Nodaway county replevin suit. While the peculiar situation of the case is not free from embarrassment, the conclusion reached by the court seems to be reasonable and inevitable under the pleadings.

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## SHAPTER v. CITY AND COUNTY OF SAN FRANCISCO.

(Circuit Court, N. D. California. August 12, 1901.)

No. 12,946.

### MUNICIPAL BONDS—ACTION AGAINST CITY.

In case of bonds issued by a city under Act Cal. March 23, 1876, authorizing the widening of a street and the issuance of the bonds therefor, and providing, as recited in the bonds, that they shall be payable at the office of the city treasurer from the fund that may be raised by taxation of the property benefited, and that the completion of the work shall operate as an acceptance by the landowners of the

lien created by the act and a waiver of all claim on the city for the debt, action cannot, where no fund is collected for payment of the bonds, be maintained against the city for a judgment that a certain amount is due on the bonds, and that the judgment be paid from the fund as provided in the act, or by enforcement of any lien created by the act against the bonds; the owners of such lands are the proper defendants.

At Law. On demurrer to complaint.

Page, McCutchen, Harding & Knight, for plaintiff.

Franklin K. Lane, City Atty., and George W. Lane, Asst. City Atty. (E. F. Preston, of counsel), for defendant.

MORROW, Circuit Judge. This is an action at law, brought to recover a judgment against the defendant in the sum of \$11,125 due to the plaintiff upon certain bonds issued by the defendant, and coupons attached thereto. The complaint alleges that the defendant is a municipal corporation organized and existing under the laws of the state of California; that the plaintiff is a citizen of the state of New Jersey; that he is a trustee under a certain deed of trust, and as such trustee is authorized to purchase and hold bonds and securities for the purposes of the trust and the benefit of the beneficiaries therein named; that in the month of January, 1878, he purchased in good faith, as such trustee and for full value, and still is the holder and owner of, five bonds or promissory notes in writing, made and executed by the city and county of San Francisco on January 1, 1877, payable to bearer, for the sum of \$1,000 each, and bearing interest at the rate of 7 per cent. per annum from the date thereof, payable semi-annually on the 1st day of July and the 1st day of January of each year, as evidenced by 40 coupons thereto attached, numbered from 1 to 40, both inclusive, and dated as due alternately on the 1st day of July and the 1st day of January of each year. The bonds were in the following form:

"United States of America.

State of California.

"City and County of San Francisco.

"1,000.

1,000.

"Dupont Street Bond.

"The City and County of San Francisco, State of California, will pay to \_\_\_\_\_, or the holder thereof, the sum of one thousand dollars gold coin of the United States of America twenty years from the date hereof, with interest thereon in like gold coin at the rate of seven per cent. per annum, payable half-yearly on the first day of July and the first day of January of each year upon interest coupons hereto attached. Principal and interest payable at the office of the treasurer of said city and county of San Francisco. This bond is issued under the provisions of an act of the legislature of the state of California entitled 'An act to authorize the widening of Dupont street in the city of San Francisco,' approved March 23, 1876, and is to be paid out of the fund that may be raised by taxation as therein provided, and may be redeemed at any time before its maturity, as is provided in said act. And this bond is further issued and taken by the holder hereof under the conditions expressed in section 22 of said act, which is as follows: 'Section 22. The completion of the work described in this act shall be deemed an absolute acceptance by the owners of all lands affected by this act and by their successors in interest of the lien created by this act upon the several lots so affected, and it shall operate as an absolute waiver of all claim in the future upon the city and county of San Francisco for any part of the debt

created by the bonds authorized to be issued by this act and their successors in interest. This shall be regarded as a contract between said owners and the holders of said bonds and said city and county, and this provision shall be stated on the face of the bonds.' In witness whereof, the mayor, the auditor, and the city and county surveyor of said city and county of San Francisco, constituting the Board of Dupont Street Commissioners, have respectively signed these presents, and caused to be affixed hereto the official seal of said city and county of San Francisco, as of the first day of January, 1877."

The signatures of the various officers followed, and the number of the bond. The coupons were alike in form, excepting as to number and date of payment thereof, and read as follows:

"Thirty-five.	Dupont Street Bond.	Coupon No.
\$35.		_____.

"The treasurer of the city and county of San Francisco will pay bearer at his office, thirty-five dolls. U. S. gold coin on bond No. \_\_\_\_\_, six months' interest.

"Due \_\_\_\_\_, A. J. Bryant,  
 "Mayor of the City and County of San Francisco, and President Board Dupont Street Commissioners."

It is alleged that the said bonds and interest coupons were executed, issued, and disposed of by the defendant under the provisions and for the purposes of an act of the legislature of the state of California entitled "An act to authorize the widening of Dupont street," approved March 23, 1876 (St. 1875-76, p. 433); that in and by said act provision was made for the payment of all the bonds provided for in said act and the coupons thereon by means of the collection from certain real property in the city and county of San Francisco described in said act of certain taxes to be levied thereupon in the manner and at the times specified in the act, the said taxes, when collected, to constitute a fund in the control of the treasurer of said city and county for the payment of said interest coupons and the redemption of said bonds; that in consideration whereof it was further provided in said act that the lien thereby given to the holders of said bonds should be a contract of and operate as an absolute waiver on the part of said bondholders of all claim in the future against the city and county of San Francisco for any part of the debt created by the said bonds, and that said contract should be stated on the face of said bonds. The plaintiff alleges that he has demanded payment of the said bonds and of the interest coupons attached thereto of and from the treasurer of the said city and county of San Francisco, but, notwithstanding that the said bonds and coupons are long past due and payable, the said treasurer has not paid the same or redeemed the same, as by said act provided, or any part thereof, except the coupons thereon from No. 1 to No. 5, inclusive, and the said bonds and the said coupons from No. 6 to No. 40, inclusive, still remain wholly unpaid and unredeemed, and due and owing to plaintiff. It is further averred that there never was collected by the defendant, or by its officers, or paid to the said treasurer, under the provisions of said act or otherwise, a sum sufficient to meet the interest on the full amount of said bonds as the same accrued, and that no funds have come to the possession of the said treasurer, or are now in his possession, under the provisions of said act or otherwise, sufficient to meet the said interest, or to meet the interest due to the plaintiff upon the

said bonds. Plaintiff therefore prays the judgment of this court that there is due to him upon the said bonds and coupons the sum of \$11,125, together with interest on each of said bonds from January 1, 1897, until payment thereof, and that he have judgment against the defendant for the said sum, "said judgment to be paid only from the fund and in the manner provided by the said act of March 23, 1876, or by the enforcement of the lien, if any, thereby created against the lands referred to in the act, and not from the general funds or other property of the city and county of San Francisco."

The defendant demurs to the complaint upon the following grounds: (1) The general ground that no cause of action against the defendant is shown, in that the judgment sought herein cannot be rendered against the defendant, as the defendant's exemption from liability for the payment of the bonds sued upon is admitted in the complaint. (2) That the action is barred by the provisions of the statute of limitations and by sections 337 and 338 of the Code of Civil Procedure of the state of California in that all the coupons sued upon, with the exceptions of Nos. 39 and 40, became due and payable more than four years prior to the commencement of this action. (3) That there is a defect of parties in said complaint, in that the owners of the property subject to taxation for the bonds are not made parties defendant; and that the tax collector and the treasurer of said city and county of San Francisco are not joined in the action. (4) That the complaint is uncertain, in that the court cannot determine from it the particular property liable for the payment of the bonds involved in the action, or whether the proceedings required by the act of March 26, 1876, for the collection of taxes and procurement of a fund from which to pay the said bonds and coupons have ever been taken.

By the express provisions of section 22 of the act of the legislature under which the bonds in suit were issued, the city and county of San Francisco was exempt from all claim of liability for any part of the debt created by the act, and this exemption was made a contract between the bondholders and the owners of the property affected by the act. The judgment which the plaintiff seeks in this action is therefore against the city and county of San Francisco, not as a debtor, but for the purpose of securing a judgment enforceable by proceedings in mandamus to compel the levy of a special tax upon the property described in the act to meet the bonds and coupons in suit. An action of this character was involved in the case of *Liebman v. City and County of San Francisco* (C. C.) 24 Fed. 705. The object of the act under consideration in that case was to open and establish a public street in the city and county of San Francisco to be called "Montgomery Avenue," and to take private lands therefor. It was there decided by Mr. Justice Field, with the concurrence of Judge Sawyer, that such an action could not be maintained against the city and county. Mr. Justice Field in that case says:

"The statute to which the complaint refers, and upon which alone the judgment is sought, declares in express terms 'that the city and county shall not, in any event whatever, be liable for the payment of the bonds, nor any part thereof,' and 'that any person purchasing said bonds, or otherwise becoming the owner of any bond or bonds, accepts the same on that express stipulation and understanding.' As already stated, the so-called 'bonds,' which

in fact are only orders or promises of the board of public works that the treasurer will pay to the holder the amounts designated, cannot be the foundation of any liability of the city and county; and that such liability is sought to be charged appears from the prayer for judgment, although the discharge of that liability is to be had out of funds to be raised by the special tax for which the act provided. The asserted ground of the action is that it is essential to establish the validity of the bonds, as a preliminary to an application for a mandamus to levy the special tax. Counsel assume that the validity of the bonds issued by one party can be determined in an action against another in no way named in them, nor liable for their payment. We do not so understand the law. We have not met with any adjudged case to that purport. On the contrary, we have always supposed that the party actually liable on a bond must have his day in court in person or by his representative, before a judgment determining its validity as against him or his estate could be regarded as having any binding force. Such liability cannot be vicariously imputed to him, or charged upon his estate. If the action be to charge particular property, of which there is no representative, there is a defect in the law, which the legislature, and not the courts, must supply. It is true that in the enforcement of bonds of municipal bodies, which are to be paid from funds raised by taxation, general or special, the validity of the bonds must first be established by the judgment of the court,—that is, the demand against the municipality on the bonds must be first carried into judgment. Then a mandamus will issue, which is in the nature of an execution. It is the executory process for the enforcement of the judgment recovered. It can only issue to command the corporation against which the judgment is rendered, or its representatives or officers, to levy the tax prayed; just as an execution on an ordinary money judgment can only be issued against the property of the judgment debtor. Whether, when the judgment against the municipality is rendered, the writ is to direct a general or special tax upon all or a portion of the property within its limits, or only upon a particular class of property, real or personal, will depend upon the directions of the statute providing for the payment of the indebtedness created. The judgment, however, must in all cases be against the corporation to which, or to whose representatives or officers, the writ is directed. It is the liability of the corporation established by the judgment which is to be discharged by the levy of the tax prayed, and not the liability of any other body."

The plaintiff, however, seeks to distinguish the statute in the present case from the statute in the Montgomery Avenue Case. He contends that the Montgomery avenue act directed state, not municipal, action; that the municipality was not consulted with respect to the legislation, or in the work to be done under the act, and that the statute was in no sense a grant of power to the city; while in the Dupont street act it is contended that the municipality of the city and county of San Francisco was authorized to act in making the improvement, that it accepted the act, and accomplished the work therein provided for, and issued the bonds in suit. This distinction does not appear to have been made by the supreme court of this state in construing the act. In *Lent v. Tillson*, 72 Cal. 404, 14 Pac. 71, Mr. Justice Temple, speaking for the court, considered this act with respect to certain objections raised to the proceedings under which the work was accomplished and bonds issued. The court took the ground that this particular improvement was more of a private than a public character. The court said (pages 414, 415, 72 Cal., page 74, 14 Pac.):

"Dupont street is one of the oldest streets in the city of San Francisco. That portion affected by this proceeding was in the heart of the city, and had long been a finished street, the lots along it on both sides built upon and

occupied. The district which it was alleged would be benefited was specifically defined in the act. Kearny street had shortly before been widened by a proceeding somewhat similar, and the result had been to make the street more attractive. The tendency of business was westward, and Dupont street was the next parallel street. It was forty-four feet wide. It was not to any considerable extent a thoroughfare except for local purposes. There was not much reason for widening the street which could interest the general public. But the case comes as near as can be imagined to being one in which it was a certain proposition that the proposed improvement would be greatly to the advantage of the individual property owners. The municipality and the general public, however, were obviously so little interested in the matter that it would hardly be putting the matter too strongly to say that there was no decent pretext for the improvement except upon the hypothesis that the local property holders desired it, and would be advantaged by it. It is inconceivable that the matter should be passed through the legislature without being a frequent subject of discussion among the lot owners, even if it were not done at their instance. They had notice, not only as a rule of law which charges every one with knowledge of the statute, but must have had such information as a fact, and also that in making the improvement the officials were acting, in a certain qualified sense, as their agents, for their individual advantage, rather than for the public."

And further, on page 432, 72 Cal., page 82, 14 Pac., speaking of the relation of the property owners to the act, the court says:

"The statute, as I have already stated, manifested very plainly that the improvement was to be made for their special benefit, and that they were to bear the entire cost. They were afforded an opportunity, even after the board was organized, to arrest proceedings, if a majority in value of frontage should be of opinion that it would not be to their advantage, and were distinctly notified that, if they permitted it to be completed, their acquiescence would be deemed an absolute acceptance by them of the lien created by the act. Under such circumstances they could not remain silent, and permit the money obtained of the bondholders to be expended in the improvement of their property, and then escape liability on the plea that the officers charged with the work, who were in a sense their agents, were guilty of misconduct and fraud, which they by proper diligence could have prevented."

Finally, it has been decided that the city and county of San Francisco is not liable on these bonds by the case of *Easterbrook v. City and County of San Francisco*, 44 Pac. 800, and the case of *Davis v. City and County of San Francisco*, 115 Cal. 67, 46 Pac. 863. The view which the supreme court of this state appears to have taken of the Dupont street act in the cases cited, in my judgment brings the present suit within the law announced in *Liebman v. City and County of San Francisco* (C. C.) 24 Fed. 705. I am therefore of the opinion that the complaint states no ground of action against the defendant. And this determination also sustains the objection that there is a defect of parties for the reason that the owners of the property subject to taxation under the act in controversy are not made parties defendant. The further objection is also sustained that the complaint is uncertain in this: that it cannot be determined therefrom what particular property is liable for the payment of the bonds sued upon in this action. I am also of the opinion that the action is barred by the statute of limitations, and by sections 337 and 338 of the Code of Civil Procedure of the state of California, with respect to all of the coupons sued upon except coupons numbered 39 and 40. The demurrer to the complaint is sustained.

## In re LITTLE.

(District Court, N. D. Iowa, C. D. May 13, 1901.)

**1. BANKRUPTCY—JURISDICTION OF COURT—EXEMPT PROPERTY.**

Where a trustee has set apart property to the bankrupt as exempt, and his action has been approved, and the bankrupt has taken possession, such property passes out of the jurisdiction of the court of bankruptcy, which cannot thereafter entertain proceedings to subject the same to liens or to adjudicate the rights of claimants thereto.

**2. SAME—SECURED CREDITORS—RIGHT TO SHARE IN GENERAL ASSETS.**

A creditor who holds security cannot receive dividends from the bankrupt estate, except on the unpaid balance of his claim after the value of the security has been deducted, as provided by Bankr. Act 1898, § 57h; and his rights are not affected by the fact that the property on which he holds a lien is set apart to the bankrupt as exempt, nor can they be enlarged as against other creditors by an order made by the referee, by consent of the secured creditor and the bankrupt, before the exempt property was set apart, that the creditor should prove his entire claim against the estate and enforce his lien only for the balance remaining unpaid.

**3. SAME—VENDOR'S LIEN—RIGHT TO WAIVE.**

Creditors whose claims represent a portion of the price of property sold to the bankrupt, and which has been set apart to him as exempt, cannot be compelled by other creditors to assert a vendor's lien on such property, but may, at their option, prove their claims as unsecured creditors.

**4. SAME—JURISDICTION OF COURT—COLLATERAL ISSUES.**

Where a creditor holding a chattel mortgage proved its claim as an unsecured debt, expressly waiving any claim to preference as against other creditors, because of its failure to record the mortgage until after the bankruptcy, but asserted the validity of its lien as against property which had been previously set apart to the bankrupt as exempt, and its claim as a general creditor is allowed, the question of the validity of the mortgage is one which is not in issue before the court of bankruptcy, and which it is not the province of such court to determine.

**5. SAME—SECURED CREDITOR—AMOUNT PROVABLE.**

Where a creditor claims a lien upon property which has been set apart to the bankrupt as exempt, the value of such property must be ascertained as provided by Bankr. Act 1898, § 57h, and deducted from the amount of the claim, to ascertain the amount provable against the general estate.

**6. SAME—SET-OFF—MUTUAL DEBTS.**

A bank which is a creditor of a bankrupt, who also had a sum on deposit to his credit at the date of bankruptcy, is entitled to apply the same on its claim as a set-off, under Bankr. Act 1898, § 68.

**7. SAME—PREFERENCES—COLLECTION FROM COLLATERAL.**

Where notes which had been given by a bankrupt were secured by collateral pledged at the time the debt was created, the holder of such notes cannot be required to surrender sums collected from such collateral as preferences before proving his claim for the unpaid balance due on the notes.

In Bankruptcy. On exceptions to rulings of referee.

John M. Hemingway and J. Y. Luke, for creditors.

F. A. Harriman and H. C. Liggett, for trustee and bankrupt.

SHIRAS, District Judge. From the record certified up in this case it appears that prior to August, 1899, the bankrupt, Dan. E. Little, was in partnership with J. W. Bailey in the furniture business,



and that on the 9th day of August he bought out his partner for the sum of \$2,000, and thereafter conducted the business in his own name, until he filed his petition in bankruptcy on the 7th day of February, 1901. It further appears that, prior to the conclusion of the purchase of his partner's interest, the bankrupt, Little, arranged for a loan of \$1,500 from the Farmers' & Merchants' Bank of Hampton, Iowa, which sum, upon the completion of the contract purchase, was paid to J. W. Bailey by the bank upon a check drawn on the bank by the bankrupt. To secure this loan the bankrupt on the 9th day of August, 1899, executed a written agreement with the bank whereby, in effect, he mortgaged the stock in trade to the bank to secure the loan; it being therein recited that:

"The party of the first part hereby sells, conveys, and assigns unto the party of the second part all his right, title, and interest in and to the stock of furniture, fixtures, hearse, coffins, and all other property appertaining to and belonging to the furniture business of the firm of Bailey & Little, this day sold unto said Little, and the said \$1,500 furnished by said bank is a part of the purchase money thereof."

This instrument now has appended thereto an acknowledgment in due form, certified to by J. A. Myers, a notary public. It is shown by the testimony of the notary that the acknowledgment was not in fact written out and signed by him until the day before the mortgage was filed for record in the office of the recorder of Franklin county, which was on the 9th day of February, 1901; and it is a disputed question of fact whether in truth the bankrupt, at the time of the execution of the mortgage, did acknowledge the instrument to be his voluntary act. It further appears that J. W. Bailey was appointed trustee of the estate, and on the 28th day of February, 1901, the trustee set apart as property exempt to the bankrupt a hearse, two horses, and other articles used in the business of an undertaker, together with some household goods and wearing apparel; and on the same day this action of the trustee was approved by the referee. It also appears that on the 25th day of February, 1901, J. E. Coonley filed a claim against the bankrupt estate, in which it is recited that the bankrupt was indebted to him in the sum of \$150, being the balance of the purchase price of two horses sold to the bankrupt on December 12, 1900, for which the bankrupt executed his note payable August 12, 1901, and also executed a written agreement or contract wherein, after stating the fact of the purchase of the horses for \$250, the payment of \$100, and the execution of a promissory note for \$150, it is provided that:

"It is distinctly understood that the ownership of said span of black mares does not pass from the party of the first part until party of the second part has paid the said note of \$150 in full; and, further, party of the first part shall be entitled to take possession of said mares, if party of second part defaults in payment of the said note."

The claimant therefore asked that his claim be adjudged to be prior and superior upon said horses, as against all other creditors, and that the property be ordered to be sold to satisfy the claim, and any balance left unpaid by such sale be declared to be a general debt against the estate. Before action was taken on this claim the trustee set apart the exempt property as already stated, which action

was approved by the referee on February 28, 1901. On the 6th day of March following the bankrupt filed with the referee a paper wherein he recited the facts connected with the Coonley claim, averred the setting apart of the horses to him as exempt property, and then prayed that the creditor be first compelled to exhaust his remedy against the general assets of the estate, and to apply upon the payment of his claim his pro rata share of the general assets, and that the horses, as exempt property, be held by the bankrupt subject to the payment of any balance which may remain unpaid on the claim after applying thereto the dividend received from the general assets. Based upon this application, the referee made the following order under date of March 6, 1901:

"Ordered by the court that the foregoing motion be, and the same is hereby, sustained by consent of both parties."

On the 12th day of March, 1901, the Farmers' & Merchants' Bank of Hampton, Iowa, filed with the referee a statement of claims against the bankrupt, which included the note for \$1,500, given by the bankrupt at the time of the purchase by him of the interest of his partner, J. W. Bailey, in the furniture business, and which was secured by a mortgage on the stock as hereinbefore stated. After reciting the facts connected with this indebtedness, it is then stated that:

"It is further alleged that the contract above set out was not recorded prior to the time said Little filed his petition in bankruptcy in this case, and no preference is claimed by virtue of said contract upon property which is subject to the claims of the general creditors; but claimant alleges that the hearse and tools and other property set off to said bankrupt, so far as the same constituted property appertaining to the bankrupt's business, are not subject to the debts of the general creditors; but claimant alleges that by virtue of the foregoing contract he is entitled to have said goods applied to the payment of the foregoing claim."

It is further averred in the proof of debt filed on behalf of the bank that, when the bankrupt purchased the interest of his partner, Bailey, in part payment therefor he executed his two promissory notes for \$300 each, payable to J. W. Bailey, and secured the same by assigning in writing the book accounts of the late firm of Bailey & Little to said Bailey; that the bank purchased these notes of the payee, Bailey, and has received part of the accounts assigned as collateral security therefor, amounting to \$269.65, out of which the bank has collected the sum of \$40.05; that one of these notes, not being paid at maturity, was renewed by a note for \$300, dated November 30, 1900, payable April 15, 1901, to O. F. Myers, cashier; that this last-named note is wholly unpaid; that payments have been made on the other note for \$300, leaving due thereon a balance of \$25.50, and that when Little filed his petition in bankruptcy there was to his credit in the bank the sum of \$51.83, which he is entitled to set off against the amount due on his notes. Based upon these facts, the bank prayed that the hearse, tools, and other undertaking implements set off as exempt be declared subject to claimant's lien; that the same be sold, and the proceeds be applied upon the claims of the bank; and that upon any balance of claim left unpaid claimant be held entitled to share with the general creditors in the dividend to be paid.

On the 16th of March, 1901, the bank filed with the referee a paper wherein was recited the order made by the referee approving the action of the trustee in setting apart to the bankrupt the exempt property, and the order allowing the Coonley claim as a general claim against the estate, and averring that the same had been made without notice to claimant, and further charging that the horses, the lowering device, and other articles set apart as exempt had all been purchased within the four months next preceding the filing of the petition in bankruptcy, and that the claims of Coonley, the National Burial Device Company, and the Iowa Coffin Company, which had been allowed as general claims, were for the unpaid portions of the purchase price of these articles set apart as exempt. It was therefore asked that the orders touching these claims be set aside; that these several articles be sold separately, and the proceeds be applied to the payment of the sums remaining due as part of the purchase price; and that the named creditors be permitted to share in the general dividend to be made only upon the balance left due after applying the proceeds realized from the sale of the named articles. The bankrupt and the trustee filed objections to the claim of the bank, and to granting the relief asked in the motion last recited, on several grounds,—it being averred that the bank had waived the contract or mortgage lien on the stock of goods, thereby waiving any lien upon the exempt property; that under the facts of the case the bank could not assert a vendor's lien upon any part of the property; that the contract or mortgage executed to the bank on the 9th day of August 1899, had been fraudulently altered in a material matter by placing thereon an acknowledgment of the instrument, without the knowledge or consent of the bankrupt; that the bank, as the transferee of J. W. Bailey, could not assert a vendor's lien as security for the two notes of \$300 each, executed by the bankrupt to Bailey; and that the court had not the power or authority to subject the property set apart as exempt by the trustee with the approval of the referee to the payment of any special liens existing thereon.

Upon the issues thus created and presented the case came on for hearing before the referee, who, having heard the evidence and argument of counsel, ruled that the court of bankruptcy had not jurisdiction to subject the exempt property to the claims set up by the bank; that the payments received by the bank within the four months preceding the filing of the petition in bankruptcy constitute a preference, and must be surrendered as a condition to the allowance of the claim of the bank; that the payments so received cannot be set off against the debts due from the bankrupt to the bank; that the bank cannot set up or ask the enforcement of the vendor's lien alleged to exist in favor of the National Burial Device Company and the Iowa Coffin Company; that the contract or mortgage executed by the bankrupt on the 9th day of August, 1899, had been rendered invalid as against both the creditors and the bankrupt by the unauthorized placing thereon of the acknowledgment now found thereon; that this contract is not a purchase-money contract; and that the order setting aside the exempt property and that allowing the Coonley claims should not be set aside. To these rulings the bank excepted, and

duly filed a petition asking a review by this court of the findings and judgment of the referee, and the case has been heard upon the record certified up by the referee, which includes the evidence upon which the case was heard by him.

The first question presented for review is upon the ruling of the referee that the court was without jurisdiction to subject the property set apart as exempt to the bankrupt to the vendors' liens alleged to exist for the unpaid portions of the purchase money upon the hearse, the horses, and other articles connected with the business of an undertaker carried on by the bankrupt. The counsel for the claimant bank have cited a number of decisions by the district courts of the United States in which it has been held that a court of bankruptcy can entertain jurisdiction over property claimed to be exempt; and doubtless in many, if not in all, of these cases, the circumstances were such that jurisdiction could be rightfully exercised; but it does not follow that such jurisdiction exists or should be exercised in every case, regardless of the questions involved, or the mode in which they are presented, or the actual situation of the property at the time the jurisdiction of the court in bankruptcy is invoked. Thus, in cases wherein the property of the bankrupt comes into the actual possession or control of the court through a receiver or trustee, the court can entertain jurisdiction over all proceedings brought to settle rights in or to the property in its possession; and, if third parties should assert a right to specific property and the bankrupt should claim the same as exempt, no reason exists why the court might not hear and decide the issues thus presented, although the court might, if deemed best, order the property to be set aside as exempt, leaving the lien claimant free to assert his right in any court of competent jurisdiction. So in other cases the exemption right of the bankrupt may extend to only a part in value of the property; for in many states the homestead right, as well as other exemption rights, is limited to a certain amount in value, and the trustee, representing the creditors, is entitled to the excess over and above the sum fixed by the exemption statute, and in such cases the court in bankruptcy, having the estate in possession, may well entertain jurisdiction over proceedings brought to settle the rights of the parties in property, part of which is claimed as exempt by the bankrupt and part is claimed by the trustee in the interest of the creditors. In all such cases the court of bankruptcy, being in possession and control of the specific property, can exercise jurisdiction over the same, and through that possession and consequent jurisdiction may hear and determine questions submitted which affect the disposition of the property; but, after the court has in fact yielded up the possession of particular property, then the right to take jurisdiction over the property, or to hear and determine questions affecting the same in proceedings brought by third parties, cannot be based upon the actual possession of the property, but must be shown to exist by reason of the existence of some other recognized ground of jurisdiction.

In the case now under consideration, as already stated, the trustee set apart to the bankrupt certain property as exempt, and this action was approved by the referee. This property, being thus separated

from the body of the estate under the control of the court, passed into the actual possession of the bankrupt. Some days thereafter the bank filed an application asking the court to order the exempt property to be sold for the reasons hereinbefore set forth. It will be noticed that it is not claimed by the bank that the property was not properly set apart as exempt under the statutes of Iowa; but the ground taken is that the court of bankruptcy should not have set apart the exemptions without first enforcing against the same the vendors' liens alleged to exist in favor of the bank, the National Burial Device Company, and the Iowa Coffin Company; and in effect what is now asked is that the court will reassert its jurisdiction over the property for the purpose of subjecting the same to the liens that it is asserted exist thereon in favor of the parties just named.

Under the provisions of the eleventh clause of section 47 of the bankrupt act, the trustee was charged with the duty of setting apart the exemptions to which the bankrupt was entitled; and under the rule adopted by this court the referee had the power to determine all claims of the bankrupt to exemptions as provided for in the eleventh clause of section 2 of the act. By the action of the trustee, confirmed by the referee, the exemptions claimed by the bankrupt were allowed, and the particular property was set apart to him, and passed into his possession and control. When thus separated from the general estate, the exempt property ceased to be in the possession of the trustee or of the court, and under the provisions of section 70 the trustee took no title thereto. Under these circumstances the referee rightly ruled that the court of bankruptcy would not entertain jurisdiction over the exempt property at the request of the claimant bank. When the application on behalf of the bank was filed, the exempt property had passed from the possession of the court in bankruptcy. The trustee had no title thereto, and the creditors at large had no equity therein. Under similar circumstances in the case of *In re Hatch* (D. C.) 102 Fed. 280, I held that the court in bankruptcy would not take jurisdiction over property set apart to the bankrupt on the petition of a mortgagee, who wished to assert his right to subject the property to the payment of the mortgage lien. The same ruling was made by Judge Rogers in the case of *In re Wells* (D. C.) 105 Fed. 762, wherein he cites the rulings made under the act of 1867, and, among others, quotes from the opinion of Mr. Justice Bradley in *Re Bass*, 3 Woods, 382, 2 Fed. Cas. 1004, wherein it is said:

"In other words, it is made as clear as anything can be that such exempted property constitutes no part of the assets in bankruptcy. The agreement of the bankrupt in any particular case to waive the right to the exemption makes no difference. He may owe other debts, in regard to which no such agreement has been made. But whether so or not it is not for the bankrupt court to inquire. The exemption is created by the state law, and the assignee acquires no title to the exempt property. If the creditor has a claim against it, he may prosecute that claim in a court which has jurisdiction over the property, which the bankrupt court has not."

See, also, *Rix v. Bank*, 2 Dill. 367, Fed. Cas. No. 11,869; *In re Poleman*, 5 Biss. 526, Fed. Cas. No. 11,247; *In re Camp* (D. C.) 91 Fed. 745.

When property claimed to be exempt under the provisions of the law of the state is set apart by the trustee and referee, and delivered to the bankrupt, it passes without the control of the court in bankruptcy, and parties who claim liens thereon by way of contract, mortgage, or as vendors must assert their rights in a court other than the court in bankruptcy. The act of setting apart the property as exempt does not release the same from liens which are enforceable against it under the provisions of the state statutes. Setting it apart as exempt property declares that the trustee has no right in or title thereto under the provisions of the bankrupt act, but in no sense is it an adjudication of the rights of third parties claiming liens thereon by way of mortgages or the like; and all courts, other than the court in bankruptcy, are at liberty to hear and determine rights to such exempt property, the same as though no proceedings in bankruptcy had been instituted. It is therefore open to the claimant bank to assert in the state court its rights to the property set apart as exempt; but it cannot do so in the court of bankruptcy, and the ruling of the referee to that effect is affirmed.

The next question for consideration is that presented by the ruling of the referee with respect to the claim of Coonley. It will be remembered that the creditor, Coonley, filed his claim before the referee, asserting a contract lien on the two horses before the same were set apart as exempt; and subsequently, by consent between the bankrupt and the creditor, an order was entered by the referee to the effect that the claim of the creditor, Coonley, should share in the general dividend, and only the balance left unpaid should be enforced as a special lien on the exempt property. From the facts shown on the record, it appears that Coonley held security upon the horses for the unpaid portion of the purchase price, and therefore, under the provisions of clause "h" of section 57 of the bankrupt act, he is only entitled to a dividend upon the amount of his claim after deducting the value of his security, to be ascertained as provided for in such clause. The fact that the bankrupt and the creditor agreed to a different disposition of the matter cannot defeat the right of other creditors to insist that the claims, being secured, can be proved only as provided for in section 57; and the fact that the property was set aside as exempt does not release it from the special lien existing against it. The exception to this ruling of the referee is therefore sustained.

With respect to the claims proved by the National Burial Device Company and the Iowa Coffin Company, it is averred by the claimant bank that the sums due them are portions of the purchase price of part of the property set apart as exempt; and it is urged in argument that these claims should be treated as secured, although these creditors are not asserting any vendors' liens against the property. By proving their claims as unsecured, these creditors show that they do not claim a special lien upon the exempt property; and there is nothing in the evidence which would justify the court in holding that they must assume the risk of establishing their right to a vendor's lien before they are permitted to prove their claims as unsecured creditors. The ruling of the referee on this question is therefore affirmed.

If I correctly understand the position of the claimant bank, a lien upon the stock of goods owned by the bankrupt, in the nature of a vendor's lien, is asserted in favor of the \$1,500 loaned by the bank to the bankrupt and applied in part payment of the purchase price coming to J. W. Bailey for the sale of his interest in the firm property to the bankrupt. As the bank, at the time this loan was made, took security in the nature of a mortgage on the property, its rights are to be measured by the written instrument then executed. This mortgage was not recorded until after the petition in bankruptcy was filed, and in the claim filed by the bank with the referee it was expressly stated that by reason of the failure to file the same for record—

"No preference is claimed by virtue of said contract upon property which is subject to the claims of the general creditors; but claimant alleges that the hearse and tools and other property set off to said bankrupt, so far as the same constituted property appertaining to the bankrupt's business, are not subject to the debts of the general creditors; but claimant alleges that by virtue of the foregoing contract he is entitled to have said goods applied to the payment of his foregoing claim."

It is thus made clear that the bank expressly waives any claim to a lien upon the property remaining in the hands of the trustee, and limits the lien asserted, considered either as a mortgage or purchase-money lien, to the goods set apart as exempt. The referee having correctly ruled that the exempt property had passed without the jurisdiction of the court of bankruptcy, it was made to appear that the question of the validity of the mortgage was not involved in any issue left pending in the court of bankruptcy. The claimant bank had expressly declared that it asserted no lien against the assets in the hands of the trustee, in which the general creditors were interested; and when the referee ruled, and rightly ruled, that the court of bankruptcy would not entertain jurisdiction over the exempt property, the question of the validity of the mortgage ceased to be an issue in the case. The referee held that appending to the mortgage an acknowledgment was a material and unauthorized alteration thereof, rendering the same wholly void, but further held that the debt secured by the mortgage was not thereby rendered nonenforceable, but that the same might be proved up and allowed as an unsecured debt. This latter holding is in accordance with the ruling of the supreme court of Iowa in *Cutler v. Rose*, 35 Iowa, 456, and is undoubtedly in accordance with justice and equity, even though it be true that the mortgage has been rendered void for the reason stated. In view, however, of the fact that the referee held that the debt due the bank was provable, but refused to take jurisdiction over the question whether the exempt property was subject to the lien of the mortgage, and as the bank expressly waived any claim to a lien upon the assets in the hands of the trustee by virtue of the mortgage, it follows that the question of the alleged alteration of the mortgage ceased to be of any moment in the case, and, as the ruling of the referee with respect to taking jurisdiction over the property set aside as exempt results in compelling the bank to resort to the state court in case it seeks to enforce its alleged lien against the exempt property, the court of

bankruptcy should have declined to pass upon the question of the alteration of the mortgage. Under the facts shown on the record, the validity or invalidity of the mortgage does not affect the decision of any of the issues which the referee undertook to pass upon. The validity of the mortgage is a vital question, however, in case the bank should undertake to enforce a claim thereunder against any of the exempt property; but, as the referee refused to take jurisdiction over the exempt property, he should not have undertaken to pass upon the validity of the mortgage, but should have left that question to be decided by the court that may be called upon to adjudge whether the exempt property is subject to any lien in favor of the claimant bank. The holding of the referee that the mortgage held by the claimant bank has been rendered void by reason of an alleged alteration is therefore set aside, to the end that the question may be left open for consideration and determination in any proceedings hereafter instituted on behalf of the mortgagee.

The referee further held that the bank could prove up its claims, provided it accounted for certain payments received within four months next preceding the filing of the petition in bankruptcy; and the exceptions present the question whether certain sums in the hands of the bank must be paid to the trustee as a condition to the allowance of the claims of the bank. With respect to the \$1,500 debt for money loaned by the bank to Little, it appears that the bank asserts that it has a lien on the hearse, which was set apart as exempt, by virtue of the mortgage executed by the bankrupt. Having security for part of its debt, the value thereof, to be ascertained according to the provisions of clause "h" of section 57 of the bankrupt act, must be deducted from the claim. It also appears that at the date of the filing of the petition in bankruptcy the bankrupt had to his credit as a depositor in the bank the sum of \$51.83. The facts present a case of mutual debts between the bank and the bankrupt with respect to this deposit, and under the provisions of section 68 the bank is entitled to set this amount off against the debt due from the bankrupt, and the amount thereof will therefore be deducted from the claim due the bank.

The evidence shows that when J. W. Bailey, in August, 1899, sold out his interest in the partnership property to the bankrupt, he took in part payment two notes, of \$300 each, and had assigned to him as collateral security the book accounts due the firm. Subsequently these notes were transferred by Bailey for value to the bank, and it succeeded to the rights of Bailey in the collateral assigned for the payment thereof. Under these circumstances the bank cannot be required to pay to the trustee sums collected from the collaterals as a condition to the allowance of the claim, even though such sums have been received within four months next preceding the initiation of proceedings in bankruptcy. The so-called preference was created when the collaterals were assigned in August, 1899, by the bankrupt, and not when collections were made thereon; and, furthermore, the collaterals were assigned as security for a debt then created, and not as a security for a pre-existing claim, and therefore there is no ground for holding that the bank must repay these sums



to the trustee before it can be permitted to prove up the balance due on the notes held by it. It would appear that the bank possibly holds some of the collaterals yet uncollected as security, and the value thereof, to be ascertained as provided for in section 57, should be deducted from the amount left unpaid upon these notes.

It also appears that the bank, within four months preceding the filing of the petition in bankruptcy, received payments from the bankrupt amounting to some \$102, if I correctly understand the evidence; and the referee held that these payments were in the nature of preferences, and must be repaid to the trustee, and it is not shown that the facts do not sustain this ruling, which is therefore affirmed.

The clerk will certify these rulings to the referee, who will notify the parties, and the case will be proceeded with as herein directed. The costs of this proceeding will be equally divided between the claimant bank and the trustee.

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In re BEAVER COAL CO.

(District Court, D. Oregon. August 7, 1901.)

No. 309.

**BANKRUPTCY—LIEN OF ATTACHMENT.**

Bankr. Act 1898, § 67f, providing that "all levies, judgments, attachments, or other liens" obtained through legal proceedings against an insolvent, within four months prior to filing of petition in bankruptcy against him, shall be void if he is adjudged a bankrupt, does not render void the lien of an attachment in action at law, though dependent for enforcement on a judgment obtained within such four months; the attachment having been served prior to such time.

In Bankruptcy. Review of decision of referee on petition of A. H. Kerr.

W. D. Fenton and Bauer & Greene, for petitioner.  
Cotton, Teal & Minor, for trustee.

BELLINGER, District Judge. Heretofore this matter came on for hearing upon an application in behalf of the sheriff of Coos county for an allowance and payment as a priority of a claim for \$769.99, being the costs and expenses incurred in attachment proceedings begun more than four months prior to the filing of the petition in bankruptcy. This claim was urged upon the ground that because, under the state assignment law, such costs and expenses have priority, the claim is within subdivision 5 of section 64 of the bankruptcy act, which gives priority of payment to debts owing to any person who by the laws of the states or the United States is entitled to priority. Priority was also claimed as a matter of equity and good conscience, and finally, because the writ of attachment in question was levied more than four months prior to the filing of the petition in bankruptcy. The petition was denied upon the consideration given to the provision of the state assignment law providing for distribution among creditors of insolvent estates "after the payment of the costs and disbursements in the attachment proceedings," and to

the further contention that the services out of which the claim arose were rendered in preserving the estate; these being the points to which the argument on the hearing was mainly, if not wholly, directed. 107 Fed. 98.

In that decision it was assumed that the lien of the attachment was provisional, and ceased with the judgment, and that the latter, having been rendered within four months of the filing of the petition in bankruptcy, was void. The rule adopted is supported by *In re Lesser* (D. C.) 108 Fed. 201, 5 Am. Bankr. R. 326, where it is held that an attachment served more than four months prior to the filing of a voluntary petition in bankruptcy, but which, under the state laws, can be made effective only through a judgment, and a levy or demand thereunder, is discharged where judgment is not obtained until within four months prior to the filing of the petition, since such judgment affects the property, and cannot be made the basis of proceedings to enforce such lien. The law of Connecticut, under which the attachment in question was levied, provides that:

"No estate which has been attached shall be held to respond to the judgment obtained in the suit \* \* \* unless the judgment creditor shall take out an execution and have it levied on the personal estate attached."

The Oregon law of attachment does not require the levy of an execution on the attached property upon the rendition of judgment in the attachment suit. It provides that, if judgment be recovered by the plaintiff, the court shall order and adjudge the attached property sold to satisfy the plaintiff's demand, "and, if execution issue thereon, the sheriff shall apply the property attached by him, or the proceeds thereof (when the property has been sold as perishable), upon the execution," etc. The levy of execution in the one case, and the order of sale in the other, do not, in my opinion, distinguish the two cases, so far as the question of lien is concerned. If the attachment is merely a provisional lien in one case, it is in the other. There is no more title or right of property in one case than in the other. In each case the attachment can only be made effective through the judgment. The same court, in the case of a creditors' suit begun more than four months prior to the filing of a petition in bankruptcy, held that the equitable lien which a creditor acquires in such a case falls with the judgment upon which it depends for enforcement, if such judgment is annulled by the subsequent adjudication in bankruptcy. The court says:

"Such a contingent or equitable lien, it is evident, cannot be superior to the judgment on which it depends to make it effectual, but must stand or fall with the judgment itself. Section 67f, therefore, in declaring that a judgment recovered within four months 'shall be deemed null and void,' etc., necessarily prevents the complainants from acquiring any benefit from the lien, or the fund attached, except through the trustee in bankruptcy pro rata with other creditors." *In re Lesser*, 100 Fed. 433, 3 Am. Bankr. R. 815.

This case was affirmed in the circuit court of appeals for the Second circuit. 5 Am. Bankr. R. 320.<sup>1</sup> The question as to the effect of an

<sup>1</sup> Opinion withdrawn, and case certified to supreme court.

attachment levied more than four months prior to the filing of the petition in bankruptcy is not decided in the appeal, but there is an intimation in the opinion that the lien of such an attachment is not vacated when the judgment in the attachment suit is rendered within the prescribed time. Of the lien or right acquired by the complainant in a creditors' suit, the court says:

"It is sometimes called an inchoate lien, or a contingent lien, but it is not a right in, or a right to hold, a particular article of property. It is not like the lien obtained by the attachment of personal property in an action at law, by virtue of which a sheriff obtains either actual or constructive possession of the property attached; and in such a case the lien is not obtained by the judgment, but by the attachment, and we are not now prepared to say, if the judgment is rendered within four months after the petition in bankruptcy is filed, that the lien by attachment is vacated."

It is thus seen that the court distinguishes between the inchoate or contingent lien acquired in a creditors' suit and the specific lien of the attachment in an action at law, and is of the opinion that in the latter case the lien is not obtained by the judgment, but by the attachment. The conclusion from this is that the lien of the attachment in such a case is not affected by the fact that the judgment is rendered within four months before the petition in bankruptcy is filed.

The district court for the district of Vermont adopts the view taken by Judge Brown in the case cited. In *re Johnson* (D. C.) 108 Fed. 373. The Vermont statute, like that of Connecticut, requires the attached property, on the rendition of judgment, to be taken in execution. The court says:

"The lien does not become perfect as a charge upon the property until the recovery of the judgment and the taking in execution. The judgment, and the levy of execution under it, are proceedings that the bankrupt act, as quoted from, expressly declares shall be deemed null and void. Without them, the attaching creditor had no perfect lien. When obtained, they are absolutely null and void. In that condition they are wholly inoperative to perfect what was before an imperfect lien."

On the other hand, it is held in *Re Blair* (D. C.) 108 Fed. 529, a recent case, that under the Massachusetts statute, where an attachment on mesne process is enforceable only by obtaining judgment and issuing execution therein, the attachment is not discharged by the filing of a petition in bankruptcy against the defendant more than four months after such attachment was levied, although the judgment was not obtained until within the four months. The court answers the argument in *Re Lesser* that an attachment does not create a true lien by referring to the fact that section 67f declares in substance that an attachment is a lien, and that, if the attachment is levied more than four months before the filing of the petition in bankruptcy, the lien created by the attachment is preserved.

The case of *Frazier v. Trust Co.*, 40 C. C. A. 76, 99 Fed. 707, is to the same effect. The decision is by the circuit court of appeals for the Fourth circuit. A receiver had been appointed in a creditors' suit, who did not take actual possession of the property in question. More than four months thereafter the debtor was adjudged a bankrupt. A decree in the creditors' suit was subsequently entered, estab-

lishing the liens of the plaintiffs on the property affected. The court held that by the order appointing a receiver the state court took the subject-matter of the litigation out of the hands of the parties and into its own hands, and that the adjudication in bankruptcy more than four months thereafter did not affect the custody so taken. The same court, in the recent case of *Pickens v. Dent*, 45 C. C. A. 522, 106 Fed. 653, applied the doctrine of the case last cited to a case where a creditors' suit to set aside a conveyance as fraudulent was begun several years before the adjudication in bankruptcy. There was no receiver, but the jurisdiction otherwise acquired in the creditors' suit was such that the federal court was not warranted in interfering with it. To the same effect are the cases of *Taylor v. Taylor*, 45 Atl. 440, 4 Am. Bankr. R. 211 (New Jersey chancery); *Doyle v. Heath*, 47 Atl. 213, 4 Am. Bankr. R. 705 (supreme court of Rhode Island); *In re Pease*, 4 Am. Bankr. R. 547 (United States district court for the Northern district of New York). In the last of these cases the decision by Referee Hotchkiss holds that under section 67f the lien of the judgment is annulled, but the judgment is not avoided. Particular attention is called to the statement, in subdivision "f," "that all levies, judgments, attachments, or other liens," etc., shall be deemed null and void, and to the fact that judgments rendered after the filing of the petition are provable debts. The object of this provision is to avoid preferences; hence the avoidance of liens, and not otherwise of judgments.

The preponderance of authority is against the rule heretofore adopted in this case, and an examination of the bankruptcy act convinces me that such rule is contrary to the intent of the law. The phrase "or other liens" in section 67f makes it clear that the word "judgments" is used solely with reference to liens created thereby. The lien, not the judgment, is the thing prescribed; and that the lien of attachments is without reference to the time when the judgment is rendered in the attachment suit is shown in the fact that the operation of the provision in question as to attachments by its terms affects only such attachments as are levied within four months of the filing of the petition in bankruptcy,—a matter wholly immaterial, if the judgment rendered within such period is annulled, and with it the lien of any attachment theretofore levied.

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In re NIXON et al.

In re LOTT et al.

(District Court, D. Montana. September 4, 1901.)

No. 99.

**BANKRUPTCY—ILLEGAL SEIZURE—LIABILITY ON BOND.**

Under Bankr. Act 1898, § 3e, providing that when a petition is filed by one to have another adjudged a bankrupt, and an application is made to take charge of the property of the alleged bankrupt prior to the adjudication, the petitioner shall file a bond conditioned for payment, in case the petition is dismissed, to the respondent, of costs, expenses, damages, and counsel fees, there is a right of recovery on the

bond where petition is against several alleged to be partners, and personality in the possession of two of them, and alleged to belong to the partnership, is seized on a warrant issued at the instance of petitioners, though such two deny that they are members of the partnership, and claim the property as their own, and their contentions are sustained by the adjudication, and the petition dismissed as to them.

### In Bankruptcy.

R. L. Clinton, J. L. Wines, Sanders & Sanders, W. A. Pennington, J. M. Hinkle, W. E. Carroll, and A. Laish, for creditors.  
McConnell & McConnell and Pemberton & Maury, for bankrupts.

KNOWLES, District Judge. Numerous creditors of Samuel Nixon, proprietor of the Silver City Mercantile Company, in Butte, Mont., filed their petition in this court to have him adjudged a bankrupt. Thereafter, on March 14, 1900, these creditors, with others, joined in the filing of an amended petition in bankruptcy, alleging that Samuel Nixon, Samuel M. Nixon, Lemuel W. Nixon, James F. Lott, and Fannie J. Lott were co-partners doing business under the firm name and style of the Silver City Mercantile Company, alleging certain acts of bankruptcy, conspiracy, collusion, fraud, etc., and praying that they be adjudged bankrupts. Pending the adjudication, at the instance of the petitioning creditors, a warrant was issued to the marshal commanding him to seize and take into his possession the property of the said alleged bankrupts. The proper bond to cover the payment of "all costs, expenses, and damages occasioned by such seizure, taking, and detention of the property of the alleged bankrupt" was given by the petitioning creditors and approved by the court, as provided in section 3e of the act of 1898; and in obedience to said warrant the marshal seized and took into his possession, as the property of said bankrupt, the Silver City Mercantile Company, three separate stocks of goods, wares, and merchandise,—one situated in South Butte, another in Centerville, and another on East Park street, in Butte City, Mont. The stock in South Butte was in the possession of L. W. Nixon, who claimed it as his own, and adversely to the Silver City Mercantile Company and all others. The other two stocks were found in the possession of Fannie J. Lott, who had placed her husband, James F. Lott, in charge, and was conducting a mercantile business at said places, and claimed said stocks of goods, wares, and merchandise as her own, and adversely to the said Silver City Mercantile Company and all others. These stocks of goods were afterwards delivered by the marshal to a receiver duly appointed by the court, and by said receiver were turned over to the trustee appointed by the petitioning creditors, who is now in possession of the same or of the proceeds of the sale thereof. To this amended petition Samuel Nixon made default, and a judgment pro confesso was taken against him. Fannie J. Lott appeared separately, and denied that she had committed any act or acts of bankruptcy; denied that she was insolvent; denied that she "is now or ever was a co-partner" with any of the other parties herein, or either of them, or that she ever had any interest whatever in the Silver City Mercantile Company; denied each and every charge of fraud, collusion, and conspiracy alleged against her in the amended petition; and averred

affirmatively that she was the owner of the goods in the store in Centerville, Silver Bow county, Mont., etc. Lemuel W. Nixon denied all the averments in the amended petition as against him. The case was called for trial before a jury, and a jury was duly impaneled. There was a controversy between the parties with reference to the issues to be tried by the jury, and, it thereupon appearing to the court that a jury trial was unnecessary for the determination of the question of partnership,—that being a question for the determination of the court alone,—and a jury trial having also been waived by all the parties in open court, and such waiver entered upon the minutes, the jury was excused. The court, after a hearing upon the evidence, found that all the parties herein except James F. Lott were co-partners doing business under the firm name of the Silver City Mercantile Company, and expressly found that James F. Lott, the husband of Fannie J. Lott, was not a member of said co-partnership. An adjudication in bankruptcy was regularly made against all the parties who were found to be co-partners, and defendant James F. Lott was discharged from the proceedings. Fannie J. Lott and Lemuel W. Nixon alone appealed from this ruling of the court to the circuit court of appeals of the United States for the Ninth judicial circuit, and the only error alleged was “that the court erred in holding said appellants, Fannie J. Lott and L. W. Nixon, to be members of said co-partnership in the Silver City Mercantile Company.” Upon the hearing and consideration of said appeal by the circuit court of appeals aforesaid, the decree of this court was reversed as to the said Fannie J. Lott and Lemuel W. Nixon, with directions to dismiss the petition as to them. This has been done.

The said Fannie J. Lott and Lemuel W. Nixon have made an application to the court for the allowance to them of their proper costs and disbursements incurred by them in successfully resisting their adjudication as involuntary bankrupts as co-partners in the Silver City Mercantile Company and the seizure of their property as the property of said co-partnership, and also pray for the allowance to them of a reasonable attorney's fee in the premises, under the provisions of section 3e of the bankruptcy act of 1898. On their behalf it is contended that, although they were made parties to the proceedings under the claim that they were co-partners in the Silver City Mercantile Company, and their property seized by the marshal as the property of the said Silver City Mercantile Company, they were in reality and in fact strangers to the controversy, and had no interest in the same, and that the seizure of their property was without warrant of law and summary, and that, in view of all the facts and of the judgment of the circuit court of appeals in their favor on their said appeal, they are not only entitled to all costs and disbursements properly and necessarily incurred in this proceeding on their behalf, but also to an attorney's fee as shall seem reasonable to the court in the premises. The application is resisted by the petitioning creditors, who contend that the provisions of said section apply only to cases where the goods and property claimed to be the property of an alleged bankrupt are taken from the possession of a stranger to the proceedings, and by summary process; that said Lott and Nixon

were not strangers to the proceedings, and that the property found in their possession was not taken by summary process. Section 3e of the bankruptcy act of 1898, under the provisions of which these goods were seized, and under which said Lott and Nixon claim their rights, reads as follows:

"Whenever a petition is filed by any person for the purpose of having another adjudged a bankrupt, and an application is made to take charge of and hold the property of the alleged bankrupt, or any part of the same, prior to the adjudication and pending a hearing on the petition, the petitioner or applicant shall file in the same court a bond with at least two good and sufficient sureties who shall reside within the jurisdiction of said court, to be approved by the court or a judge thereof, in such sum as the court shall direct, conditioned for the payment, in case such petition is dismissed, to the respondent, his or her personal representatives, all costs, expenses, and damages occasioned by such seizure, taking, and detention of the property of the alleged bankrupt. If such petition be dismissed by the court or withdrawn by the petitioner, the respondent or respondents shall be allowed all costs, counsel fees, expenses, and damages occasioned by such seizure, taking, or detention of such property. Counsel fees, costs, expenses, and damages shall be fixed and allowed by the court, and paid by the obligors in such bond."

Now, it is an established fact that at the time of the inception of the proceedings, and at the time of the issuing of the warrant to the marshal, and at the time of the taking and detention of these goods under said warrant, these goods were in the possession of Lott and Nixon under a claim of ownership, and the marshal took them from the possession of said Lott and Nixon as the property of the Silver City Mercantile Company, notwithstanding the claim of ownership asserted by them. The goods were all of them personal property, and that the possession of personal property raises a presumption of title in and ownership of the property by the possessor is a rule of law so well settled and established that it does not admit of question. It may be said once for all that, laying aside for a moment the question of partnership in the Silver City Mercantile Company, that Lott and Nixon's possession of this personal property under a claim of ownership and title in them could not be disturbed or interfered with save and except by appropriate legal proceedings in a court of competent jurisdiction. The allegations in the amended petition were to the effect that Lott and Nixon, with others, were co-partners in the Silver City Mercantile Company, and that the goods in their possession were in fact the property of said company. Upon the basis of these allegations the warrant of seizure was issued, and the goods taken from their possession. These allegations being controverted, it was incumbent upon the petitioning creditors to establish them by competent evidence. They were material facts upon which the right to take and seize the goods was predicated and the seizure made. If the allegations were true, the seizure was right; if false, it was all wrong. On the trial of these issues the petitioning creditors failed to establish this material fact of the co-partnership of the defendants Lott and Nixon in the Silver City Mercantile Company. As to them the decree of this court was reversed, and the petition ordered dismissed, and this has been done. They are now, and must, for the purposes of this application, be, considered and treated as

strangers from the beginning of the proceedings against the Silver City Mercantile Company. The circuit court of appeals has held and decided that they were and are not partners therein.

Upon a naked representation by the petitioning creditors herein that Lott and Nixon, as strangers, were in possession and claimed to be the owners of certain goods alleged to be the property of the Silver City Mercantile Company, and asking for a warrant of seizure under the provisions of section 3e of the act of 1898, this court would have entertained serious doubts as to its right to issue such warrant, and would have left the question of the right of possession and ownership of the property for the adjudication of the tribunal in which the bankrupt himself might and could have litigated that question, which in this instance was the state court. By the mere fact that a person, partnership, or corporation has been declared bankrupt, and a district court of the United States has so adjudged, such court does not draw to itself by that act, in addition to control of the bankrupt's property and credits, also the right and jurisdiction over contested rights in any other court. The very reverse is the fact and the law. In all controversies between the trustee of the bankrupt's estate and a stranger or third parties as to the title and ownership of property alleged to belong to the estate of the bankrupt the jurisdiction of the state courts is expressly preserved, and such trustee is relegated to these courts for a determination of his rights when the bankrupt himself should or could have litigated them in that or those courts. *Eyster v. Gaff*, 91 U. S. 521, 525, 23 L. Ed. 403; *Bardes v. Bank*, 178 U. S. 524, 20 Sup. Ct. 1000, 44 L. Ed. 1175. Applying the doctrine announced by the supreme court of the United States in these two cases to the case at bar, this court was without jurisdiction as to the persons and property of Fannie J. Lott and Lemuel W. Nixon, and the seizure and detention of their goods under its warrant was not only summary, but also illegal and unlawful. The defendants Lott and Nixon were put to much trouble and considerable expense by reason of the instituting of these proceedings against them by the petitioning creditors. Among some of the legitimate expenses connected therewith was the expense of employing counsel to resist these proceedings. In that resistance they were successful. The result is that they go forth and are dismissed hence as strangers. In conformity to the views expressed herein, I hold that Fannie J. Lott and Lemuel W. Nixon, under the provisions of section 3e of the act of 1898, are entitled to their proper costs and disbursements incurred herein, to be now taxed by the court under the circumstances presented in this case, together with a reasonable attorney's fee, to be also taxed by the court against the petitioning creditors herein. I do not believe it is within the discretion of the court to fix the amount of the attorney's fee in the premises on the basis of its own knowledge of their worth, and without other proof. I shall therefore not do so, and will require proof of the extent and value of such services to be made before me at some time during the present term of this court at Butte, Mont., the defendants' attorneys to give notice thereof to all concerned at least five days prior to the time of making such proof.



## In re DEMAREST et al.

(District Court, D. New Jersey. July, 1901.)

**BANKRUPTCY—EXEMPTIONS—PARTNERSHIP PROPERTY.**

Under the exemption law of New Jersey (Gen. St. p. 1421, § 35), which provides that "goods and chattels of every kind not exceeding in value \$200, the property of any debtor having a family resident in this state," shall be exempt from levy, etc., a bankrupt is not entitled to such exemption out of the assets of a partnership.

In Bankruptcy. On exceptions to order of referee.

The following is the order of Referee Atwood L. De Coster:

The property of the bankrupts was sold by the United States marshal, under order of this court, prior to adjudication of bankruptcy. After the trustee in bankruptcy qualified, the clerk of court paid to trustee the net proceeds from the sale, amounting to \$755.48. This was all the property belonging to the bankrupts. They had no property excepting partnership property. The claims proved amount to over \$3,900. Albert W. Demarest is a married man, the head of a family, a resident of New Jersey. He made application to the trustee to have \$200 paid him as and for his exemptions. The trustee refused to make such payment. Application has been made to the referee by Mr. William N. Runyon, attorney for said Albert W. Demarest, for an order directing the trustee to set off or pay to said Albert W. Demarest an exemption of \$200. The referee refuses to make such order for the reason that debtor is not entitled to exemption out of partnership property until partnership debts are paid.

Marshall Van Winkle, for petitioning creditors.

Nelson & Wm. R. Runyon, for bankrupts.

KIRKPATRICK, District Judge. This matter comes before the court on exceptions to the order of the referee refusing to allow to the bankrupts an exemption of \$200 out of the partnership assets. The statute of the state of New Jersey, title "Executions" (Gen. St. p. 1421, § 35), provides that goods and chattels of every kind, not exceeding in value two hundred dollars, the property of any debtor having a family resident in this state, shall be reserved for the use of the family, and shall not be liable to be seized in execution. The goods and chattels exempted by the act must be the property of the debtor, and such as, but for the act, would be liable to be seized and sold in payment of his individual debts. When partnership assets are levied upon to satisfy the individual debt of one of the partners, there is taken and sold, not the goods and chattels themselves, but the interest of the debtor in a joint or partnership property. The sale is made subject to the partnership debts, and the purchaser takes only what would be due the debtor on a settlement of the partnership affairs. Each partner is entitled to have all the assets of the partnership applied to the payment of its debts, because he is individually liable to have any deficiency made out of his private estate. To this effect are all the decisions in New Jersey. The finding of the referee will be affirmed.

In re ROALSWICK et al.

JOHN B. STETSON CO. v. WOODIN.

(District Court, D. Montana. August 22, 1901.)

**BANKRUPTCY—RECOVERY OF GOODS SOLD TO BANKRUPT—EVIDENCE OF FRAUD.**

To authorize the rescission of an executed sale of goods to one who subsequently became a bankrupt, on the ground that he obtained the same by false and fraudulent representations, it must be shown that he made such representations knowing them to be false, or without reasonable grounds for believing them to be true, and they must have induced the seller to consummate the sale when he otherwise would not have done so. A report furnished by a commercial agency to the seller, based in part on statements made by the buyer several months before his bankruptcy, at a time when he did not know himself to be insolvent, and which do not appear to have been willfully false, and in part upon the independent estimate of others as to his financial condition, is not a sufficient evidence of fraud to warrant such rescission.

In Bankruptcy. On petition of the John B. Stetson Company.

Ranson Cooper, for trustee in bankruptcy.

Geo. H. Stanton and H. H. Emery, for petitioning creditors.

KNOWLES, District Judge. From the agreed statement of facts on file in this matter it appears that for a number of years prior to March 6, 1901, Lewis and Andrew Roalswick were partners doing business as merchants at Great Falls, Mont., under the firm name of Roalswick Bros. Upon their voluntary petition, filed in this court March 6, 1901, they were duly adjudged bankrupts, and thereafter Frank A. Woodin was duly appointed as trustee of their property and estate. He duly qualified as such trustee, entered upon the discharge of his duties, and took possession of all the property and estate of the bankrupts, including the merchandise in controversy herein, and claimed by the petitioner, which merchandise is stored in a warehouse in Great Falls, Mont., mingled with other goods belonging to the estate, but capable of segregation and identification by reason of being still in the original packages unbroken. The petitioner has made a demand upon the trustee for the possession of these goods upon the ground that there was no sale, on account of the fraud of the buyers in fraudulently and falsely misrepresenting their commercial standing, financial condition, etc., and that they knew themselves to be insolvent at the time, and bought the goods in contemplation of filing their petition in bankruptcy. The trustee refused to comply with this demand, and thereupon a petition was filed in this court practically setting forth the same grounds, and praying that the trustee be required to deliver these goods to the petitioner. The trustee answered, and denied all of the averments of fraud and misrepresentation alleged in the petition. Briefly stated, the facts are as follows: On September 1, 1900, Roalswick Bros. placed with the petitioner an order for certain goods, amounting in the aggregate to \$237. The goods were to be shipped from Philadelphia, Pa., for delivery to the firm at Great Falls, Mont., on or about February 1, 1901. The order was accepted, goods were shipped, and delivered to the firm at Great Falls on the 23d day of February, 1901,

and stored in a warehouse, as hereinbefore stated. Prior to the shipment of the goods, the petitioner obtained a report of the commercial standing, financial condition, etc., of the firm from the R. G. Dun Mercantile Agency, the report being furnished through its correspondent at said Great Falls. This report is relied upon to sustain the contention of the petitioner as to the false and fraudulent representations of the firm at the time of the inception of the contract of sale, and no other, and is as follows:

"Roalswick Bros. D. G. Clo. B. S. &c. Great Falls, Mont.

"Nov. 17, 1900.

Trav. Report.

No. 221-223 First Ave. South.

"Lewis Roalswick interviewed, and he states that the firm has taken no inventory this year, for which reason he is unable to make a statement; but he estimates the firm's liabilities for merchandise at \$8,000 outside of what they are owing for winter goods now in transit or under order, the amount of which he says he is unable to give. Also says the firm is owing to the bank \$890, and that they have a stock on hand of probably \$30,000. He further states that the firm has arranged to consolidate its business with that of Archie Burrell in the grocery line, and they will operate as a corporation under the name of Fair Commercial Co. These two firms, however, will not unite until a new store building on Central avenue, which is in course of construction, and which they will occupy when completed, is finished. This building is not expected to be ready for them until after the beginning of the next year. Roalswick Bros. are reported to be doing a fair trade, and the men give it their close attention, but in some quarters it is thought they are inclined to overwork their capital. Their stock is not thought worth in excess of \$20,000, and the best estimates received for their responsibility in the neighborhood of \$7,000. Their bank debt is said correct. So far as can be ascertained locally, they are satisfactory in their payments, and appear to have no difficulty in getting what credit they require. Trade reports received in May and June last, however, from N. Y. City, St. Paul, and Minneapolis showed them to be slow in some instances, though, as a rule, prompt and satisfactory. The Fair Commercial Company has recently been incorporated with a capital stock of \$50,000, but as yet nothing has been paid in, and, as stated above, will not begin business until its store building is completed, which will be some weeks yet. In the meantime Roalswick Bros. are considered a fair risk for reasonable amounts.

"A. E. 11/27/1900.

N. C."

This report speaks for itself. It is just such a report as could be expected of an agency of this kind, made upon inquiry locally as well as elsewhere, and drawn from the sources usually open to and possessed by such an agency. It is the close, guarded, and conservative estimate and opinion given by a mercantile agency upon the commercial standing, financial condition, etc., of the parties reported upon in the community where they carry on their enterprise and commercial ventures. There is absolutely nothing in the statements therein contained, even if they had been made by a member of the firm on their behalf, that would indicate any fraud, misrepresentation, concealment, or deceit as to their commercial standing, financial condition, etc., made at the time for the purpose of obtaining credit. From it the firm appears to be solvent, and there is nothing to indicate that the firm either knew or had reasonable grounds to believe that they were insolvent, and it is agreed that they did not know they were insolvent at that time. The granting of the prayer of the petition would be, in effect, a rescission of an executed contract of sale. To justify a court in thus rescinding an executed contract of

sale, there must be something more than the simple failure of the buyer to pay the seller for the price of his goods. There must be such representations or statements to the seller by the buyer, in relation to his commercial standing, financial condition, etc., from which it may reasonably be inferred that, if the seller had known or been informed of the true state and condition of the buyer's affairs, he would not have consummated the sale by a delivery of the goods. The representations must be willfully false, or must have been such as the buyer did not believe to be true, or had no reasonable grounds to believe to be true, and by means whereof the seller was deceived, and thereby induced to consummate a sale he otherwise would not have made. If, on the other hand, the buyer honestly, and upon reasonable grounds, believed his representations to be true, the seller will not be entitled to a rescission of the executed contract of sale. There is nothing in this report that would indicate any intent to defraud or deceive the seller. It must be inferred that the buyers acted in good faith, and from honest motives, and that they in good faith believed themselves perfectly solvent at the time of the inception of this contract of sale; and this is agreed to. The seller must be held to have relied upon the report furnished by the aforesaid mercantile agency, and not upon any representations made by the buyer.

It is claimed that the firm ordered these goods with the knowledge of their insolvency, and in contemplation of filing their petition in bankruptcy. There is nothing in that claim. It is merely an assertion unsupported by any evidence whatever. The buyers continued in business at the same place and in the same way for a period of more than six months after the order for goods was accepted, and there does not appear to have been the least thought or suspicion that they were insolvent, or contemplated bankruptcy.

For the reasons herein stated, the petition is denied.

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KENTUCKY DISTILLERIES & WAREHOUSE CO. v. WATHEN et al.

(Circuit Court, W. D. Kentucky. July 16, 1901.)

UNFAIR COMPETITION—PRELIMINARY INJUNCTION—SIMULATION OF BRANDS OF WHISKY.

Complainant purchased from one of the defendants and his associates a distilling business conducted under the trade-name of "West End Distillery Co.," and also certain valuable brands, for which it paid a large sum, among which were the brands "Ky's Criterion" and "Honey-moon." The other defendants, who were sons of the seller, subsequently started a distillery, and placed upon the barrels containing their goods the name "East End Distillery Co.," in connection with which they used the brands "Ky's Credential" and "Honeycomb," and also their own names as distillers. *Held*, that the use of their names was lawful, the name of the distiller being required to be placed upon the package by the internal revenue law, and also that the adoption of the name "East End Distillery Co.," in itself, did not afford a ground of action, but that the use in connection with such names of the brands named was prima facie evidence of an intentional simulation, which entitled

complainant to a preliminary injunction upon the ground of unfair competition.<sup>1</sup>

**In Equity.** Suit for unfair competition. On motion for preliminary injunction.

Moran, Mayer & Meyer and Chas. H. Stoll, for complainant.

Dodd & Dodd and Barnett & Barnett, for defendants.

**EVANS, District Judge.** If the relief sought by the complainant in this case were based solely upon the ground that it was entitled to the benefits of a trade-mark, I should think that the motion for a temporary injunction ought to be overruled. But, technically speaking, the pending motion does not require us, at present, to view the matter from the standpoint of mere trade-mark law. What aspect the answer of the defendants may put upon the case, we do not, of course, know. The gravamen of the complaint is that the complainant, as purchaser from J. B. Wathen and his then associates, is the owner of certain very valuable brands of whisky, which cost it a very large sum of money, and that the defendants are unfairly and wrongfully seeking, by the simulation of those brands, to get the benefit of the complainant's property, and the advantage of its large expenditures. The general principles governing such attempts are stated with clearness in many adjudicated cases, but each case at last must depend upon its own peculiar circumstances. In many instances these make the application of general principles quite difficult, and occasionally somewhat unsatisfactory. Owing to certain peculiarities of this case it is not easy to reason out a perfectly logical result. Without going into details, it may give some idea of those difficulties to remember that this case relates to brands upon a class of merchandise which is not sold by the complainant or by either of the defendants otherwise than in barrel lots, and then rarely, if ever, when the barrel and its brands are present for inspection. It is sold almost entirely by "drummers" traveling abroad with samples only, and the retailer of it after its purchase probably always sells it from bottles in no way branded either by the complainant or by the defendants. While, therefore, the brand may be important and valuable, it is not often either seen or noticed at the time of actual sale. The proof is clear and the complainant admits that the wholesale purchaser is never in any wise deceived by the brands which it claims are simulated in this case, and probably most of the defendants' customers are men of that class. The merchandise about which we are now concerned is not, like snuff, or thread, or baking powders, put up in small packages, and exposed to the view and observation of the public who want to buy, and who are very likely to be deceived by artfully contrived imitations. The brands which we are now considering are only put by the parties to this suit upon barrels or other large packages. Besides, there is another circumstance of prime importance growing out of the laws of the United States. Section 3295, Rev. St., as amended by the act of July 16, 1892 (27 Stat. 201), requires that the

<sup>1</sup>Unfair competition in trade, see notes to *Scheuer v. Muller*, 20 C. C. A. 165, and *Lare v. Harper & Bros.*, 30 C. C. A. 376.

name of the distiller shall be stamped or burned upon the head of every package of distilled spirits put into bonded warehouses, and this must not be erased until the package is empty. This is information of the most authentic character as to who is the manufacturer of the merchandise, and it must be put on the barrel. There is no option as to this requirement, and, as the distiller's name must be put upon one end of the barrel, I see no reason why it may not be put upon the other, though this latter right should be so exercised by the distiller as not to place his name in arrangement with other words to which another has an exclusive right in such a way as to bring the case within those equitable principles which seek to restrain unfair competition. As will be seen, those words in this case are "Ky.'s Criterion" and "Honeymoon." There is no law, and no contract was shown at the hearing, which forbids R. E. Wathen & Co. from becoming distillers, and when complying with the laws of the United States in that behalf, under which they become distillers, their name must be stamped or burned upon each barrel or other package of their product. There is no reason in the law of the case why that firm might not employ M. A. Wathen as salesman, none why they might not engage the services of J. W. Flood or of J. L. Hackley, all of whom were formerly employes of J. B. Wathen, and none why they might not occupy as their own the office of their father, if the parties interested so chose, though these latter circumstances may, when taken in connection with the other facts, have some bearing upon the *quo animo* with which certain brands were selected and used by the partnership firm.

The foregoing considerations are among those which have caused me trouble in the consideration of the evidence offered upon the pending motion. How they may strike me after a full defense, and after the evidence is offered in more regular form, and after cross-examination of the witnesses rather than in the shape of affidavits, I cannot say. But as this is a motion only for a temporary restraint upon certain defendants, and as that restraint, if injurious and wrongful, can be compensated in damages which can be secured by a bond, I have concluded to solve the doubts upon two phases of the case in favor of the complainant. I do this upon the following grounds: J. B. Wathen and his associates, if any, had sold certain property to the complainant for a very large sum of money, which was paid to him. The property thus sold included certain brands which had been made extremely valuable by him, and for doing which he had been repaid in the price he received. The outlay, therefore, by which this value was given to those brands, was paid ultimately by the complainant. The co-partnership firm of R. E. Wathen & Co., of which, however, J. B. Wathen does not appear to be a member, was made up of his three sons, one of whom, at least, is an infant, and all of whom were without means. They all reside in their father's home, but how they obtained the necessary capital to begin and continue operations does not appear. They obtained all their father's ordinary paraphernalia and outfit not sold to complainant, including his office and most of his traveling force. These matters, separately or combined, even if they did touch the complainant somewhat close, would not, per se, I think,

afford any reason for concluding that there had been in any legal way an injury inflicted upon the complainant, and would have been of no material consequence if the firm had not, in selecting names for their products, also come so close to certain of the complainant's brands. The use of words like "Old Fashion Fire Copper 5th Dis. Ky. Bourbon," or like "The Celebrated Fire Copper 5th Dis. Ky. Bourbon," is too common in the trade to permit them to be the subject of any exclusive appropriation, but the manner of their use, when taken in connection with the words "Honeycomb" and "Ky.'s Credential," and the arrangement of the words on the barrels of the defendants, seem to me to show that there was a manifestly industrious effort to come as close to the words "Honeymoon" and "Ky.'s Criterion" as possible without actually using these words. The fact that defendants R. E. Wathen & Co., in making their brands, take the first and most striking half of the word "Honeymoon," and the abbreviation "Ky.'s," and the two first letters of its accompanying word, "Criterion," seems to me to be very persuasive, and particularly when, in the first instance, the word "Honeycomb" is fixed so close to the words "East End Distillery Co." by the defendants. The law requires the name of every distiller to be branded on the head of the barrel, and there being no law or contract to prohibit R. E. Wathen & Co. from distilling spirits, and thus yielding a revenue to the United States,—the prime object of the internal revenue laws,—there is no reason why these Wathens, as well as J. B. Wathen, may not be distillers, pay revenue, and sell their product. In doing the work of distillers, the law requires that they shall do it under their own names, and that happens also to be Wathen. Hence the word "Wathen" does not and cannot cut as much figure in this case as the word "Garrett" did in the Snuff Case, reported in 24 C. C. A. 173, 78 Fed. 472. The snuff there was known as "Garrett's," while the merchandise here is branded by the complainant as "Honeymoon" and "Ky.'s Criterion." Indeed, the gravamen of the complaint made in the bill is not, and, in view of the internal revenue laws of the United States, could not have been, the use of the name "Wathen," which was not the prominent feature of the brand itself, although it was of the manufacture. The gist of the complaint, as before indicated, is the use by R. E. Wathen & Co. of the words "Ky.'s Credential" in such a way as to simulate the complainant's brand of "Ky.'s Criterion," and in the use of the word "Honeycomb" in such a way as to simulate the complainant's brand of "Honeymoon." All things considered, it seems to me, as this case is now presented, that these two brands of the firm of R. E. Wathen & Co. do unfairly impinge upon the said two brands of the complainant. When the court considers how easily this approximation and imitation might have been avoided by a different arrangement even of the words in the defendants' brands, so as clearly and unmistakably to show even to the most casual observer that the products were not those of the complainant, and especially when we consider how this might have been done by other words equally useful, but which would have left no pretense of ground for complaint, we cannot believe that the similarity was accidental. Evidently it was designed for a purpose, and in this connection the manner of using

the words "Old Fashion Fire Copper" may be somewhat suggestive. There could be no just criticism upon the firm of R. E. Wathen & Co. for making whisky as good or better than that of the complainant, nor for so representing it, even by express comparison and otherwise, to their customers; nor, unless the formula has been made a proprietary one, would there be any reason why R. E. Wathen & Co. might not make their spirits by precisely the same formula as that used by the complainant. There is no proof offered to show that this formula was either secret or proprietary. The sole ground upon which I put my judgment upon the pending motion is that the use of the principal words, viz. "Ky's Credential" and "Honeycomb," in the brands of R. E. Wathen & Co., are intentional simulations of the principal words in the complainant's brands, viz. "Ky's Criterion" and "Honeymoon," and in the arrangement and general appearance thereof, in connection with other phases of the brands, there is a great probability of injury to the complainant by the taking to the firm of R. E. Wathen & Co. of some of the value and benefit of the brands which complainant purchased from J. B. Wathen to the knowledge of each of the defendants. This probability of damage to complainant seems to me to be the true basis for relief against unfair competition. It is not so much that the public may be deceived, per se, as that the complainant may be injured. Many affidavits were read on the hearing tending to show that in point of fact there had been no deception in any sale made of R. E. Wathen & Co.'s product, but that, on the contrary, there had always been a clear understanding of the exact situation and a sale of the merchandise on its own merits. This might be the case as to the past, but still leave the danger open for the future. Besides, these matters will probably become more pertinent to any inquiry that may hereafter come up as to the amount of any actual damages sustained by complainant by anything done by R. E. Wathen & Co. There does not appear to be any complaint that the defendants are using the names of J. B. Wathen or J. B. Wathen & Co. or J. B. Wathen & Bro. or J. B. Wathen & Bro. Co., under all of which J. B. Wathen had made whiskies before his sale to the complainant. With all these considerations still in mind, I have concluded that the trade-name "East End Distillery Co.," alone and of itself, in no way injures or infringes upon the rights of the complainant respecting its trade-name, known as "West End Distillery Co.," though it does serve as a sort of handle or assistant to the use of the brand "Honeycomb." There is not sufficient resemblance either in sound or appearance between the two to impose upon anybody of ordinary caution and intelligence. It could concern no one who desired to purchase, nor would he be at all likely to inquire, where a mere distillery was located, as an inducement at least to purchase, or whether it was in the east or west end of—he knew not where. It is nowhere indicated on the brand or trade-name of complainant that Louisville, one end or the other, is the locus of manufacture, nor can that be material. "West," in the one case, and "east," in the other, is the principal word, and at first sight and at first sound the two are entirely different. It results that the motion for the temporary injunction must be sustained as to the



use of the words "Ky.'s Credential" and "Honeycomb" in the brands of R. E. Wathen & Co., but denied as to all other matters. This will, I am confident, remedy the real injury done complainant, and will make legally harmless the defendants' use of the name "The East End Distillery Co." Used by itself, that name does no legal injury to any right of the complainant. It only harms when put in close connection with the imitative word "Honeycomb." In view of the court's doubts, and as the whole case may be changed upon final hearing, the temporary injunction will not be allowed except upon terms that the complainant give bond, conditioned according to law, with good surety, in the sum of \$10,000, and, if there should be any unusual delay in the preparation of the case by the complainant, the defendants will be permitted at any time to move to dissolve the temporary injunction.

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THOMSON-HOUSTON ELECTRIC CO. et al. v. NASSAU ELECTRIC  
R. CO. et al.

(Circuit Court, E. D. New York. June 4, 1901.)

PATENTS—SUIT FOR INFRINGEMENT—REOPENING TO ADMIT NEW EVIDENCE OF  
ANTICIPATION.

Where the existence of a foreign patent, alleged to anticipate the invention of complainant, is not discovered by defendant until after the close of a long and expensive litigation in which the validity of complainant's patent has been sustained, and it only remains to enter a decree, to that effect, but defendant has not been guilty of laches, and such foreign patent appears to be important and relevant to the issue, the court may reopen the case to allow it to be pleaded in defense, but will only do so on terms, as to the payment of costs and expenses, which will practically place the complainant in the same position it would have occupied had such patent been pleaded at the commencement of the litigation.

In Equity. Suit for infringement of patent. On motion to reopen case.

Betts, Betts, Sheffield & Betts (Frederic H. Betts and Samuel R. Betts, of counsel), for complainants.

Harding & Harding (George J. Harding and Richard Eyre, of counsel), for defendants.

THOMAS, District Judge. After an extended and expensive litigation in this and other courts, it has been determined that the complainants were entitled to enjoin others from infringing certain letters patent. Before the entry of such decree in this court the defendants made application to reopen the case upon the ground that a certain patent issued by the government of Austria was an anticipation of the complainants' main invention. The existence of such Austrian patent seems to have been absolutely unknown and without influence upon the complainants' alleged invention, and, notwithstanding most earnest and extended investigation by the defendants and persons acting in their behalf, the existence of such patent was not discovered until shortly before the present motion. The defendants ask that they may be allowed to set up and use such patent to

defeat the results of the long and expensive struggle in this suit, when in fact such patent should have been pleaded at the very out-start of the litigation; when, if as effective as now claimed by the defendants, it would have decided at once the complainants' status. Notwithstanding the very great hardship which must result to the complainants from allowing this patent to be pleaded, it is felt that it is so important and relevant to the issue that the application cannot be justly denied; but the complainants must be placed in the position in which they were at the time when the patent should have been interposed as a defense. Therefore the motion to reopen the case and amend the answer by setting up such patent is granted, provided the defendants shall give a bond in the sum of \$50,000, conditioned for the payment to the complainants of all moneys expended, whether taxable or otherwise, in the conduct of this suit, to the present time, including all counsel fees paid to the complainants' solicitors, attorneys, and counselors, and all fees and sums paid to experts, and all other necessary expenditure, which payment shall be made in case it shall be decided finally by this or any other court in this action that the complainants are not entitled to recover by reason of the Austrian patent which is now sought to be set up as a defense; and provided, further, that the defendants shall, within 30 days after the filing of this decision, pay to the complainants the sum of \$2,500 counsel fees, and stipulate to pay all the expenses of taking the evidence, both of the complainants and defendants, relevant or made relevant by reason of the answer amended as above, which counsel fees and expenses shall be independent of the sum secured to be paid by the bond. The particular form of the order to be entered herein and the form of bond will be settled with the court upon the application of the parties.

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THOMSON-HOUSTON ELECTRIC CO. et al. v. NASSAU ELECTRIC  
R. CO. et al.

(Circuit Court, E. D. New York. June 29, 1901.)

1. PATENTS—CONSTRUCTION OF CLAIMS.

The effort should be, in the construction of a patent, to ascribe a purpose to each claim, and to avoid a construction which would deprive a claim of a distinct purpose.

2. SAME—INFRINGEMENT—SWITCH FOR ELECTRIC MOTORS.

The Condict patent, No. 393,323, for a switch for electric railway motors, construed, and held valid and infringed as to claims 27, 29, 31, 21, 22, and 10, and not infringed as to claims 20, 28, 23, 24, and 30, but that claims 2 and 7 are invalid.

Supplemental Opinion. For former opinion, see 108 Fed. 244.

THOMAS, District Judge. The opinion recently filed herein reached the conclusion that the defendants infringed claims 27, 29, and 31, and there was reserved for further hearing the question whether there was infringement of claims 20, 21, and 22, 28, 2, 7, 10, 23, 24, and 30. Such hearing has been had, and the following conclusions result:

The language of claim 28 is precisely that of claim 29, save the following words in claim 29: "and means controlled by the motor switch for operating the resistance switch." In other words, claim 28 does not in terms provide for unitary control. But the complainants urge that the words "substantially as described" should be deemed a part of that claim, under the decisions of *Mitchell v. Tilghman*, 19 Wall. 287, 391, 22 L. Ed. 125; *Westinghouse v. Air-Brake Co.*, 2 Ban. & A. 55, 57, Fed. Cas. No. 17,450; *Matthews v. Shonberger* (C. C.) 4 Fed. 635, 639. But, if such words were supplied, claim 28 would not be infringed unless it were construed to have the precise meaning due to claim 29. In such case claim 28 would be an exact duplication of claim 29, and meaningless, within the decision of *Thomson-Houston Electric Co. v. Elmira & H. Ry. Co.*, 18 C. C. A. 145, 71 Fed. 396. The effort should be, in the construction of the letters, to ascribe a purpose to each claim, and to avoid a construction that would deprive a claim of a distinct purpose. It may be that claim 28 has an independent use, and that under some other state of facts its applicability would appear. Therefore, while there may be propriety in supplying words, nothing may be gained in the present case by adding the words indicated. It is sufficient to determine that claim 28 is not infringed by the defendants, and to leave it to fulfill on other occasions such purpose as the patentee may have intended by the language employed by him.

Claims 21 and 22 have reference to the conception stated in the following language in the specification:

"It is also evident that while the motors are coupled in a given manner a slight movement of the switch will have the effect of cutting in or out one or more of the resistances, Y, and thereby provide an additional means of regulation where slight variations in the speed or power of the motors are required."

The obvious intention was to provide means for regulating the speed and power of the motors where the combinations described in 27, 29, and 31 are employed. Under such an interpretation claims 21 and 22 are infringed, but claim 20, while providing for means of varying the power of the current flowing through the motors, is similar to claim 28, in this: that it does not provide for the unitary control which is essential to the validity of claims 27, 29, and 31. Claim 20 might be construed with reference to the specifications to relate to such combination. But, if that construction were adopted, claim 20 would have the same meaning as claim 21, and would be superfluous. There is no occasion for so limiting claim 20. The fact that claim 21 in *hæc verba* makes the proper provision excludes the propriety of such construction. Hence it is sufficient to conclude that claim 20 is not infringed.

The next group to be considered is that including claims 2, 7, and 10. Claim 10 provides for a specific mechanism, which is infringed by defendants' controller No. 1. There is no evidence as to the specific mechanism of other controllers of the defendants upon which a decision can now be predicated. It is sufficient, therefore, to limit the infringement of claim 10 to all controllers so similar to No. 1 in construction as may come within the scope of the present holding.

It is questioned whether claims 2 and 7 of this group are broad enough to fall within the condemnation of Thomson-Houston Electric Co. v. Lorain Steel Co. (C. C. A.) 107 Fed. 711. It is unnecessary to discuss the process of reasoning by which the conclusion is reached that claims 2 and 7 cannot be sustained by reason of the holding of the appellate court. In neither claim is there a new element, nor does the union of the parts described result in any new function or mode of operation.

It is further thought that claims 23, 24, and 30 are not infringed by defendants, even if such claims may be sustained, in view of the prior art. The invention is a very narrow one. Claim 30 provides:

"The combination of two motors, a source of electric power, a motor circuit, a switch for coupling the coils of the motors in series or multiple to vary their internal resistance, and a switch to cut either of said motors out of circuit without impairing the operation of the switch."

What is the meaning of the expression "without impairing the operation of the switch"? It is thought that it was the intention of the patentee to state that the employment of the cut-out switch does not prevent the motor switch from coupling the coils of the motors in series or in multiple, to vary their internal resistance. But the defendants contend, and it is thought justly, that when their controllers cut one motor from the circuit they can only control the remaining motor by external resistances, and that the only switch corresponding to the complainants' switch mentioned in the claim is thereby rendered ineffective; while, on the other hand, when Condict cuts out the motor he cuts out the external resistance also. It is understood that Nassau controllers Nos. 3 and 4 alone may infringe claims 23 and 24. These claims call for a controlling switch, and, among other elements, they demand an independent switch to cut one of the motors out of operative circuit. But the defendants use a single switch, which both combines the means of reversing and of cutting out either motor. In addition Condict cuts out the motor by short-circuiting it, while the defendants cut out the motor by disconnecting both its terminals. There is at least sufficient dissimilarity in the devices employed by the complainants and defendants to differentiate the means of effecting the desired result to justify the conclusion already stated, that infringement is not proven. It results that there should be a decree adjudging the validity and infringement of claims 27, 29, 31, 21, 22, and 10, and the noninfringement of claims 20, 28, 23, 24, and 30, and the invalidity of claims 2 and 7.

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WALKER PATENT PIVOTED BIN CO. et al. v. BROWN et al.

(Circuit Court, E. D. Pennsylvania. July 20, 1901.)

No. 17.

PATENTS—INVENTION—TILTING BIN.

The Walker patent, No. 614,279, for a bin, describes a swell-front, counterbalanced, tilting bin for merchandise, which was not anticipated, being an improvement over those of the prior art both as to the counterbalancing of the bin and the utilizing of space in the supporting frame,

and the combination of such features produced a new type of bin of superior utility, and shows patentable invention. Also held infringed.

In Equity. Suit for infringement of patent. On final hearing.

Ernest Howard Hunter, for complainants.

E. H. Fairbanks, for respondents.

ARCHBALD, District Judge.<sup>1</sup> If the plaintiffs' bin is a patentable invention, in view of the prior state of the art, it is conceded that there has been an infringement; and the concession is not a large one, for the bin constructed by the defendants so exactly reproduces its controlling features that one has to look closely to discover any difference between them. It is found in two unimportant particulars,—with regard to the axis of the bin and the display partition; at most mere details of construction, in which, in the matter of simplicity, the defendants may have somewhat improved upon the plaintiffs, without relieving their bin, however, in other respects from its infringing character. The utility of the invention may also be regarded as confessed by the studied imitation of it which we find. The only question, therefore, is whether the patent has been anticipated.

The patentee, in his specification, declares, with regard to his invention, that it "relates to pivoted or tilting bins, having for its object the provision of means to facilitate the operation of such bins, as well as the utilization of a certain portion thereof for the display of merchandise." "Broadly speaking," says he, "my invention comprises a bin mounted in a casing structure so as to be pivoted at the front edge thereof, said bin having a swell front projecting beyond the normal front of said supporting structure. As hereinafter described, said swell front may be provided with a false front beneath a glazed opening in the former, and a space be thus provided for the display of merchandise as aforesaid." Its limits are recognized in the following disclaimer:

"I am aware that it is not broadly new to construct a tilting bin so that a portion of its contents shall be upon each side of a vertical line extending through the axis of its rotation; but, as far as I am aware, such construction is limited to devices of the class shown in United States letters patent No. 209,936, granted to W. H. Stewart on November 12, 1878. Such a construction is obviously not adapted for the embodiment which I have illustrated, for the reason that its axis of rotation occurs some distance within the supporting structure. If its axis is shifted to a position at the front, \* \* \* then such a bin becomes of the type illustrated in United States letters patent No. 222,640, granted to A. K. Potter on December 16, 1879."

But the intended differentiation from the prior art is better illustrated in the declaration made by the patentee at the time of his final application:

"It is submitted," as it is there said, "that applicant's type of bin is essentially different from the bins disclosed by the prior art, which are not of his invention, in that the axis of oscillation of his bin body is located at the extreme front edge of its supporting casing. Such a location \* \* \* permits the use of a bin which is of dimension equal to that of the chamber in which it is mounted. Referring to Moses and Burgett, of record, it will

<sup>1</sup> Specially assigned from Middle district of Pennsylvania.

be seen that the location of the axis of oscillation of said bins within the supporting casing or chamber, instead of at the front edge thereof, necessitates the loss of considerable space at the bottom of the bin chamber to permit of the forward movement of the bin body; the amount of space thus wasted being determined by the angular relation of the bin to the casing at the extreme limit of its movement. When said bins are mounted tier upon tier, as is usual in store structures, such a loss is not only disadvantageous from an economical standpoint, but also renders such construction undesirable by reason of the unsightly opening aforesaid beneath the bin for the accumulation of dust and fragments of merchandise. Applicant has limited his claims filed herewith to his peculiar type of bin differentiated from the prior art by the location of its pivotal connection with its supporting structure as aforesaid. This particular feature of location of the axle [axis] of oscillation of the bin was disclosed by applicant in his prior patent (Walker, of record). As shown in Fig. 3 of said patent, however, no provision was made for counterbalancing the bin body. Therefore the depth from front to rear of that form of bin was limited by the necessity for maintaining the center of gravity near the pivotal point; for, if not so located, the bin fell into closed position, when released by the operation, with such a jar as to discharge some of its contents within the bin chamber. To overcome this defect, applicant devised the subject-matter of his present application, wherein all the advantages of the location of the axis of oscillation at the front of the structure are retained, and the bin body is counterbalanced by a swell front. \* \* \* It is submitted that applicant has not sought to cover broadly a counterbalancing bin, for such bins are well known in the art; nor has he sought to claim broadly a display front upon a tiltable bin, although it appears from the record that such construction is novel with him. On the contrary, the claims herewith presented are limited as aforesaid to a particular type of bin, and to a combination of elements present in said particular type which cannot be found in the references of record."

By these somewhat extended extracts it is established that the patentee, at the time of applying for the patent in suit, conceded that there was no novelty in a tilting bin,—such, for instance, as the Stewart (1878), the Potter (1879), the Burgett (1885), the Hardenbergh (1886), and the prior Walker (1895); nor yet in one that was counterbalanced,—such as the Stewart, the Burgett, the Hardenbergh, and the Carr; nor did he put especial stress on the display front, although laying claim to the novelty of it in combination with the other features. The whole invention to which he seems to have addressed his mind consisted in a peculiar type of the bins referred to, wherein, by means of a swell or incline front, and the location of the axis of oscillation at the extreme point of the supporting casing, a much more perfect counterbalancing of the bin was brought about, at the same time that the whole capacity of the bin chamber was utilized. As an incident of the incline front, he also recognized the possibility of an advantageous display of the contents of the bin, where that was desired, by means of a glazed panel, and partition back of it, either or both. Was this new, and did it involve an exercise of the inventive faculties such as the patent laws are designed to protect? After a careful consideration of the several previous patents put in evidence, I am satisfied that it did. What the patentee produced—to express it in a phrase—was a swell-front, counterbalanced, tilting bin. In form it certainly differs from anything that had preceded it, and it is in its form, and what is accomplished thereby, that its virtue as well as its novelty consists. Progressively con-

sidered, a tilting bin was an improvement on one that was stationary; and one that was counterbalanced was an improvement again on one that was not. Thereafter the development of the art would lie along the line of perfecting the counterbalancing as well as introducing and adding other advantageous features. Not only to prevent a shifting of the contents, but to make the bin easier to handle, the better the counterbalance, the better the bin; in fact, in this constitutes its real utility. The Stewart (1878) was an improvement in that direction, as well as the Burgett (1885), and the Hardenbergh (1886), which copied it; but what these inventions gained in counterbalancing they lost in another respect. In each there had to be a space left under the bin in which it could tilt forward, and, considering the uses to which such structures are put, the loss of space which this involved was considerable of a detriment. Now, it is just here that the plaintiffs' patent doubly comes in. By throwing the face of the bin forward in a front which swells out from the supporting casing, opportunity is given to locate the axis of oscillation back of a material portion of the contents of the bin, thereby preserving and improving upon the counterbalancing of previous structures, at the same time that the space at disposal is carefully economized by the bin being made to occupy to its full the inclosing bin chamber. It seems to me that this is improvement as well as invention, and is not anticipated by anything in the prior state of the art. The patentee has, as he claims in his application, produced a new type and style of tilting bin, in which he is entitled to be protected. So the patent office thought in granting him a patent, and that action should be allowed a certain weight. It is true, the patent seems to have been granted solely upon the strength of the inventor having utilized the entire space of the inclosing chamber; but this does not prevent us from giving due force to the improvement attained in counterbalancing as well. Nor, on the other hand, can this be characterized as a mere matter of dimension, not patentable. It was the remedying of a defect in this respect found in previous attempts, which involved real invention.

But it is urged that all the essential features of the complainant's patent are present in the Carr (1892), and it is confidently asserted that the latter must have escaped the attention of the patent examiner, or the patent would not have gone out. To this I cannot agree. It is true that, as part of the kitchen cabinet devised by Carr, we find a lower compartment, provided with a tilting, counterbalanced bin, which has an inclined or sloping front; but the similarity so suggested is one of terms merely, rather than of fact or effect. Properly analyzed, the Walker has no more the features of the Carr than it has of other tilting and counterbalanced bins to which reference has been made. The face of the Carr bin inclines forward from the axis, and not back, which makes a material difference in its character and results. In no sense has it the swell front such as is found in the Walker, nor is the counterbalancing effected in the same way. In the Carr the main bottom of the bin is inclined upward at the back, so as, in opening the bin, to throw the contents in the opposite direction; but this is counteracted again by the false bottom in front,

which works the other way, making the counterbalance very imperfect, and ineffective. Just the opposite of this is true in the Walker. As soon as the bin is tilted forward, the contents at once incline in that direction, sliding into the angle of the swell front, and tending to divide themselves evenly on each side of the axis of oscillation. Such an improvement in counterbalancing would itself, as it seems to me, be patentable, without more. But a still greater contrast is found when we come to the matter of economy of space. In the Carr, the same as in other preceding structures, there is a decided loss of it. By the false bottom in front and the sloping bottom back of it fully as much is thereby sacrificed as in the Stewart, the Hardenbergh, or the Burgett; while in that before us the whole bin space, as we have seen, is substantially utilized. So that we find with regard to the present invention, in contrast with the Carr, the same advance in the art as we did as to the others enumerated; and, if they presented no obstacle to its being patented, neither does it.

So far we have considered the patent in suit without regard to display; but the peculiar advantages afforded by a swell front, where display is desired, did not escape the inventor, and are not to be lost sight of by us. The general features of the invention are covered by the first claim of the patent, which is intended to apply to every case where a bin is employed of the character described, whether there is an attempted display of its contents or not. The second, third, and fourth claims cover the superadded matter of display. Of these the second provides for a simple panel of glass in the face of the bin; the fourth has the glass with a partition back of it, to hold up to it a portion of the merchandise displayed; while the third has a partition without a glass, the utility of which I fail to appreciate. How far, then, do these specifications add to the character of the invention? No doubt the use of a glazed front to display the contents of a box or bin is not new; nor does it acquire novelty by being inclined backwards; nor yet, by having a partition back of the glass, to hold in place the goods displayed. All of these features are found in the Rosenberg patent (1895), if, indeed, they were not long since in common use. But what is claimed for them here is that they are new in combination with the other predominating features of the complainant's bin. A bin where the contents can be known at a glance would seem to be an advance on one where they cannot; and one whose front inclines upward to meet the eye would seem, therefore, to be a material improvement on one where the front, being perpendicular, requires a bend of the head, and a corresponding additional effort, to know what is in it. The advantage may be slight, but it is such that no one would hesitate to choose between the two. Now, it is the combined effect, successfully accomplished in this direction in the complainant's patent by the swell front operating in conjunction with the glazed panel inserted in it, and the partition back of that, all working effectively to the same end, that constitutes, as it is claimed, the novelty of this part of the patent. But, while this has the appearance of merit, and the result attained may seem to involve invention, I must confess that I am not so clear on this branch of the case as I am on the rest of it. While it is true that there is, to a



certain extent, a combined effect brought about by the special features alluded to, by which a more desirable style of bin is produced than if the display was not provided for, yet the means employed are so common, and, when closely analyzed, stand so much in the light of a superadded incident,—an aggregation, rather than a combination,—that I am inclined to regard them as contributing nothing to the novelty or patentability of the whole. This conclusion, however, does not affect the general result. The peculiar type of bin which the inventor devised is patentable without this, and it is therefore patentable with. The invention stands where, I think, the inventor intended and understood that it would stand,—on the general features of his bin,—and there I will let it rest. Let a decree be drawn sustaining the bill and ordering an account as prayed for, with costs.

**THOMSON-HOUSTON ELECTRIC CO. v. LORAIN STEEL CO.**

(Circuit Court, S. D. New York. August 1, 1901.)

**1. PATENTS—ANTICIPATION—ESTOPPEL.**

The fact that, on the citation by the patent office of a prior foreign patent as an anticipation, the applicant relied solely on the ground that such patent was not an anticipation of his invention, does not estop him, when the foreign patent is pleaded in defense to a subsequent suit for infringement, from carrying the date of his invention back to antedate such patent.

**2. SAME—PRIOR PUBLIC USE.**

The inventor of a commutator brush for use on electric motors, more than two years prior to his application for a patent, used a brush having the essential features of that described in the patent on a motor used to propel a car or carrier with which he was experimenting, and which was run at intervals during several months along a cable stretched over a vacant lot adjoining his factory in a city, and was exhibited to visitors. The experimenting had relation to the car, and not to the brushes. *Held* that, as to the brushes, it was a practical public use which rendered the patent invalid.

**3. SAME—COMMUTATOR BRUSHES.**

The Van Depoele patent, No. 390,921, for an improvement in commutator brushes or contacts, the essential feature of which is the use of carbon as the material for such brushes, *held* void for prior public use.

**In Equity.** Suit for infringement of the first claim of letters patent No. 390,921, issued to Charles J. Van Depoele October 9, 1888. On final hearing.

Frederick P. Fish and Kerr, Page & Cooper, for complainant.  
Richard Eyre, for defendant.

**LACOMBE**, Circuit Judge. The specification states that the "invention relates to improvements in commutator brushes or contacts for use with dynamo-electric generators and electro-dynamic motors. In the operation of electric motors, it is desirable for various reasons to use a thick brush or contact, held by suitable mechanism in position tangential to the surface of the commutator; that is, projected endwise against it. [Concededly the word "tangential" is a misuse for "radial," which the context shows was intended.] In

these positions the brushes may be moved around the commutator to any desired position without in the least affecting their mechanical relation thereto, and it has been usual to use thick bunches of thin copper laminæ, secured together at their outer ends, for this purpose; but I find in practice that the leaves of brushes so constructed will get into the interstices or separations between the sections of the commutator, by the rotation of which the leaves of which the brush is composed will be gradually bent outward and away from each other, and so in a short time rendered useless. This difficulty I have overcome by substituting for the copper contact brushes heretofore used brushes or contacts of carbon or other nonhomogeneous substance, which, being porous, will in a short time take up a quantity of copper dust and form a smooth wearing face that is extremely durable." After a reference to the drawings the specification proceeds:

"My improved brushes consist of plates or pieces of carbon shaped to fit loosely within the boxes or holders where they are placed, and then securely held in position against the commutator by the tension of suitable springs, to be referred to. The carbon brushes or contacts, A, may be of any desirable length or shape, according to circumstances; the particular shape and size or proportion herein shown being merely for the sake of illustration. The lower ends of the brushes should be formed or molded to fit the surface of the commutator; the subsequent wear being sufficient to retain the shape originally given."

After setting forth the details of the boxes, or holders, with their springs, etc., the specification concludes:

"In order to reduce the resistance of the carbon brush to the minimum, the boxes, CC', are brought down very close to the surface of the commutator; and, should the small resistance then remaining be a disadvantage, the brushes themselves can be plated with a good conductor, and all objection thus removed. I do not limit myself to the use of carbon alone, as any non-homogeneous or porous hard conducting substance will answer the purpose and come within the scope of my invention."

The first claim, alleged to be infringed, is:

"(1) The combination, with a commutator cylinder formed of separated insulated segments, of commutator brushes bearing upon the surface thereof, and formed of carbon or other similar unyielding material, and of a width greater than the distances between the commutator segments, substantially as described."

Four other claims, not alleged to be infringed, deal with details of holders, springs, etc. The only one in controversy here is the first or broad claim for the use of "carbon" as a commutator brush. In view of the conclusion which has been reached, it will be necessary merely to allude briefly to some of the arguments which have been advanced on behalf of the defendant.

It is contended that the patent should be construed as calling for some peculiar kind of carbon, which will hold copper dust, as felt does rouge. This seems to be a very strained construction. Van Depoele, anxious to cover all possible equivalents, announced his invention as covering other similar unyielding material,—“any non-homogeneous or porous hard conducting substance.” But apparently he did not know of any other than carbon, nor so far as the record shows has any since been found. He found that the hard brittle

carbon of the art would in operation "form a smooth wearing face that is extremely durable." He had the idea that in some way or other this effect was obtained by copper dust worn off the commutator and taken up by the pores of the carbon. It makes no difference whether this idea of Van Depoele was correct or not. He has not made it a part of his invention. Carbon is a broad word. It may be used to include a diamond or soot; but according to all the canons of patent construction it must be here taken as meaning the carbon known at the time to electricians under that name,—the ordinary carbon of the art, such as was employed for the pencils of arc lamps, for battery plates, for rheostats or artificial resistances, and other similar electrical purposes. It was made up of some variety of coke, either from petroleum or bituminous coal, the structure of the material being agglomerate; that is, it is practically numerous particles cemented together, leaving pores between the particles, but not large openings. The improvement of the patent may be obtained by the use of just such carbon pencils or blocks; and, inasmuch as the inventor does not indicate that the functions discharged by the new brush are to be secured by the use of some peculiar variety of carbon not then used in the electrical art, there is no ground for thus confining his patent.

Leaving out of consideration for the moment a British patent (1,288 of 1885, to Forbes), the question of anticipation in the prior art as disclosed by patents may be briefly dismissed. No reference shows the combination of a commutator cylinder formed of separate insulated segments with commutator brushes of carbon wider than the distances between the segments. Separate insulated segments were old, solid brushes were old, wide brushes were old, radially applied brushes were old, and carbon applied to many uses was old; but the history of the difficulties attending the use of the earlier brushes, of the long period of discouragement during which persons skilled in the art and familiar with the many uses carbon subserves in that art, were striving ineffectually to overcome those difficulties, and of the prompt and almost universal acceptance of the solution offered by the carbon brush of the patent, shows clearly the existence of patentable invention sufficient to sustain the patent to the full breadth of the first claim.

Allusion has been made to British patent 1,288 of 1885 to Forbes. This antedates the patent in suit, for which application was filed February 8, 1887, renewed September 7, 1888, and patent issued October 9, 1888. A publication, "Thompson's Dynamo Electric Machinery of 1886," which referred to the device shown in the Forbes patent, was cited by the patent office against Van Depoele's application. Such a reference could, of course, be disposed of in one or other of two ways,—either by carrying back the date of invention for which patent was requested, or by satisfying the patent office authorities that the reference could be differentiated from the invention of the American applicant. Van Depoele's counsel chose the latter course, and succeeded in convincing the examiner that no part of the field covered by the first claim of the patent in suit was occupied by Forbes. Defendant contends that the patentee is now es-

topped from showing that he perfected his invention before the date of the Forbes patent. It is difficult to see why this should be, and in the absence of any authority to sustain such contention it cannot be accepted.

By stipulation of counsel the effective date of the Forbes British patent for anticipatory purposes is fixed as October 28, 1885. Aside from all other early uses by Van Depoele of his invention, the record shows a sale to the Rockford Air Brush Company of Rockford, Ill., of a small motor on which carbon commutator brushes were placed. Upon the oral testimony there is dispute as to whether this sale was in 1884, 1885, or 1886; but finally the shipping book was produced, showing shipment on September 21, 1885. The book was produced from the proper custody, was proved as a book of original entry, and a careful examination fails to disclose anything suspicious about it. The year is not entered on the page containing this entry, nor on some pages preceding and succeeding; but it is manifest that the entries at the tops of the pages were made continuously, and that this was in 1885. Lower down on the same page is an entry of 1887, but it is of a shipment to a new customer. Evidently the page was kept open for further shipments to the Rockford Company, until it became apparent that they were to buy no more. The evident intention was to give each customer a page, which accounts for dates in November and December appearing on an earlier page. Upon the proof there can be no doubt of this sale in September, 1885, nor that it was a reduction to practice such as would antedate Forbes; and this brings us to a branch of the case to which most of the proof has been directed.

Defendant's main defenses are an earlier use by Bottomley in Philadelphia, a similar one by Nolen in Toledo, and a public use by Van Depoele himself more than two years prior to the publication of the patent by filing application, February 8, 1887. The adverse uses need not be discussed, since the conclusion arrived at upon consideration of the evidence as to the patentee's own acts disposes of the case. The concrete question presented is this: Did Van Depoele prior to February 8, 1885, make a public use of the invention of the patent,—a use in an open way, which use was not experimental? This involves two inquiries: First, as to what he did; second, as to when he did it.

The evidence—complainant's evidence—shows that Van Depoele conceived the invention at least as early as 1881, when in his factory he used an arc light plated carbon, from which he had filed some of the plating, as a brush, and the machine ran successfully for an hour and a half. Van Depoele was dead when the record was made in this cause, and quite naturally the evidence of his proceedings from that time is somewhat fragmentary. It may be noted preliminarily that what the patent describes (so far as the first claim is concerned) is simply the use of just such a carbon in just such a way, and that arc-light pencils, or cut-up battery plates of the carbon then known to the art, will act, and act efficiently, in combination with the segmental commutators of the art as it was in 1881. If the patent is to be construed as it is construed supra, there would not seem to be

much room for experimentation beyond the use of 1881. Of course, if the carbons of that period were unsatisfactory, and the inventor were struggling to find some modification of their constituents, surface, structure, or application which would make them more efficient, and, having found it, claimed it, his experiments might have continued for years prior to such discovery. But when the invention claimed is the invention practiced experimentally in the patentee's own shop six years before, subsequent uses open to the public view will be most carefully scrutinized. Testimony of various persons who worked with him shows various uses of carbon brushes subsequent to 1881, which need not be discussed; and also two uses in 1885. As the complainant's brief expresses it (and the proof warrants the statement):

"In July, 1885, he made a successful practical public use of the invention in connection with a public lighting plant at Cheltenham Beach, near Chicago, and in September, 1885, in the ordinary course of business, sold a motor equipped with carbon brushes."

There was nothing peculiar about the carbons in these machines. In the Cheltenham Beach case the "carbon brush was sawed out of a battery carbon that was half an inch thick." In the Rockford case "the carbon brushes were made of a strip of spring copper, and on the end was a piece of round plated carbon from an arc lamp and soldered to the end of the strip." The evidence does not show a use at Cheltenham for more than a week. Still during that time the combination of commutator and carbon brush, which the claim covers, was in practical, substantial public use. There is no evidence of any use of the Rockford machine; but, as there was no complaint made about it, we may infer it worked so far as the patented combination is concerned. These two uses are within the two-year limit. They antedate Forbes, but do not work an abandonment under the statute.

Still another use by Van Depoele is proved. The complainant first introduced it in evidence, contending that it occurred in the summer of 1885. It is known as the "Telpher Use." Van Depoele conceived the idea that it would be a good thing to convey ore from one mountain top to another by means of a car slung on a cable, operated by electricity, and arranged so as to reverse automatically. Adjoining his factory at the corner of Franklin and Van Buren streets, Chicago, was a vacant lot extending to Market street, a distance something less than 400 feet. In order to experiment with this new system of transportation, he had cables erected across this empty lot some 15 to 20 feet above the ground. On one of them there was a car suspended, in which was a motor, started by a generator in the factory. There was on the car an automatic reverser, which struck against a projection at either end of the line, reversing the brushes, and causing the car to start back. All the witnesses concur in the statement that this apparatus remained there for many months. Sometimes the car would be covered up, perhaps for weeks at a time. Then Van Depoele would run it up and down for half an hour or an hour. Whenever there were visitors around, he would show it to them. The man who helped to put it up, a witness called by complainant, testified: Originally there were copper brushes on

the motor. When it was put up, he got in the car, and started from the Franklin street side. When he got to the other end, the car stopped, and upon investigation he found that reversal had bent over the end of the brushes, which were thus out of contact with the commutator. The next day Van Depoele gave him two small copper brush holders, in which were ordinary electric light carbons. These he substituted for the copper brushes, and thereafter sat in the car, and ran it about four or five weeks, whenever there were visitors to the works. There was no further trouble. He ran it ten or fifteen minutes at a time. It always worked well, and equally well in both directions. One day, however, the wheels jumped off the cable, an accident in no way connected with brush or commutator, after which witness declined to ride in it. There is no dispute on the proof as to what this use was. As to a system for overhead electrical transportation it was experimental, but as a use of carbon brushes in combination with a segmental commutator on an electric motor it was a substantial public use. Speaking of this very use, at a time when the evidence seemed to indicate that, while antedating Forbes, it yet fell within the two years, complainant's expert says:

"It was a practical use of the invention, since the motor was used occasionally to propel the car in connection with the experiments on the cable system, which the apparatus was intended to embody."

This statement is entirely accurate. What, then, is the date of the beginning of the "telpher use"? for the evidence of the first operator shows clearly a successful use of carbon brushes within the first four weeks of the cable experiments. Crot, this first operator, gave the date as the summer of 1885, adding he began work at the factory in the fall of 1884. Subsequently he corrected the date of his arrival at the factory to March, 1884. Verstraete, one of complainant's witnesses, thinks it was 1883; says the cable system was a long time in the empty lot; may have been there up till 1884. McLaughlin, another of complainant's witnesses, says it was operating in 1884; that it was up there a long time; he thinks until 1885. Elsewhere he says he had seen carbon brushes used from 1883 to 1886,—one on a four-light machine in the factory six to eight months before the Cheltenham plant was installed, which he thinks "would be the winter of 1884-1885." Evidently his recollection as to dates is good, for the books show the Cheltenham plant was installed in June, 1885.

This witness says he is not sure as to dates of the "telpher use," but is sure it "was one of the earlier experiments." This would seem to indicate it was earlier than Cheltenham. McGhie, another of complainant's witnesses, says the suspended cable system was taken down in July or August, 1886, and moved over to the new factory, but not put up again, and that it had remained up in the neighborhood of a year and a half, which would bring it to January, 1885. Birtman, another of complainant's witnesses, says it was standing when they moved, which he says was May or June, 1886, and that the car and cables remained suspended over the vacant lot "a year or a little over." McDougall, one of defendant's witnesses, says that the car and cables were in operation in the fall of 1884. McKenzie, another of defendant's witnesses, puts it in 1883 or 1884.

The strong preponderance of all this evidence is to the effect that the first three weeks' use of the motor in this car, which car was used in the telpher experiments, was prior to February 8, 1885, and thus beyond the two years. Like all such evidence, however, it is somewhat unsatisfactory, being individual recollections of long-past dates, unchecked by any record evidence. Another witness, however, Archer, called by defendant, kept a diary, in which he recorded such important matters as change of residence or employment, receipt or disbursement of money, etc. The diary is produced, and there is nothing suspicious about it. The witness was twice employed by the Van Depoele Company. The first time he was in their employ he remembers distinctly seeing the suspended cables and car. The second time it was no longer there. He is not familiar with the details of its construction, and does not know what brushes it used; but that is immaterial. Other witnesses—complainant's own witnesses—tell us that. It appears by Archer's diary that he first came into the employ of the Van Depoele Company at Chicago in January, 1884, and remained with it until March 25, 1884, when he left and went to Rockford, Ill., in the employ of another company. He did not return to the Van Depoele Company until 1886. It seems impossible to escape the conclusion that the open and public use of carbon brushes on the motor in the "telpher system," testified to by Crot, was prior to February 8, 1885; and since, for the reasons above stated, it cannot be held to be experimental only, such use more than two years before application will defeat the patent. The bill is dismissed, with costs.

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#### EDISON v. AMERICAN MUTOSCOPE CO.

(Circuit Court, S. D. New York. July 15, 1901.)

##### 1. PATENTS—AMENDMENT OF APPLICATION—INSERTING NEW CLAIMS.

The fact that the original application for a patent contained only claims for the method of producing an article does not preclude the applicant from introducing by amendment claims covering the apparatus by which such method is carried out, as well as the product, where both the apparatus and product are described in the specification and constitute a part of the actual invention; and a patent issued on the amended application is not invalid as to the apparatus and product because they were in public use and on sale more than two years before the amendment was filed.

##### 2. SAME—ABANDONMENT.

Where an inventor has filed more than one application for a patent covering the same invention, his permitting one of such applications to lapse does not constitute an abandonment.

##### 3. SAME—INFRINGEMENT—KINETOGRAPHIC CAMERA.

The Edison patent, No. 589,168, for a kinetographic camera, claims 1, 2, and 3, were not anticipated and are valid. Claim 5, which covers a tapelike photographic film having thereon a series of photographs of successive positions of an object in motion, is also valid, being for a thing previously unknown, and is not limited to the product of the particular apparatus described in the prior claims. All of said claims also held infringed.

In Equity. Suit for infringement of patent. On final hearing.

Richard N. Dyer, Frederick P. Fish, and S. O. Edmonds, for plaintiff.

Thomas B. Kerr and Parker W. Page, for defendant.

WHEELER, District Judge. This suit is brought upon letters patent No. 589,168, dated August 31, 1897, and granted to the plaintiff upon an application filed August 24, 1891, for a kinetographic camera. In the specification he says:

"The purpose I have in view is to produce pictures representing objects in motion throughout an extended period of time, which may be utilized to exhibit the scene including such moving objects in a perfect and natural manner by means of a suitable exhibiting apparatus. In carrying out my invention I employ an apparatus for effecting by photography a representation suitable for reproduction of a scene, including a moving object or objects comprising a means, such as a single camera, for intermittently projecting at such rapid rate as to result in persistence of vision images of successive positions of the object or objects in motion as observed from a fixed and single point of view, a sensitized tapelike film, and a means for so moving the film as to cause the successive images to be received thereon separately and in single-line sequence. The movements of the tape film may be continuous or intermittent, but the latter is preferable, and it is further preferable that the periods of rest of the film should be longer than the periods of movement. By taking the photographs at a rate sufficiently high as to result in persistence of vision, the developed photographs will, when brought successively into view by an exhibiting apparatus, reproduce the movements faithfully and naturally."

He then describes a camera in which the film is wound from one reel to another intermittently past the lens, between which and the film a disk perforated near the edges revolves, bringing the apertures between the lens and the film when the latter is at rest, and the solid part between them when it is in motion, producing successive exposures, by which photographs of moving subjects may be taken, at equal distances, in a line, upon the film, with great rapidity, up to 46 per second, which may be so reproduced in the same order as to present by the persistence of the eye an illusion of the subjects in such motion. The claims are for:

"(1) An apparatus for effecting by photography a representation, suitable for reproduction, of a scene including a moving object or objects, comprising a means for intermittently projecting at such rapid rate as to result in persistence of vision images of successive positions of the object or objects in motion, as observed from a fixed and single point of view, a sensitized tapelike film, and a means for so moving the film as to cause the successive images to be received thereon separately and in a single-line sequence.

"(2) An apparatus for taking photographs suitable for the exhibition of objects in motion, having in combination a single camera and means for passing a sensitized tape film at a high rate of speed across the lens of the camera, and for exposing successive portions of the film in rapid succession, substantially as set forth.

"(3) An apparatus for taking photographs suitable for the exhibition of objects in motion, having in combination a single camera and means for passing a sensitized tape film across the lens of the camera at a high rate of speed and with an intermittent motion, and for exposing successive portions of the film during the periods of rest, substantially as set forth."

"(5) An unbroken transparent or translucent tapelike photographic film, having thereon equidistant photographs of successive positions of an object in motion, all taken from the same point of view; such photographs being arranged in a continuous straight-line sequence, unlimited in number save by the length of the film, substantially as described."



The invention appears to have been made in the summer of 1889, and this is not disputed. The devices do not appear to have been in public use or on sale in any way prior to August 24th of that year, or two years before the application. But in the original application the claims were all for the method of producing successive photographs of moving objects in a line upon the film, and not for the means or the combination of means of this production, or for the product; and the claims for these devices were not made till 1896, when they were brought in by amendment. This amendment is said to be the real application for them. They had been in public use and on sale much more than two years prior to that time, and the right to a patent for them is claimed to have been thereby barred. The invention of the things, as well as of the method, was at all times, however, described in this application, and the amendment changing the claims to correspond with the different phases of the invention seems to have been well within the lawful power, discretion, and practice of the patent office. The application went by appeal from the rejection on references by the examiner to the examiners in chief. As to this they said:

"It was urged at the hearing that this application as originally presented contained only method claims, and that a patent granted thereon might be subject to attack, as being for a different statutory class of invention from that originally presented. But it is entirely clear that the invention as now claimed is precisely the same invention as that originally disclosed and claimed. The applicant has made a mistake in claiming the manner of use of his apparatus, instead of claiming the apparatus itself, and has an indubitable right to correct that error."

So this change of claims had the full approval of the patent office, and it was thereby made as valid as any action there could make it. An accompanying application, covering the same things, appears to have been permitted to lapse, by withdrawal from prosecuting it against opposition, from which an abandonment in law is claimed to have followed; but while there could be more than one application, either of which might result in a patent for the same thing, there could be but one patent for that thing, and all of those applications but one would have to be disposed of in some other way, and while this one remained there would not seem to be any abandonment in law for what that would cover. The examiners in chief stated the references, on which the claims appealed had been rejected, to have been M. Marey's phenakistoscope, described in an article reprinted in the *Scientific American Supplement*, June 10, 1882, entitled the "Photographic Gun"; the patent to Le Prince, No. 376,247, dated January 10, 1888; and an article by one Levison on "Amateur Photographers," in the *Brooklyn Eagle* of June 14, 1888. The phenakistoscope of M. Marey appears to have been considered an anticipation of the method, and the others, for reasons well founded and stated, not to have been anticipations of the devices, and new forms of the claims were suggested as allowable, which became those now in question. A great number of prior patents and publications, including those mentioned and a French patent and certificate of addition thereto to L. Ducos of 1864, have been set up in the answer, and learnedly described and compared with

the patent in suit in the evidence. After much discussion of all, the expert of the defendant appears to reach the conclusion that Le Prince, Marey, and Levison as nearly disclosed the invention of the first three claims, and Ducos in his certificate of addition as nearly that of the fifth claim, as any. Le Prince's devices appear to have been put into successful use to some extent, but that and all the others had such limitations and defects that the examiners in chief seem to have been well warranted in saying:

"This application thus presents the first complete disclosure of an apparatus by which can be produced a series of photographs on a continuous film, by the use of which a reproduction of an animate scene may be obtained."

The sensitized tapelike film is an element of the combination of each of these first three claims, and no combination without it could be the combination of either of them. It was not known, nor in existence, till about the time of this invention. This patentee did not invent it, but manufacturers produced it. Others are said to have been ready for it, but he was the first to use it in a practicable way in these combinations in any machine producing this result. All, including the defendant's expert, appear to agree that he made a contribution to this art, and that which he made appears to have been a last step that counted. That the illusion of moving pictures could be produced by rapidly taking images of subjects in motion, and rapidly exhibiting them in the same order, was well known and understood before this invention, and many contrivances had been made for accomplishing this result, but none of them had these devices operating together in the same way. He did not invent the lens, nor the camera, nor the sensitized tapelike film, nor instantaneous exposure, nor discover the persistence of the eye; but he appears to have invented means for taking the film before the lens at the right speed, and for making rapid exposure at the right times, for projecting the images upon the film at proper intervals for producing a line of successive images upon the film, ready for use by well-known means, by persistence of the eye, in exploiting the illusion. This compact machine, containing the new combinations of the mechanical means and parts of the first three claims, working together for the production of the images in their line and order upon the film, seems to be what his invention in this respect was. The product of this machine, covered by the fifth claim, seems also to have been different from that of Ducos' machine, or of any, and new as a manufacture, and patentable, as hard-rubber sets of teeth were, and sound records have been. None of the objections to these claims have, according to these views, been sustained, and they are therefore held to be valid.

In the defendant's camera such a film is carried intermittently past the lens, with such a perforated disk revolving between them, making successive exposures, by which photographs of objects in motion in a line upon the film are made with such rapidity that they may be so reproduced as, by the persistence of the eye, to give an illusion of the motion. The means are not the same as those of the patent, but they are equivalents in the combinations of the first three claims. The fifth claim is not in terms for the product of this

patented machine, as Cummings' set of teeth in *Smith v. Vulcanite Co.*, 93 U. S. 486, 23 L. Ed. 952, was a product of that process, but for the film of the patent, with equidistant photographs of successive positions of an object in motion taken from the same point of view upon it, in continuous straight-line sequence and unlimited number, save by the length of the film, however produced. Such a film, with such a line of photographs upon it, had never been produced but by this apparatus, or existed, and so it was new; but the operation of the machine did not so inhere in it that it would not have been new if produced in any other way. The defendant's machine does not always produce such an equidistant series, but it sometimes does; and when it does, to that extent it would seem to be an infringement of this claim. In the plaintiff's machine this equal distance is produced between the negatives by toothed wheels working in punched holes in the edge of the film. In the defendant's machine holes are punched in the edge of the film at the same point in respect to each photograph, and the spaces between the positives are rectified by these holes. The claim is not limited to negatives, and these positives are within its terms; and the fact that they are equally spaced by an operation in arranging the negatives does not prevent or relieve the infringement. The defendant appears to have taken the substance of the invention covered by these claims, and the plaintiff, therefore, appears to be entitled to a decree.

Decree for plaintiff.

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#### EDISON v. AMERICAN MUTOSCOPE CO.

(Circuit Court, S. D. New York. July 27, 1901.)

#### PATENTS—SUIT FOR INFRINGEMENT—STAY OF INJUNCTION PENDING APPEAL.

Where difficult and doubtful questions are involved in a suit for infringement of a patent, and the injunction awarded to complainant by the final decree would work peculiar injury to defendant in case of reversal, owing to the diversity, public character, and intricacies of its business, the court may properly stay such injunction pending appeal, on condition that defendant files statements showing the business done in the meantime which would be prevented by the injunction, gives security for the payment of the profits and damages arising out of such business in case of affirmance, and prosecutes the appeal with diligence.

In Equity. Suit for infringement of patent. On motion to stay injunction pending appeal.

Dyer, Edmonds & Dyer, for plaintiff.

Kerr, Page & Cooper, for defendant.

WHEELER, District Judge. In view of the difficulty of the questions involved, and of the diversity, public character, and intricacies of the defendant's business, and the near time within which the questions may, by promptitude in prosecuting an appeal, be presented to the appellate court, I think the injunction should be stayed till the appeal can be heard in that court, but on such terms as will secure the rights of the plaintiff, so far as may be, in case the de-

cree is wholly or in part affirmed. This is usually done by requiring such statements to be filed as will show, as far as practicable, the extent of the business which the injunction would prevent, in order that it may be made readily to appear on accounting, and security for the payment of the profits and damages of such business, if finally decreed to the plaintiff. The affidavits submitted on this motion do not show with clearness what would be such a practicable and useful statement. That most so would seem to be a list of cameras in use, and of the contracts with lessees for the use of infringing machines, and of contracts with others for furnishing to them infringing materials. The stay should therefore, so far as the matter has now been made to appear, be conditioned upon the filing of such a statement. A bond has been mentioned as proper; but no figures showing or suggesting what should be the amount of such a bond have been furnished or hinted at, and no suggestion has been made that the defendant is not pecuniarily responsible. To fix upon the amount from what is now made to appear would be mere guesswork.

In view of the whole situation, the injunction is stayed till August 10th. If then an appeal has been perfected, and a bond filed to an amount and with surety approved by the plaintiff's counsel, or fixed and approved by the clerk, it is further stayed to September 1st. If then a list of such contracts is filed, it is continued till the first day of the next term of the circuit court of appeals. If then the appeal is docketed and noticed for hearing by the defendant as a preferred cause, the stay is continued till the hearing, decision, and mandate.

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### METALLIC EXTRACTION CO. v. BROWN.

(Circuit Court of Appeals, Eighth Circuit. June 18, 1901.)

No. 1,346.

**1. PATENTS—CONSTRUCTION OF CLAIMS.**

Unless the language used clearly requires it, a court will not import into a claim of a patent a feature of construction fully covered by another claim, merely for the purpose of sustaining the claim, and subjecting another to the charge of infringement.

**2. SAME—ORE-ROASTING FURNACE.**

Claim 4 of the Brown patent No. 471,264, for an ore-roasting furnace, which covers "in an ore-roasting furnace a wheeled carrier, adapted to travel within the same, having a laterally projecting arm, to which the stirrers or blades are attached, and means for operating the carriers, substantially as herein described," cannot be construed as making the supplemental chamber and slotted wall, described in the specification, and covered by claim 1, an element of the combination, and without it the claim is void for anticipation.

**3. SAME—SUIT FOR INFRINGEMENT—COSTS.**

Under Rev. St. § 973, where a complainant alleges infringement of two claims of a patent, and recovers as to one, but the other is held void for anticipation, he cannot recover costs.

On Rehearing. For former opinion, see 104 Fed. 345.

John H. Miller, for appellant.

P. C. Dyrenforth and William H. Dyrenforth, for appellee.

Before SANBORN and THAYER, Circuit Judges.

THAYER, Circuit Judge. In our former decision in this case (43 C. C. A. 568, 104 Fed. 345) we announced no conclusion respecting the validity of claim 4 of the patent No. 471,264, granted to Horace F. Brown for improvements in ore-roasting furnaces, because on the first argument of the case little, if anything, was said by counsel for either party respecting that claim; for which reason it was assumed that in the estimation of counsel the device covered thereby was unimportant, and that the first claim of the patent, the merits of which were discussed at length, embraced everything of value in the Brown invention. After our previous opinion was filed, complaint was made by the appellant that the decision did not dispose of all the material questions arising upon the record, inasmuch as the fourth claim was left unnoticed. For this reason a motion for rehearing was sustained, and counsel were given leave to file briefs respecting the validity of the fourth claim; the reargument to be confined to that issue. In accordance with such leave, briefs have been filed, and the subject has undergone further consideration.

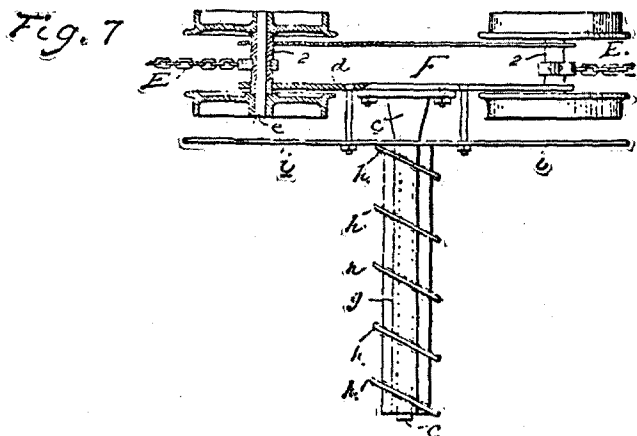
The fourth claim of the patent in controversy is couched in the following language.

"(4) In an ore-roasting furnace, a wheeled carrier, adapted to travel within the same, having a laterally projecting arm, to which the stirrers or blades are attached, and means for operating the carriers, substantially as herein described."

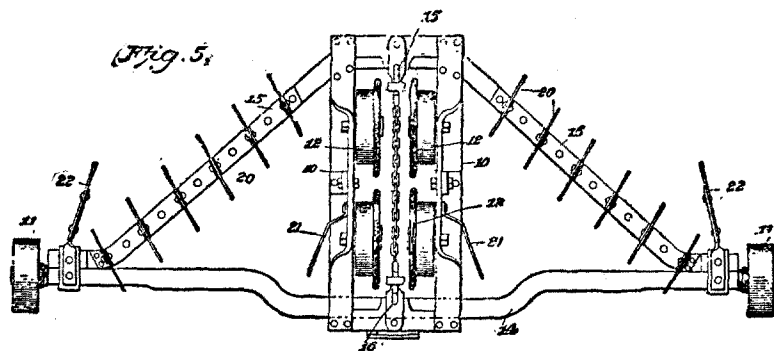
Counsel for Brown, the patentee, as well as one of his witnesses, who testified as an expert, concede that if this claim is read literally, and confined to a device consisting of four elements, to wit: (1) a wheeled carrier; (2) a laterally projecting arm; (3) stirrers attached to the arm; and (4) means for operating the carriers,—then the claim is anticipated by patent No. 468,736, issued to Charles M. Allen on February 9, 1892, to which a reference was made in our former opinion. 43 C. C. A. 568-571, 104 Fed. 345-348. The subjoined cuts illustrate the wheeled carrier and rabble arm attachments described in the respective patents issued to Brown and Allen.

There seems to be no escape from the conclusion that the fourth claim of the Brown patent is anticipated by the Allen patent. Allen describes a wheeled carrier adapted to run on a track laid within the oven of an ore-roasting furnace, from which arms project with blades depending therefrom to stir the ore, substantially as in the Brown device. The Allen patent also discloses means for operating the carrier which do not differ materially from the means employed by Brown. Letters patent No. 80,065, issued to Robert George on July 21, 1868, which was referred to in our previous decision, seems also to anticipate the carrier device which Brown describes and claims. Counsel for the patentee contend, however, that in order to save the fourth claim of Brown's patent from anticipation, the supplemental chamber and slotted wall described in the patent, and covered by the first claim, should be read into the fourth claim by intendment, as an addi-

Brown's Wheeled Carrier and Rabble Arm.



Allen's Wheeled Carrier and Rabble Arms.



tional element; and this object they propose to accomplish by transposing the language of the claim, so as to make it read as follows: "In an ore-roasting furnace, substantially as herein described, a wheeled carrier adapted to travel within the same, having a laterally projecting arm to which the stirrers or blades are attached, and means for operating the carriers," instead of reading the claim as it is written in the patent, where the words "substantially as herein described" seem to refer to those means for operating the carriers which Brown describes in his specifications and drawings. We are of opinion that the proposed construction of the claim, by which the words last above quoted are made to relate to the clause "an ore-roasting furnace," so as to include the supplemental chamber as one of the essential elements of the fourth claim, is not its natural or proper construction, and we very much doubt whether any such construction of the claim was contemplated by the patentee when the claim was formulated. The language of the claim is well chosen to cover the carrier, which Brown describes as an independent device, disconnected from every other feature of his furnace; and it is

altogether most probable, we think, that he intended to claim broadly any wheeled carrier adapted to run on rails within the oven of an ore-roasting furnace, if it was provided with a laterally projecting arm, from which depended stirrers, and was operated substantially in the manner which he had described. The claim does not contain any apt language which would suggest to a casual reader that the patentee intended to incorporate as one of the elements thereof the invention consisting of the supplemental chamber and slotted partition wall, which are covered completely by the first claim; and, in the absence of words which do clearly indicate such a purpose, we are not disposed to import into the claim a feature of construction already protected by another claim, merely for the purpose of sustaining the claim, and subjecting another to the charge of infringement. Such a method of construing the claims of a patent has often been condemned. *McCarty v. Railroad Co.*, 160 U. S. 110, 116, 16 Sup. Ct. 240, 40 L. Ed. 358; *Stearns & Co. v. Russell*, 29 C. C. A. 121, 85 Fed. 218; *Wilson v. Machine Co.*, 34 C. C. A. 280, 92 Fed. 167. In the present instance, the supplemental chamber, which, as Brown says in his specification, is the essential feature of his invention, is fully protected by his first claim, and we perceive no necessity for claiming it again in a more limited form, in connection with a carrier device, which is old in the art, nor do we believe that such was his purpose. Entertaining the view, therefore, that Brown intended to claim broadly the carrier device mentioned in his patent, disconnected from the other features of construction embodied in his furnace, and being furthermore of opinion that a carrier such as his patent discloses was at the time old in the art of furnace building, the decree below must be modified to the extent of striking out so much of the decree as sustained the validity of the fourth claim, and enjoined the defendant below from infringing the same.

The point is made by the appellant that if claim 4 of Brown's patent is adjudged to be invalid according to its contention, then, although the decree below is sustained as to claim 1, no costs can be recovered by the complainant below by virtue of sections 973 and 4922 of the Revised Statutes, since no disclaimer was filed by the complainant as to claim 4 before the present action was instituted. This point seems to be well made, and in accordance with the mandate of the statute as it has heretofore been construed. *Trap Co. v. Felthousen* (C. C.) 20 Fed. 633; *Mann's Boudoir Car Co. v. Monarch Parlor Sleeping-Car Co.* (C. C.) 34 Fed. 130, 134.

It is accordingly ordered that the decree below be modified in the manner heretofore indicated by expunging those provisions of the decree which adjudged the fourth claim of the Brown patent to be valid, and enjoined the infringement thereof, but that in all other respects the decree below be affirmed, except that each party be required to pay his own costs.

## HASTORF v. HUDSON RIVER STONE SUPPLY CO. et al.

(District Court, S. D. New York. June 15, 1901.)

## 1. NEGLIGENCE—BURDEN OF PROOF.

Where elevated bins holding crushed stone gave way, precipitating the stone, etc., into the water, and damaging a scow moored beneath them for the purpose of loading stone thereon, the burden was on the owner of the bins to show freedom from negligence.

## 2. SAME—EVIDENCE—SUFFICIENCY.

Elevated bins loaded with crushed stone gave way, precipitating the stone into the water, and damaging a scow moored beneath for the purpose of being loaded with stone. The bins were not overloaded at the time, and had been frequently examined without finding defects. They were erected by a competent engineer. Two witnesses testified that they told the man in charge of the scow to move it 20 minutes before the accident occurred. *Held* insufficient evidence to show negligence on the part of the defendants, but negligence by the scowman, the libellant's employé.

In Admiralty.

Louis B. Adams, for libellant.

Kellogg & Rose, for the Metropolitan Crushed Stone Co.

Edward E. Haskell, for the Hudson River Stone Supply Co.

BROWN, District Judge. The above libel was filed to recover a certain balance of charter hire, and the damages sustained by the libellant's scow Alexandria on May 26, 1900, at Eddyville on Rondout creek, while the scow was under charter to the respondent, the Hudson River Stone Supply Company, and while lying at the bulkhead under some elevated bins for holding crushed stone, belonging to the Metropolitan Crushed Stone Company. The latter company has been brought into the action as defendant by petition under the fifty-ninth rule. The bins were 35 feet long and 30 or 40 feet deep and supported by trestle work and a foundation built upon a somewhat sloping stone foundation running out under the water. Between half past 6 and 7 o'clock a. m., of May 26th, the structure gave way and went over into the water, the bins falling upon the libellant's scow.

The bins had been built by a previous company upon foundations which were in part new, but in which to some extent, as I understand, some old crib work was used. It was built under the superintendence and direction of a competent engineer, it was but recently completed, and the property had been sold only a short time before the accident to the Metropolitan Crushed Stone Company. From that company the Hudson Supply Company purchased a boat load of crushed stone and chartered the libellant's boat to go and get it. The scow was about two-thirds loaded at the time of the accident.

I cannot find upon the evidence sufficient proof to sustain the charge of negligence or want of care or prudence (Flynn v. Railroad Co., 142 N. Y. 439, 37 N. E. 514) against either of the defendants. The supply company had no knowledge about the bins and was under no responsibility for them. The burden of proof rested on the crushed stone company, under the circumstances proved, to show itself free from negligence or fault. Warn v. Oil Co. (D. C.) 61 Fed.



631; Wolf v. Society, 164 N. Y. 30, 58 N. E. 31; Stewart v. Ferguson, 164 N. Y. 553, 58 N. E. 662. I think it has done so.

The bins had been built according to the judgment and direction of a competent and skilled engineer. The company purchased the property after further examination, without any knowledge or suspicion of any defect or weakness or improper construction, if there was any. The bins were not overloaded. During the period immediately preceding the accident, the bins and the supports were frequently and carefully examined for the purpose of seeing whether there was any evidence of defect and none was found. But on the morning of the accident, from 20 minutes to half an hour before it occurred, the engineer of the supply company in the course of his usual examination observed evidence of giving way and cracking. He was alarmed, and went to the libelant's boat and called out to the scowman in charge that he should "get out of there with his boat," as the bins were falling or giving way. The scowman he says, answered "All right." The latter denies this conversation; but Wood, another witness also testifies to giving him similar warning, and two days afterwards in a conversation with the scowman the latter stated to a third witness that he had been aroused from sleep by some one calling to him. The scowman was only partly dressed when the accident occurred; but that he had been notified some considerable time before, is proved by the fact that after he was first notified the engineer rowed across the creek to notify the superintendent on the other side, and was returning when the accident happened; and that prior to the accident the scowman was seen to come out on deck, look about, and then go back again. Upon this proof, I think that there is not only failure to fix any negligence or want of care upon either of the defendants, but that the evidence of neglect on the part of the scowman after due notice, is such as to charge him with the responsibility. It was a very simple matter to remove the scow from danger. There was a strong current, and by simply casting loose the mooring line running up stream, the scow would in a few moments have swung down stream and have been out of reach of harm.

The scowman being employed by the libelant and furnished by him along with the scow, the libelant is chargeable with the neglect of his employé, and is consequently precluded from recovery. See *Quinn v. Construction Co.* (C. C.) 46 Fed. 506.

As respects the claim for damages the libel is dismissed, but under the circumstances without costs; and a decree for the libelant ordered for \$60.42, the amount admitted to be due for charter hire, without costs.

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In re CALIFORNIA NAV. & IMP. CO.

(District Court, N. D. California. September 3, 1901.)

No. 11,801.

**1. CARRIERS OF PASSENGERS—INJURY TO PASSENGERS—PRESUMPTION OF NEGLIGENCE.**

The explosion of a steam drum on a steamer, by which passengers were injured, is prima facie evidence of negligence on the part of the carrier in a proceeding to recover for such injuries.

**2. SAME—PASSENGER RIDING ON PASS.**

The obligation of a carrier as to the care required for the safety of a passenger is precisely the same to a passenger riding on a free pass as to those who pay fare, in the absence of a special agreement by which he assumed the risk of injury from the negligence of the carrier or its servants.<sup>1</sup>

**3. MASTER AND SERVANT—INJURY TO SERVANT—LIABILITY OF MASTER.**

In an action against the owner of a steamboat to recover for the death of a fireman employed thereon through the explosion of a steam drum near which he was working, the fact of the explosion is not sufficient to charge the defendant with liability, but the burden rests on plaintiff to further prove that defendant failed in its duty to exercise reasonable care to make and keep the drum in a safe condition.

**4. SAME—PLACE TO WORK—FAILURE TO MAKE PROPER INSPECTION.**

A steam drum connected with the boilers of a steamboat exploded, killing a fireman, who was working near. The drum had been in use several years, and the steam pressure at the time of the explosion was less than the boilers were permitted to carry. A short time previously a leakage of the drum had been discovered, but no examination or test was made to discover its cause. *Held*, that the bursting of the drum must be attributed to its having become weakened from some cause, which the evidence tended to show might also have been the cause of the leakage, and that the owner of the vessel, which was the employer of the deceased, was liable for the death under a state statute giving a right of action therefor, on the ground that it failed in its duty to exercise reasonable care to make the drum safe by a proper inspection and repairs.

**5. SAME—DELEGATION OF DUTY BY MASTER.**

A master cannot relieve himself from liability for the negligent performance of a positive duty, which he owes to a servant in respect to the safety of the place where the servant is required to work, by delegating such duty to others.

**6. WRONGFUL DEATH—DAMAGES RECOVERABLE—CALIFORNIA STATUTE.**

Under Code Civ. Proc. Cal. § 377, giving a right of action for wrongful death to the heirs or personal representatives of the deceased, to recover such damages "as, under all the circumstances of the case, may be just," the measure of damages in such an action is the probable pecuniary loss to the plaintiff, or those in whose behalf he sues. The mere fact of heirship does not give a right to damages, and where the only heirs of the deceased are collateral relatives only nominal damages are recoverable without proof of actual or probable pecuniary loss.

**7. ADMIRALTY—ACTIONS FOR PERSONAL TORTS—NOMINAL DAMAGES.**

Nominal damages for personal torts are not awarded by courts of admiralty.

In Admiralty. Proceeding for limitation of liability.

Woods & Levinsky, F. D. Nichol, and W. B. Nutter, for petitioner. Jacobs & Flack for claimant Susie P. Blunt, administratrix.

Samuel Knight, for claimant Giuseppe Foppiano.

William H. Jordan and Jessie Watson, for claimant Johanna Daly, administratrix.

Reddy, Campbell & Metson, for claimant Augustina Brizzolara, administratrix, and Peter Tulan, administrator.

DE HAVEN, District Judge. On November 27, 1898, the steamer T. C. Walker was owned by the petitioner, the California Navigation & Improvement Company, and employed by it as a common carrier of passengers and freight between the ports of San Francisco

<sup>1</sup> Rights of person traveling on pass, see note to *Chamberlain v. Pierson*, 81 C. C. A. 164.

and Stockton, in the state of California; and on that day, while proceeding on her voyage between these ports, the steam drum attached to her boilers exploded, causing the death of certain of her passengers and members of the crew, and injuring others. Actions were brought against the petitioner to recover damages for personal injuries and the loss of life caused by such explosion, and the petitioner thereupon commenced this proceeding, contesting its liability for damages, and at the same time asking for a limitation of its liability, under sections 4283-4285 of the Revised Statutes, and acts amendatory thereof, in the event that the court shall adjudge that it is liable for such damage. The value of the steamer and freight pending has been appraised, under admiralty rule No. 54, at \$23,251, and G. Foppiano, a passenger, and the personal representatives of W. A. Blunt, Luigi Brizzolara, passengers, and of John T. Tulan, the master, and Jeremiah Daly, a fireman, on the T. C. Walker, have answered the petition, and presented their respective claims for damages, and the proofs in support thereof.

1. The boilers and the drum of the T. C. Walker were constructed in the year 1893, and on May 14, 1898, were inspected by the United States inspector of boilers, and a certificate issued by him permitting their use in the navigation of the steamer for a term of one year with a steam pressure of 170 pounds to the square inch. The evidence also tends to show that at the time of the explosion the steam pressure in the boilers did not exceed 157 pounds. It was also shown that a few weeks before the accident a leakage was observed in one of the girth seams of the drum, but no examination was made for the purpose of determining the condition of the drum at that point, or to ascertain the exact cause of such leakage; and the fact that such leakage had been discovered was not brought to the attention of the master of the steamer, or any managing agent of the petitioner. It may be stated as a well-settled principle of law that the obligation of a common carrier of passengers is to carry them safely, unless prevented by some cause against which human foresight and diligence cannot guard. *Stokes v. Saltonstall*, 13 Pet. 181, 10 L. Ed. 115; *The City of Panama*, 101 U. S. 453, 25 L. Ed. 1061; *Railroad Co. v. Derby*, 14 How. 468, 14 L. Ed. 502; *Shear. & R. Neg.* (5th Ed.) § 495. And in the determination of that branch of the present case relating to the claims of Foppiano, passenger, and of the personal representatives of Blunt and Brizzolara, passengers killed, the mere fact of the bursting of the steam drum is *prima facie* evidence of negligence upon the part of the petitioner or its employes, and casts upon it the burden of proving that such explosion could not have been prevented by reasonable care; that is, by the exercise of the highest degree of care on its part. *Caldwell v. Steamboat Co.*, 47 N. Y. 282; *Dunlap v. The Reliance* (C. C.) 2 Fed. 249; *Boyce v. Stage Co.*, 25 Cal. 460; *Yoemans v. Navigation Co.*, 44 Cal. 71. This rule of evidence is based upon the principle "that, where an act takes place which usually, and according to the ordinary course of things, would not happen if proper care was exercised, it is presumed that such care was not observed." *Caldwell v. Steamboat Co.*, 47 N. Y. 282. The voluminous evidence taken before the United States commissioner, upon which this case was submitted for decision, has been fully

considered, and, in my opinion, is not sufficient to rebut the presumption of negligence which the law, in the first instance, imputes to the petitioner from the fact of the explosion. The boilers and drum had been in use for a number of years, and there is nothing in the evidence tending to show that the bursting of the drum was caused by a latent defect therein,—such a defect as could not have been previously discovered by examination and the exercise of that high degree of care which is required of those in charge of machinery of that character when used in vessels engaged in the transportation of passengers. Blunt, one of the passengers killed, was riding on a free pass, but, in the absence of a special agreement by which he assumed all risk of accident from the negligence of the servants of petitioner, the obligation of the petitioner to carry him safely was precisely the same as that which it owed to the passengers who had purchased tickets. *The New World v. King*, 16 How. 469, 14 L. Ed. 1019; *Railroad Co. v. Derby*, 14 How. 468, 14 L. Ed. 502; *Todd v. Railroad Co.*, 3 Allen, 18, 80 Am. Dec. 49; *Waterbury v. Railroad Co. (C. C.)* 17 Fed. 671. It follows from what has been said that Foppiano and the personal representatives of Blunt and Brizzolara are entitled to recover damages from the petitioner.

2. The claim of the administratrix of the estate of Jeremiah Daly, deceased, rests upon principles of law peculiarly applicable to the relation of master and servant. Daly was employed as a fireman on the T. C. Walker, and while engaged in his work was killed by the explosion to which reference has been made. The petitioner, as his employer, owed to the deceased the duty of exercising reasonable care to make the place where he was required to work safe; and this, of course, would include the duty to exercise reasonable care to ascertain whether there was any defect in the steam drum which might endanger his life while at work. "A master employing a servant impliedly engages with him that the place in which he is to work, and the tools or machinery with which he is to work or by which he is to be surrounded, shall be reasonably safe." *Railroad Co. v. Baugh*, 149 U. S. 368-386, 13 Sup. Ct. 914, 921, 37 L. Ed. 772, 780. This rule imposes upon the master the duty of exercising "reasonable care in furnishing suitable machinery and appliances for carrying on the business for which he employs the servant, and in keeping such machinery and appliances in repair, including the duty of making inspections, tests, and examinations at the proper intervals." *Railway Co. v. Daniels*, 152 U. S. 684, 14 Sup. Ct. 756, 38 L. Ed. 597. The master cannot escape from the obligation of this positive duty by the delegation of its performance to an agent or servant employed by him. In the language of the court in *Corcoran v. Holbrook*, 59 N. Y. 517, 17 Am. Rep. 369:

"As to acts which a master or principal is bound as such to perform towards his employes, if he delegates the performance of them to an agent, the agent occupies the place of the master, and the latter is deemed present, and liable for the manner in which they are performed."

That such is the law upon this point is well settled. *Hough v. Railway Co.*, 100 U. S. 213, 25 L. Ed. 612; *Fuller v. Jewett*, 80 N. Y. 46, 36 Am. Rep. 575; *Ford v. Railroad Co.*, 110 Mass. 240, 14 Am. 110 F.—43

Rep. 598. The burden of proving that the petitioner was negligent in the discharge of its duty towards Daly as above defined, and that such negligence was the proximate cause of his death, is upon the administratrix of his estate. Shear. & R. Neg. (5th Ed.) § 222. And the rule is that in actions in which the servant or his personal representative seeks to recover damages from the employer upon the ground of alleged negligence the negligence of the latter is not established by simply proving the naked and unexplained fact of the occurrence of the accident which caused the injury complained of. *Railway Co. v. Daniels*, 152 U. S. 684, 14 Sup. Ct. 756, 38 L. Ed. 597; *Railway Co. v. Barrett*, 166 U. S. 617, 17 Sup. Ct. 707, 41 L. Ed. 1136; *Railway Co. v. Salmon's Adm'x*, 11 Kan. 83. The reason why further proof is required in such actions to establish the liability of the employer is that an accident may be caused by want of due care upon the part of the injured servant, or solely by the negligence of a fellow servant at the time, in either of which cases the employer would not be liable for the injury. Under the rule stated it was therefore incumbent upon the administratrix of Daly to prove, not only the fact of the explosion, but, in addition thereto, that petitioner was negligent either in the selection of the steam drum in the first instance, or in failing to use ordinary care to keep it in a reasonably safe condition for use, and that such negligence was the proximate cause of the explosion. It is not claimed, and there is nothing in the evidence tending to show, that the drum, when originally placed in the steamer by the petitioner, was not in all respects safe and sound. Was, then, the accident caused by the subsequent negligence of the petitioner in not keeping the drum in a proper state of repair? I think the evidence shows that the explosion was due to the defective or weak condition of the drum. There is no escape from this conclusion without rejecting the uncontradicted testimony of the witnesses Cates and Murray that just prior to the explosion the steam pressure on the boilers was not more than 157 pounds, being 13 pounds less than they were allowed to carry. The bursting of the steam drum under such a moderate pressure of steam shows that it had become weakened from some cause; and the evidence also tends to show that what may have been the result of a weakness or defect, namely, a leakage in one of the girth seams, was observed some time prior to the explosion, and no examination or test was ever made by the petitioner for the purpose of determining its cause. The duty of keeping and maintaining this part of the boilers in a condition "reasonably and adequately safe for use by employes" devolved upon the petitioner, and this, as before stated, included the further duty "of making inspections, tests, and examinations at the proper intervals." *Railway Co. v. Daniels*, 152 U. S. 684, 14 Sup. Ct. 756, 38 L. Ed. 597. All of the expert witnesses who testified upon the point expressed the opinion that, when the leakage referred to was discovered, a careful examination of the steam drum should have been made without delay, and the cause of the leakage ascertained. Indeed, that prudence required such action is self-evident. If this examination had been made, it is probable that the defective condition of the drum would have been discovered, and such repairs could have been made, or other steps taken, as would have prevented the subsequent explosion.

The failure of the petitioner to make such examination was negligence; and, as the duty of using ordinary care to keep the drum in repair was a positive duty, which it owed to its employé Daly, its non-performance cannot be excused upon the ground that the failure to make the examination was due to the negligence of the engineer or other of its servants, upon whom it had devolved the duty of keeping the boilers in proper repair. It is only necessary to add that it was no part of the duty of the deceased to make an inspection of the steam drum for the purpose of ascertaining its condition, and there is nothing in the evidence tending to show that the explosion was caused by any want of care upon his part. Upon consideration of all the evidence, my conclusion is that the administratrix of Daly is entitled to recover damages against the petitioner.

3. The question as to the amount of damages the claimants are respectively entitled to recover is to be next considered. Guseppe Foppiano was severely injured by the explosion, suffering a fracture of the sternum at the junction of the fourth rib; a fracture of three ribs on the right side and two on the left side; a severe scalp wound; wound and burn of the left leg, and burns on the hands and wrists. These injuries for a time threatened his life, and caused him to be confined to his bed for three or four months. He had not fully recovered when he gave his deposition in February, 1900, and up to that date had not been able to work; but whether or not his injuries are such as to permanently disable him, or disable him for any great length of time, is not shown by the evidence. The burden of proving such disability, if it exists, was upon the claimant for damages. He is 58 years of age. Prior to the accident he was in the enjoyment of good health, and had been for some time employed at wages of from \$12 to \$14 per week. As the result of his injuries he has incurred expenses amounting to \$300, and lost the wages he might otherwise have earned. This claimant is entitled to recover damages in such an amount as will compensate him for his pain and suffering, the expenses he has incurred, and for the value of the time lost by him in consequence of his injuries. In my judgment, he should be allowed damages in the sum of \$2,500.

4. Luigi Brizzolara was killed by the explosion. At the time of his death he was 59 years of age, and his life expectancy, according to the American table relating to that subject, was 14 years and 9 months, or thereabouts. He left surviving him a widow and five children, three of whom were minors, living at home. His business was that of a dealer in coal, from which he derived an annual income of \$2,000, and his personal expenses were not less than \$100 per month. Jeremiah Daly was 42 years of age at the time of his death, and left a wife and eight minor children, the eldest 16 years of age. He was a fireman by occupation, employed at wages of \$45 per month. All of this money went to his family, with the exception of his necessary personal expenses, which were small. His life expectancy was 26 years and 9 months. W. A. Blunt, one of the passengers killed, was 47 years of age. He was a laborer, industrious, in good health, and was employed at the usual rate of wages paid for unskilled labor, and at the time of his death was receiving

\$1 per day and board. His life expectancy was 23 years, and he left surviving him a wife and four children. John T. Tulan was the master of the steamer T. C. Walker, and was killed by the explosion. He was 43 years of age, and in good health. His life expectancy was 26 years. He left surviving him two brothers and two sisters, and no other heirs. It is stipulated that all of his brothers and sisters are over the age of 21 years, but whether older or younger than the deceased does not appear. He had been employed by petitioner for a period of seven years as master, at a salary of \$115 per month. Whether his earnings exceeded his expenditures, and whether he was provident or improvident, does not appear. The right of the personal representatives of Brizzolara, Daly, Blunt, and Tulan to sue to recover the damages claimed in this proceeding is given by section 377 of the California Code of Civil Procedure, which provides:

"When the death of a person, not being a minor, is caused by the wrongful act or neglect of another, his heirs or personal representatives may maintain an action for damages against the person causing the death, or if such person be employed by another person who is responsible for his conduct, then also against such other person. In every action under this and the preceding section, such damages may be given as under all the circumstances of the case may be just."

This statute does not authorize damages to be given for the suffering of the deceased, nor for grief and sense of bereavement upon the part of the surviving relatives. Only the direct pecuniary loss to the heirs of the deceased can be considered in estimating the damages which may be recovered in actions under this statute. *Morgan v. Southern Pac. Co.*, 95 Cal. 510, 30 Pac. 603, 29 Am. St. Rep. 143, 17 L. R. A. 71. The language of the statute is that "such damages may be given as, under all the circumstances of the case, may be just." This, in effect, means that the damages shall rest in the sound discretion of the court or jury; a discretion to be exercised in view of the fact "that such damages are to be measured by what shall fairly seem the pecuniary injury or loss to the plaintiff." *Morgan v. Southern Pac. Co.*, 95 Cal. 501, 30 Pac. 601; *In re Humboldt Lumber Mfrs.' Ass'n* (D. C.) 60 Fed. 428. And it is manifest that in reaching a conclusion in relation to the proper sum to be awarded, a conclusion which must be based solely upon a consideration of what the deceased might probably have earned by his labor, or realized from his business in the future, for the benefit of his heirs, the court is necessarily compelled to proceed upon very uncertain data. In the language of the court in *Southern Pac. Co. v. Lafferty*, 6 C. C. A. 474, 57 Fed. 536, it may be said:

"The method of estimating the pecuniary damages in cases of this character is, at best, somewhat problematical, and depends to a great extent upon the sound judgment of the jurors as to what would be just, reasonable, and proper under all the circumstances, taking into consideration the age of the deceased, his condition of health, his employment, and reasonable expectations of life."

Even if it should be assumed that the deceased would have lived the full period of his life expectancy, it is reasonable to suppose that his later years would have been feeble, and it would be contrary to all experience to assume that he would have been in the constant receipt

of wages while he lived, or, if engaged in business, that he would certainly have met with continued success. In estimating damages, therefore, in this class of actions, the fluctuations of business, if the deceased was engaged in business, and, if not in business, the uncertainty as to what might have been the future condition of his health and ability to perform labor, and of securing constant employment at the present rate of wages, must be allowed due weight, so that, as nearly as possible, the judgment given shall "be just alike to the injured and the injurer." *Cheatham v. Red River Line* (D. C.) 56 Fed. 248. In accordance with the foregoing views, and upon consideration of all the evidence, damages should, in my judgment, be awarded as follows: To Augustina Brizzolara, administratrix of the estate of Luigi Brizzolara, the sum of \$3,000; to Johanna Daly, administratrix of the estate of Jeremiah Daly, the sum of \$5,000; to Susie P. Blunt, administratrix of the estate of W. A. Blunt, the sum of \$2,700.

5. The administrator of the estate of John T. Tulan is not entitled to recover, as the evidence will not warrant the court in finding that his brothers and sisters, who are his only heirs, have suffered any pecuniary loss by reason of his death. The case of *Burk v. Railroad Co.*, 125 Cal. 364, 57 Pac. 1065, 73 Am. St. Rep. 52, was an action brought by a sister and two brothers of one Burk to recover damages for his death, which was alleged to have been caused by the negligence of the defendant therein; and in construing the section of the statute above quoted the supreme court of California held that in an action brought by collateral heirs of a deceased person to recover damages on account of his death the mere fact that they are such heirs does not tend to show pecuniary damage, and, in the absence of other proof tending to show actual damages, or at least probable loss, resulting to them from his death, the recovery must be limited to nominal damages. The court in that case said:

"It is said the fact that a right to sue is given implies that damages may be recovered although no rights of plaintiff have been violated. Confessedly, plaintiffs had no legal claim on deceased for anything, and he owed no duty to them to accumulate an estate and leave it to them. \* \* \* The majority of men die without much property. Whether the deceased would have succeeded in accumulating, and, if he had been successful, would have left it to plaintiffs, is matter of pure speculation. Such a guess as to probabilities is not, according to settled rules and maxims of the law, proper ground for the award of damages."

So here there is no evidence tending to show that Capt. Tulan was in the habit of saving his wages, or that his brothers and sisters had any reasonable expectation that he would ever give or leave them, or any of them, anything of value. In this state of the evidence, the administrator of his estate would be entitled to recover nominal damages if the action was in a court of law, but in courts of admiralty nominal damages for personal torts are not awarded. *Barnett v. Luther*, 1 Curt. 434, Fed. Cas. No. 1,025. A decree will be entered dismissing the claim of the administrator of John T. Tulan, and awarding damages to the other claimants in the several amounts above stated, and for costs, and interest from the date of the decree until satisfaction.



## In re CALIFORNIA NAV. &amp; IMP. CO.

(District Court, N. D. California. September 6, 1901.)

No. 11,693.

## 1. SHIPPING—LOSS OF CARGO—HARTER ACT.

Section 3 of the Harter act, which exempts owners of vessels which are in all respects seaworthy and properly manned, equipped, and supplied from liability for loss of merchandise or property resulting from faults or errors in navigation, applies in a case where the question of liability arises in a proceeding by the owner for limitation of liability, as well as in a direct action against him.

## 2. WRONGFUL DEATH—ACTION FOR DAMAGES—CALIFORNIA STATUTE.

Under Code Civ. Proc. Cal. § 377, giving a right of action for wrongful death, damages are recoverable only where the heirs of the deceased are shown to have sustained pecuniary loss by reason of his death.

## 3. SHIPPING—HARTER ACT—LOSS OF PASSENGER'S BAGGAGE.

Damages for personal injuries of a passenger, or for the loss of his personal baggage, are not within the exemptions of the Harter act.

## 4. SALVAGE—COMPENSATION—PRIORITY OF LIEN.

A claim for salvage services rendered to a vessel injured in collision is entitled to a preference in the distribution of the proceeds of such vessel or the fund paid into court or secured in proceedings for limitation of liability, over claims of passengers for personal injuries or loss of baggage, or for damages sustained by the other vessel in the collision.

In Admiralty. Proceeding for limitation of liability.

Page, McCutchen & Eells, for petitioner.

Samuel Knight, for Shipowners' & Merchants' Tugboat Co.

Hugh Brown, for the administrator of the estates of several deceased claimants.

M. T. Moses, for claimant M. P. Leshner.

H. D. Pillsbury and Ansel Smith, for River Exp. Co.

Rodgers, Paterson & Slack and Wm. P. Humphreys, for claimants Grattan, McKee & Herkner and Musto.

A. H. Ashley and Warren Gregory, for administrator of the estate of Hong Bing, deceased, and other claimants.

Reddy, Campbell & Metson, for administrator of estates of certain Chinese, deceased.

Crandall & Bull, for claimant W. P. Fuller & Co.

Andros & Frank, for J. D. Spreckels & Bros. Co.

E. E. Wood, for claimant C. F. Bond.

DE HAVEN, District Judge. On November 2, 1898, the steamer J. D. Peters, carrying freight and passengers, left San Francisco bound for the city of Stockton, in this state. Not long after starting, and while still in the Bay of San Francisco, she came into collision with the steamer Czarina. Both steamers were badly damaged, and in consequence of the injury received by the J. D. Peters she partly sunk, only her pilot house and a portion of the cabin on the after deck remaining out of water. The cargo carried by her was lost and several Chinese passengers drowned. The petitioner was the owner of the J. D. Peters, and commenced this proceeding under sections 4283-4285 of the Revised Statutes of the United States for a limitation of its liability for damages on account of the collision referred to,

and the value of the steamer and her freight pending has been appraised at \$6,000. Claims have been presented in the proceeding by various persons for damages on account of merchandise shipped on the J. D. Peters and lost; by the personal representatives of the several Chinese passengers drowned for damages on account of the death of such passengers; by M. P. Leshner, a passenger, for personal injuries and loss of baggage; by J. D. Spreckels & Bros. Company, owners of the *Czarina*, for damages resulting to that steamer from the collision; and by the Shipowners' & Merchants' Tugboat Company for salvage services rendered to the J. D. Peters.

1. The fact is not disputed that the collision was caused by the sole fault of the master and pilot of the J. D. Peters in the management and navigation of that steamer. The evidence also shows beyond all doubt that the J. D. Peters was seaworthy in hull, equipment, and crew, and that her master and pilot had been licensed as such for 20 years, and had the reputation of being a careful and capable officer. Upon this state of facts the petitioner is exempt from liability for damages on account of the loss of the merchandise carried by the J. D. Peters, and the claims presented therefor must be disallowed; the case falling within section 3 of the act of February 13, 1893 (27 Stat. 445), known as the "Harter Act," which provides:

"That if the owner of the vessel transporting merchandise or property to or from any port in the United States of America shall exercise due diligence to make the said vessel in all respects seaworthy and properly manned, equipped, and supplied, neither the vessel, her owner or owners, agent, or charterers shall become or be held responsible for damage or loss resulting from faults or errors in navigation or in the management of said vessel; nor shall the vessel, her owner or owners, charterers, agent, or master be held liable for losses arising from dangers of the sea or other navigable waters, acts of God, or public enemies."

It is argued in behalf of those who have presented claims for damages for merchandise lost that this statute is only intended to apply when the shipowner is directly sued, and has no application to cases like the present, where the shipowner has paid or given security for the payment into court of the appraised value of the ship and freight pending, the contention being that in such case the shipowner has provided a fund to which all persons who have sustained damage or loss have a right to resort. I am satisfied that the statute will not bear this construction. When freight has been shipped on a vessel "in all respects seaworthy, and properly manned, equipped, and supplied," and such freight is lost because of a fault or error in navigation or in the management of the vessel upon which it is carried, the shipper is not entitled to look for damages to the vessel or owners, nor to any fund in court representing such vessel and freight pending. This is the plain meaning of the section of the statute above quoted. In *re Piper-Aden-Goodall Co.* (D. C.) 86 Fed. 670.

2. In relation to the claims for damages presented by the personal representatives of the several passengers drowned, it is only necessary to say that the evidence fails to show that the heirs of such deceased persons have sustained any pecuniary loss by reason of their death; and upon the authority of *Burk v. Railroad Co.*, 125 Cal. 364,

57 Pac. 1065, 73 Am. St. Rep. 52, and *In re California Nav. & Imp. Co.*, 110 Fed. 670, these claims will be disallowed.

3. Damages for personal injuries received by a passenger and for loss of his personal baggage are not within the provisions of the Harter act. *The Rosedale* (D. C.) 88 Fed. 324. The evidence is undisputed that the passenger Leshner lost personal baggage which originally cost \$624.50, and that, by reason of being compelled to stand for about two hours in water three feet deep on the deck of the steamer, he contracted rheumatism, from which he suffered eight months, and was prevented from following his usual occupation during that time. Upon consideration of the evidence, I find that the baggage lost by him was at that time worth one-half its original cost, and that on account of its loss, and his personal exposure and sickness resulting therefrom, this claimant has sustained damage in the sum of \$800.

4. There is no conflict in the evidence as to the right of the J. D. Spreckels & Bros. Company, a corporation, to recover damages in the sum of \$12,000 for injuries sustained in the collision by the *Czarina*, and for loss of the use of that steamer while she was undergoing repairs consequent upon the collision.

5. The claim of the Shipowners' & Merchants' Tugboat Company is for salvage services rendered to the J. D. Peters after the collision, in making fast to her while she was drifting towards the Pacific Ocean partly submerged, and towing her into the shallow water of an arm of the Bay of San Francisco, and thereafter towing her to Hunter's Point dry dock for repairs. It appears from the evidence that the services thus performed by this claimant were meritorious, and resulted in rescuing the J. D. Peters from a position of great peril, and for this service the sum of \$800 will be allowed. This claim, being for salvage, is entitled to a preference over the other claims allowed in the matter of payment. *The Spaulding*, 1 Brown, Adm. 310, Fed. Cas. No. 13,215.

Let a decree be entered directing that the claim of the Shipowners' & Merchants' Tugboat Company, and all costs in the proceeding, be paid in full, and from the balance remaining the claims of J. D. Spreckels & Bros. Company and M. P. Leshner be paid pro rata; that all of the other claimants take nothing by this proceeding; and for a limitation of the liability of the petitioner to the appraised value of the J. D. Peters and her freight pending.

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SMITH v. BOOTH et al.

(District Court, S. D. New York. June 18, 1901.)

1. SHIPPING—LOSS OF GOODS IN TRANSSHIPMENT—NEGLIGENT LOADING OF LIGHTER.

A shipment of rice was made from Liverpool under bills of lading requiring it to be transported to New York, and there delivered to W. & Co., and by them to be transshipped by a designated line of steamers, and delivered to the consignee in Havana. W. & Co. received the rice, and contracted with a lighterage company to transfer the same to the Havana steamer. That company chartered a lighter, together with a lighterman, who was furnished by the owner, and who engaged the

stevedores and superintended the work. Through his negligence the lighter was so loaded as to be top-heavy, and when discharging capsized, and the greater part of the rice was lost. *Held*, that W. & Co., the lighterage company, and the owner of the lighter were each liable for the loss,—W. & Co. on their contract to safely transship, the lighterage company on its undertaking as carrier to lighter the goods, and make proper delivery, and the owner of the lighter for the negligence of its servant, and its obligation to indemnify the lighterage company as carrier; on which ground it was cited into the cause as defendant by W. & Co., under the fifty-ninth rule.

**2. SAME—LIMITATION OF LIABILITY—CHARTERER.**

A lighterage company which contracts to transfer cargo from one ship to another, and for that purpose charters a lighter, the lighterman, who employs the stevedores, and superintends the work, being furnished by the owner, is not entitled to a limitation of liability, under Rev. St. § 4286, for a loss of cargo by the capsizing of the lighter through negligent loading.

**3. SAME—BILLS OF LADING.**

Bills of lading for a shipment of rice from Liverpool required its delivery to W. & Co. in New York, by whom it was to be transshipped and forwarded by a steamer of a company operating a line to Havana, "on terms, tenor, and conditions of bill of lading of the aforesaid company." The goods were lost by the capsizing of a lighter employed by W. & Co. while being transferred to the Havana steamer. *Held*, that the bill of lading which would have been issued by such steamer did not become operative, since the goods were not delivered on board, and that W. & Co. could not avail themselves of its provisions to relieve themselves from liability for the loss.

**In Admiralty.**

This action was instituted originally by J. Raymond Smith against Henry P. Booth alone, as sole member of the firm of James E. Ward & Co., to recover the value of 1902 bags of rice, which were lost overboard from the lighter Mary Elizabeth on September 1, 1898, by her capsizing while lying alongside the steamer Avala, engaged in transshipping rice from the lighter to the steamer.

The rice was shipped at Liverpool, England, by Messrs. Twigge & Crosfield, on the steamer Teutonic, under 8 bills of lading, each covering 250 sacks, for transportation to New York, and there "to be delivered in like good order and well-conditioned (subject to various exceptions here immaterial) unto James E. Ward & Co., and by them to be transshipped and forwarded thence, by one of the steamers of James E. Ward & Co., at ship-owners' expense, conveying the goods under the terms, tenor, and conditions of the bill of lading of the aforesaid company, at risk and expense of shippers and consignees, and deliver same at port of Havana, unto order, or assigns."

The bills of lading were indorsed in blank and sent to Brown, Martinez & Co., of Havana, who thereby became entitled to delivery of the rice at Havana. The rice was insured by the Maritime Insurance Company, Limited, of Liverpool, in the amount of £2,250 British sterling under a valuation of £2,500. Twigge & Crosfield, Brown, Martinez & Co., and the Maritime Insurance Company, Limited, made assignments of their interests to the libellant.

On arrival of the Teutonic at New York, Ward & Co. received the rice, and made the necessary entry at the custom house for the purpose of transshipment. James E. Ward & Co. at this time had no steamers of their own. They had formerly run a line of steamers to Cuban and Mexican ports which was then and still is known as the "Ward Line"; but some years before this shipment they transferred all their steamers to the New York & Cuba Mail Steamship Company, a corporation by which the business of the line was thereafter, and is still conducted. James E. Ward & Co. were the agents of that corporation, and the defendant Henry P. Booth the sole

member of the firm, was and is its president. His answer averred that he had employed the Export Lighterage Company for the transshipment of goods from the Teutonic to the Ayala, one of the steamship company's chartered vessels, and that the Export Lighterage Company had chartered the lighter, Mary Elizabeth, from the Merritt & Chapman Derrick & Wrecking Company, by whose fault, if any fault there was, the lighter capsized; and on his petition the Merritt & Chapman Derrick & Wrecking Company was cited into the cause as defendant under the fifty-ninth rule. The latter company answered that it had no connection with the Mary Elizabeth except as agent of the Commercial Lighterage Company, another corporation, which owned the lighter; and on Booth's second petition the Commercial Company was cited under the fifty-ninth rule as an additional defendant. By various amendments to the libel, the Export Lighterage Company was also made defendant, and it was finally alleged that the rice was in the joint possession of Booth and that company, and that the loss occurred through their joint fault and negligence, and the joint fault and negligence of those to whom the work of transshipment had been intrusted.

The Export Lighterage Company by its answer alleged that the loss did not happen through any defect of the lighter, its loading, or the manner of discharge; that it had no contract with the libelant's assignor, and that it was not answerable for the loss. The Commercial Lighterage Company denied any negligence on its part, and by amendment pleaded that the value of the vessel did not exceed the sum of \$300, to which sum it claimed to limit its liability, if any liability existed.

Butler, Notman, Joline & Mynderse, for libelant.

Wing, Putnam & Burlingham, for H. P. Booth.

Benedict & Benedict, for Export Lighterage Co.

Avery F. Cushman, for Merritt & Chapman Derrick & Wrecking Co. and Commercial Lighterage Co.

BROWN, District Judge (after stating the facts as above). Upon careful consideration of the evidence and circumstances, I am satisfied that the lighter capsized in consequence of improper loading, that is, from putting the entire cargo of over 200 tons upon deck, with none in the hold, so that the lighter had not ordinary or reasonable steadiness. Only about 10 tons in all had been removed when the lighter capsized. It was unloaded over the port side. A short time before, a list to starboard was observed, and as it increased the stevedore's men set to work rolling the bags of rice from the starboard side to the port side, but before a sufficient change could be made the lighter capsized.

The loading of the lighter was under the immediate supervision of the lighterman Harrigden, who was in the employ of the Commercial Lighterage Company, the owner of the scow and was paid by that company; and the letting of the scow to the Export Lighterage Company included the services of Harrigden, who was in charge of it. On arrival of the scow he was directed by Mr. Bird, who was the general agent and manager of James E. Ward & Co., and was also the president of the Export Lighterage Company to proceed to pier 50 North river, where the Teutonic discharged, and take the rice and bring it (about two miles) to the New York & Cuba Mail Steamship Company's pier near the foot of Wall street. Under this order the lighterman proceeded to the Teutonic's pier, engaging stevedores, who were paid by the lighterage company, and superintended and directed the loading of the rice upon the lighter in the

manner above stated. On the 26th of May the lighter was towed around the Battery to the docks of the Ward Line, remained there until the 1st of September, when the *Avala*, one of the steamship company's chartered steamers, being ready to receive the cargo for transportation to Havana, the lighter was sent alongside that steamer for the purpose of delivering the rice on board.

It is suggested that as the lighter leaked somewhat, so as to require some pumping every few hours, the leak might have increased from some pounding or accident in changes of position during the several days that the lighter was waiting in the slip, so that when the list to starboard began it was rapidly increased by the flow of water to the starboard side. The evidence shows, however, that the lighter was pumped out until the pump sucked at 4 a. m., less than three hours before the accident. The suggestion of further injury to the boat and consequent heavier leaks have no foundation in the evidence; and as a bare possibility, it cannot be regarded, considering that a sufficient cause of the accident appears in evidence, namely, in the loading of the lighter to her full capacity, or as would appear from the evidence of Mr. Briggs, a former owner, somewhat above her proper capacity, and placing the entire load on deck without anything below to steady her. The lighter, moreover, was completely housed over, excepting a few feet at the stern and the bow. All the rice was inside the house, which was filled nearly to the top, so that when the lighter commenced to list to starboard, the side of the house prevented any of the bags from rolling off, which but for the house might have relieved the lighter and have prevented capsizing.

Some claim is made that the stevedores of the steamship were to blame for not unloading the rice more carefully so as to preserve the lighter's equilibrium. The lighterman told the stevedores that the lighter was tender, and asked that the unloading be in the inverse order of the loading, beginning forward. It not being convenient for the *Avala* to begin discharging through the forward gate or doorway of the house on the lighter, the discharge was commenced from the aft gateway, and in this Mr. Harrigden, whose business it was to keep tally of the bags as they were delivered on board of the steamer, seems to have concurred. In other respects the stevedores testified that they did unload in the manner requested by Mr. Harrigden and in a manner different from usual; and without going into further details, I find that there was no such substantial disregard of Harrigden's request, or of any notice given by him to the stevedores as to charge them with blame or negligence.

From the above finding as to the cause of the loss, the liability of all the defendants follows as a legal consequence; that of the defendant Booth, as the sole representative of James E. Ward & Co., upon his contract to transship the goods and his failure to do so; that of the Export Lighterage Company, which having as carrier undertaken to lighter the goods and make proper delivery to the *Avala* was bound as carrier (Carv. Car. by Sea, §§ 5, 462) to do so, and was answerable to the owner for any negligence causing damage; and that of the Commercial Lighterage Company for the negligence of Harrigden, its employe, in the management of the

loading. The Export Lighterage Company as carrier is not excused by the negligence of the lighterman on the chartered scow, which was merely the agency it employed to effect the carriage. *Gannon v. Ice Co.*, 33 C. C. A. 662, 91 Fed. 539. The Commercial Lighterage Company is liable, not only for the negligence of its employé in handling the goods, but upon its obligation to indemnify the Export Lighterage Company and Booth upon their liability as carrier, on which ground they were cited as defendants into the cause under the fifty-ninth rule. That company seems, however, to be within the provision of section 4283 of the Revised Statutes, which limits the liability of an owner to the value of his interest in the vessel and her freight then pending.

The liability of the Export Lighterage Company, as charterer of the lighter, does not seem to be within the provision of section 4286; inasmuch as the charterer did not in this case "man, victual and navigate the lighter at its own expense," and the defendant Booth is clearly not within this provision. If it be unequal, and in that sense inequitable, that the owner of the vessel should be relieved by the statute from a large part of the damage resulting from the negligence of its own employé, while the charterer who suffers from the same negligence, is not relieved, it can only be said that this relief is a statutory and arbitrary one, and can extend no further than the statute prescribes, and that the charterer in this case is not within it; while it would be equally inequitable, as between the charterer and the defendant Booth, that the charterer should be relieved to the prejudice of Booth, who is in no personal fault and is clearly entitled to indemnity from the charterer who undertook to do the lighterage and transshipment.

It is contended in behalf of the defendant Booth that he is entitled to the benefit of various stipulations in the Ward Line's bill of lading, which would have been issued had the rice been shipped upon the Avala in pursuance of the agreement in the original bill of lading, whereby it was provided that the goods were to be transshipped by James E. Ward & Co. and forwarded by them from New York "by one of the steamers of James E. Ward & Co. at shipowner's expense, conveying the goods on terms, tenor and conditions of bill of lading of the aforesaid company at risk of shippers and consignees, and deliver the same at the port of Havana." Although James E. Ward & Company had no steamers, it may be conceded that the carriage of the goods from New York to Havana would be subject to the usual terms of the bill of lading in use by the Ward Line; but no such bill of lading could come into operation until the rice was either put on board the Ward Line steamer, or else properly delivered into the possession and control of the steamship company for that purpose. Neither was done. At the time when the lighter capsized no such transshipment or delivery of this rice had been made. It was still in the possession of Booth or of the Export Lighterage Company as lighterman. The stevedores of the steamship company were engaged in transshipping the rice from alongside. But in consequence of the improper loading of the lighter, there was no proper delivery, and the stevedores were not able to secure the goods or to take possession or control of them

before the lighter capsized. I find, therefore, that the expected bill of lading and its various provisions never became applicable to these goods; that the contract did not provide that that bill of lading should cover any lighterage of the goods from the Teutonic to the Havana steamer, nor any contract of James E. Ward & Co. for such lighterage, or their possession of the goods prior to a proper and complete delivery of them to the steamship company, or their delivery of them on board the steamer.

Decree for libellant against the defendants with costs, except as against the Merritt & Chapman Derrick & Wrecking Company, as to which this libel is dismissed with \$20 costs.

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THE JAMES D. LEARY.

THE EVELYN.

(District Court, S. D. New York. December 14, 1900.)

ADMIRALTY—COLLISION—ANCHORAGE GROUND—NEW YORK BAY—SMOKE—FOG.

A steamer passed the Narrows and came into New York Bay at night without a pilot, and came to anchor considerably to the east of the anchorage grounds fixed by the secretary of the treasury, which were marked by buoys; the master not knowing the true boundaries of the grounds, though the rule had been in force since 1888. A tug and tow were passing out, and the steamer was not seen by the tug until she was within 300 feet from her, when the steamer was discovered straight ahead. The tug then endeavored to avoid collision, and passed about 150 feet to the east of the steamer, which was struck by the tow. The night was clear, except for patches of fog and smoke, which obscured view of vessels but for a few minutes. The steamer's anchor light was visible at times at least from one to two miles while the tug was slowly approaching her. *Held*, that both steamer and the tug were at fault for the collision; the steamer in anchoring outside the limits of the anchor grounds, and the tug in not keeping a proper lookout,—and that the damages and costs should therefore be divided.

In Admiralty.

Wing, Putnam & Burlingham and Mr. Forrester, for The Evelyn.  
Foley & Wray, for the scows.

Convers & Kirlin, for The Leary.

BROWN, District Judge. The steamship Evelyn, a coastwise steamer inward bound, passed the Narrows between 12 and 1 o'clock on the morning of April 4, 1900, and anchored a short distance above the lower white spar buoy that marks the easterly line of the anchorage grounds off Clifton, Staten Island. At about 3 a. m. the tug Leary, with two loaded mud scows 110 feet long in tow on a hawser about 250 feet long, one behind the other, came out of the Kills bound for the dumping grounds below Coney Island. The tide was ebb, and according to the testimony set somewhat upon the Staten Island shore; and the Leary in going down, was headed, as her pilot testifies, from one to two points toward the Long Island shore in the direction of Fort Lafayette. The night was clear, except a little haze on the water, and the wind was light from the northwest, which carried some smoke from the copper works near Constable's Point across the bay, which was occasionally thick enough to obscure the sight of vessels to some extent and for a few minutes, when the



smoke would again clear up. On account of this smoke the witnesses from the Leary say that the Evelyn could not be seen until she was only about 300 feet away, and when the Leary was about directly ahead of her crossing her at an angle of about three points. The Leary's wheel was immediately put hard a-starboard, and going under a slow bell before; her engine was then started ahead full speed. The Leary passed about 150 feet to the eastward of the Evelyn, but the port bow of the forward scow struck the Evelyn's port bow, the hawser was parted, and the scow went down on the west side of the Evelyn, and the tug to the east. Both the scow and the steamer sustained damages, for which the above libels were filed.

Upon all the circumstances I must find the steamer, as well as the tug in fault for this collision. The weight of testimony leaves little doubt that the steamer was considerably to the eastward of the anchorage grounds prescribed by the secretary of the treasury under section 21 of the act of May 16, 1888. The easterly line marked out in those regulations as well as by the charts, runs about north by east from quarantine wharf to a point a little to the southward of the east and west line of the Kills, and embraces all the waters to the westward of that line to the Staten Island shore. The upper part of those waters is over a half a mile in breadth and gradually narrows below to a point. The easterly line of this anchorage ground is clearly marked by three white spar buoys. The clear weight of testimony is that the Evelyn was considerably to the eastward of these buoys. The pilot of the government boat Argos, a wholly disinterested witness, was engaged from half past 12 o'clock until 6 a. m. in picking up the permits of tugs going down the harbor for dumping purposes. He testifies that during this interval he passed up and down and rounded five or six times between the lower white buoy and the Evelyn, while she lay at anchor, which he says was at least 500 feet to the eastward of the buoy and about 1,000 feet to the northward and eastward of it. The pilot of the Kaiser Wilhelm der Grosse, which anchored below the Evelyn at about 2 o'clock of the same morning, confirms other testimony to the same effect. The master of the Evelyn came in without a pilot, and did not know the true easterly line of the anchorage grounds, as on cross-examination he states those grounds to run from Robbin's Reef light to Craven Shoals—an error that would explain his mistake. Considering the length of time, however, that these regulations have been in force, no vessel can be held excused for such an error. This contributed to the collision, especially in weather occasionally obscured, by throwing the tug to some extent off her guard, since vessels at anchor would not naturally be looked for to the eastward of the buoy ranges. The *La Bourgogne*, 30 C. C. A. 203, 86 Fed. 475, 479; The *Ailsa* (D. C.) 76 Fed. 868. This fault in position was enhanced by her want of an active anchor watch forward and the omission of any fog signal by ringing the bell during periods of partial obscuration and the failure to pay out chain before collision. The *Richmond*, 12 C. C. A. 1, 63 Fed. 1020.

The tug's testimony that there was occasional smoke from the copper works about the time of collision and some haze on the water, is confirmed by disinterested witnesses, so that I cannot discredit this

testimony altogether, although I think the tug's evidence in that regard exaggerated. The alleged sounding of fog signals was not for any considerable time. The captain says it was for about two minutes. This is not set up in the answer, nor very strongly confirmed by other witnesses. It was so brief as to be of little importance, and of the many other vessels anchored in that region at the same time, none were giving fog signals. The evidence of obscuration shows that it was only partial, occasional and for short periods; so that had a proper lookout been kept by the Leary, the Evelyn's anchor light visible at times at least from one to two miles distant while the tug was slowly approaching her, should have been seen in time to avoid collision.

Both the tug and the steamer should be held in fault and the damages and costs divided.

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THE THOMAS B. GARLAND.

THE EMMA J. KENNEDY.

(District Court, S. D. New York. June 21, 1901.)

ADMIRALTY—COLLISION—FERRYBOATS—TUG AND TOW.

Inland navigation rules, article 19 (2 Supp. Rev. St. p. 639), gives a tug and tow going up East river right of way over ferryboats. Article 22 requires ferryboats to avoid crossing ahead of a tug and tow, if the circumstances admit, and article 23 declares that a ferryboat, on signaling to cross a tug and tow, and getting no answer, shall stop and reverse. *Held* that, where a ferryboat on coming from her slip was 1,000 feet from a tug and tow coming up the river about midstream, and though there was no reason why the ferry could not have passed astern of the tow, she claimed to have signaled to pass in front, and, on getting no response from the tug, kept her course until she was within 50 feet of the tow, when she endeavored to stop, but was struck by the tow, the ferryboat was at fault, and was not entitled to maintain a libel against the tug and tow.

In Admiralty.

Wheeler & Cortis and Mr. Haight, for libelant.

Convers & Kirlin, for the Thomas B. Garland.

Foley & Wray, for the Emma J. Kennedy.

BROWN, District Judge. A little before 6 o'clock in the morning of November 20, 1900, shortly after the ferryboat Sag Harbor had left her slip at 34th street, East river, on her trip to Long Island city, when about 800 or 900 feet outside of the slip, she came in collision with the schooner Garland going up river in the flood tide in tow of the tug Kennedy upon a hawser of about 150 feet and received damages, for the recovery of which the above libel was filed.

When the ferryboat started from her slip, the Kennedy with her tow was not far from midstream, about 1,000 feet below, but was pointing somewhat toward the New York shore in order to pass to the southward of Man of War rock, off 38th street, so as to go up the westerly channel in passing Blackwell's Island. She had her regulation light properly set and burning, with two white vertical lights indicating her tow, which the libelants say were seen. Upon leaving the slip the ferryboat had the tug and tow upon her starboard

hand. It was her duty by article 19 of the inland rules of navigation (2 Supp. Rev. St. p. 639) to keep out of their way. Article 22 required her to avoid crossing ahead of the tug and tow "if the circumstances of the case admit." According to the pilot's own testimony, there was nothing to prevent his going astern of the tug and tow as that rule required. The testimony of the pilot of the tug, corroborated by several witnesses, is that as the ferryboat was seen coming out of her slip, he gave her a signal of one whistle and got one whistle in reply importing that the ferryboat would go astern. He supposed that there would be no further trouble; that was in accordance with the rules of navigation, and had the rules been observed, there was not the least reason for any collision. It is possible that the single whistle, taken as a reply, may have been the whistle given by the ferryboat on starting out of the slip a little delayed. Shortly after getting out of the slip, however, the pilot of the ferryboat testifies, and other witnesses confirm him, that he gave a signal of two whistles to the tug indicating his desire to go ahead of her; that this signal of two whistles was repeated twice afterwards, making three times in all, and that no answer was received to either; that the ferryboat continued on at full speed until she had reached a point within about 100 feet of the line of the tug and tow, the tug and tow being then nearly ahead of him when he got an answer of one whistle from the tug, whereupon he gave an alarm and reversed, and that the tug passed about 50 feet ahead of him. He claims that within this space of 50 feet he completely stopped the ferryboat from full speed ahead and got stern way on her; and that the collision with the schooner was caused solely by her starboarding, by which the schooner's bow was brought against the starboard side of the ferryboat. This is contradicted by the witnesses for the schooner, and in my judgment is wholly disproved, and the claim of the ferryboat that by reversing from full speed ahead she could get stern way on in advancing 50 feet is ludicrous and absurd.

The collision was plainly caused by the persistent and reckless navigation of the ferryboat, in direct and deliberate violation of the 19th, 20th, 22d and 23d articles of the rules of navigation, as well as rule 3 of the supervising inspectors, which under the circumstances required her to stop and reverse after getting no answer to her first signal of two whistles.

As regards the contradiction of whistles, it is possible that the answer of one whistle, which the witnesses for the tug say was received from the ferryboat, in answer to her signal of one whistle, may have been a slip whistle given by the ferryboat as she was leaving the slip. I do not doubt that the tug gave the signal of one whistle and heard the answer of one whistle in apparent reply. The tug and tow were in full view of the ferryboat at the time. The tug afterwards gave another signal of one whistle in response to the signal of two whistles from the ferryboat, the only signal of two whistles that was heard. I am of opinion that this was all the reply that was required from the tug.

The libel should be dismissed, with costs.

## DELAWARE, L. &amp; W. R. CO. v. FRANK et al.

(Circuit Court, W. D. New York. August 26, 1901.)

No. 131.

**1. CARRIERS OF PASSENGERS—SPECIAL TICKETS—CONTRACT PROHIBITING TRANSFER.**

A common carrier has a right to issue and sell special tickets at a reduced rate of fare in consideration of the purchaser's agreement to certain conditions and limitations contained therein, among which it may be stipulated that the ticket shall not be transferred, and the use of such a ticket by another to whom it has been transferred in violation of the contract is an actionable wrong.

**2. SAME—CONTRACT MADE BY TICKET—INTERFERENCE WITH PERFORMANCE BY THIRD PARTIES.**

A railroad ticket broker who induces the purchaser of a special ticket, in which he has agreed, for a valuable consideration, not to transfer the same, to violate such agreement by selling the return portion of the ticket for the purpose of having it used by another, is guilty of an actionable interference with the performance of the contract.

**3. FEDERAL COURTS—PARTIES TO SUIT IN EQUITY—DISMISSAL AS TO CERTAIN DEFENDANTS.**

A federal court may dismiss a suit as against defendants between whom and the complainant the requisite diversity of citizenship does not exist, and retain it as to remaining defendants over whom it has jurisdiction, where the defendants dismissed are not indispensable parties, and their dismissal will not prejudice the rights of the others.

**4. INJUNCTION—PARTIES—JOINDER OF DEFENDANTS.**

In a suit by a railroad company for an injunction to restrain the purchase from passengers of partly-used tickets, nontransferable by their terms, and their resale for use in violation of the contract contained therein, where different brokers are engaged in dealing in the same class of tickets, all or any number of them may be joined as defendants.

**5. JURISDICTION OF FEDERAL COURTS—AMOUNT IN CONTROVERSY—SUIT FOR INJUNCTION.**

In a suit for an injunction the amount involved for the purpose of determining the jurisdiction of a federal court is the value of the right to be protected, or the extent of the injury to be prevented, by the injunction.<sup>1</sup>

**6. INJUNCTION—GROUNDS—INADEQUACY OF LEGAL REMEDY.**

A court of equity has jurisdiction of a suit to enjoin wrongful acts by defendants where the complainant's legal remedy involves numerous actions against irresponsible defendants, to recover small sums, in which the damages would not be clearly susceptible of proof, and which, if successful, would not result in any practical benefit to complainant.

**7. EQUITY—RIGHT TO INVOKE JURISDICTION—PROTECTION OF CONTRACTS ARISING OUT OF UNLAWFUL COMBINATION.**

In a suit by a railroad company to enjoin the defendants, who were ticket brokers, from dealing in special tickets issued by complainant on account of the Pan-American Exposition, which were by their terms nontransferable, it appeared from the showing made on a motion for a preliminary injunction that complainant was a member of a combination known as the "Trunk Line Association," formed by a number of railroads operating in different states for the purpose of preventing competition; that the passenger receipts of all such roads were pooled and divided on an agreed basis; and that the special rates made on account of the Exposition were fixed, and the terms of the tickets which were the basis of the suit prescribed, by such association through its passenger committee. *Held*, that such combination was illegal, as in violation

<sup>1</sup>Jurisdiction as affected by amount in controversy, see notes to *Auer v. Lombard*, 19 C. C. A. 75; *Shoe Co. v. Roper*, 36 C. C. A. 459.

of the federal anti-trust law (26 Stat. 209), and that complainant could not invoke the aid of a federal court of equity for the protection of rights claimed under contracts which were the direct result and evidence of such unlawful combination.

In Equity. On motion for preliminary injunction.

Rogers, Locke & Milburn, for complainant.

Roberts, Becker, Messer & Groat, Laughlin & Ewell, Louis L. Ullman, and George F. Schultz (Tracy C. Becker and Louis Marshal, of counsel), for defendants.

HAZEL, District Judge. The injunctive relief of this court is invoked by the complainant on the ground of diverse citizenship, and on the further ground that, by the wrongful and fraudulent action and threatened continuance of the wrongful and fraudulent sale of special coach excursion tickets, account Pan-American Exposition, by the defendants, the complainant is damaged far in excess of the sum of \$2,000. The complainant is a citizen of Pennsylvania. The bill alleges that the complainant believes the defendants are citizens of New York. A restraining order was heretofore allowed on the bill and accompanying affidavits, with an order to show cause why an injunction pendente lite should not be granted. Sixty-one defendants are proceeded against, many of them under the name of John Doe. By the bill it is claimed that the complainant railroad corporation is greatly wronged and damaged by the fraudulent and unlawful acts of the defendants, who are railroad ticket brokers engaged in business at Buffalo, N. Y. After reciting that the complainant operates a railroad for the carriage of passengers and freight for hire between Hoboken, N. J., and Buffalo, N. Y., and branch lines connecting with its main line and various other railroad lines with which it interchanges freight and traffic, the bill alleges that there is now being held in the city of Buffalo, within the jurisdiction of this court, the Pan-American Exposition; that, shortly before the opening of the Exposition, application was made by the officers thereof to the complainant and other railway companies connecting with it, to reduce their usual and ordinary rate of fare charged for passenger transportation from points along their lines to Buffalo and return to the initial point. To this request, it is alleged, complainant consented, and thereafter caused to be sold at its various stations tickets for special round trips and excursions to Buffalo at greatly reduced rates. The bill further alleges that, in consideration of such reduced rates, such tickets provide that the same shall not be transferable nor be valid or accepted for transportation in the hands of any person other than the original purchaser; that the same shall be good for only a specified number of days from the date of sale stamped thereon, and before being presented for return passage shall be stamped by a validating agent at Buffalo not later than the day canceled thereon,—that being the day on which said ticket shall be used for return to the initial point, and then to be used by continuous passage on the same train. The ticket has printed on its face the words, "Special Excursion Ticket, Account Pan-American Exposition." The conditions as above set

forth are printed thereon, and the purchaser is required to subscribe to the following contract:

"In consideration of the reduced fare at which this ticket is sold, I, the purchaser, hereby accept and agree to be governed by all the conditions as stated in the above contract."

It is further alleged that the New York Central & Hudson River Railroad Company and the West Shore Railroad Company, connecting roads, have issued like tickets, which are good in part over complainant's road. The bill then alleges broadly that defendants are engaged as ticket brokers or ticket scalpers at Buffalo, and in the conduct of their business procure from the original purchasers, and other persons in many instances, the return portions of such tickets purchased by them from Buffalo to the initial point, and that, when the same are procured, such tickets are sold to other persons, who, by falsely impersonating the original purchaser before the validating agent of complainant, and signing the original purchaser's name to such ticket, are enabled to use such tickets for transportation over complainant's railroad. It is further alleged that defendants, by billboards and placards placed over and in front of their various offices, give notice that they buy and sell such tickets at cut rates; that they employ solicitors to intercept persons originally purchasing such Pan-American special-rate tickets, on their arrival at Buffalo, for the purpose of purchasing the return portions of such tickets, and that such tickets are disposed of to the traveling public; that the purchaser is instructed how to impersonate the original purchaser so as to escape detection. It is also charged that forgeries and other fraudulent and wrongful acts are committed by the defendants, the original purchaser of the ticket, and the purchaser from the defendants, for the purpose of hindering and impeding the complainant in its business, and to deprive it of the sale of tickets at the regular and ordinary rate from Buffalo to other points along its line, and to defraud it out of the amount of the fare which the person fraudulently using such ticket would otherwise pay for such transportation. It is also alleged that the defendants are pecuniarily irresponsible, that it is impossible for complainant to establish from which of the defendants fraudulent tickets are purchased, and that no practicable means exist by which the frauds of the defendants can be detected or prevented. The bill also alleges that the defendants, or many of them, are united in an association and band and conspire together to carry on the business of purchasing and disposing of said tickets, and that complainant's business is thereby greatly injured, and its earnings and profits lessened. At the time of the hearing on the motion to continue the injunction, 36 defendants appeared, by counsel, specially, to object to the jurisdiction of the court. Other defendants appeared in person. The ground of objection is that a diversity of citizenship does not exist between complainant and many of the defendants. Affidavits of two defendants were read and filed, showing that they are citizens of the same state as the complainant. Affidavits of other defendants were also read and filed, from which it satisfactorily appears that such defendants are not citizens of New

York. The affidavits denying diversity of citizenship **are**, upon this application, treated as a plea to the jurisdiction of the **court** to grant the provisional relief sought.

Defendants contend (1) that the bill cannot be dismissed **as** to any defendant not within the jurisdiction of the court without a dismissal of the bill as to all defendants; (2) that the bill does not state a cause of action, either in law or equity, against any of the defendants; (3) that complainant is engaged in an open violation of the anti-trust law of congress in maintaining in combination with other railroads a rate of fare to the Exposition and return to the initial point; (4) that the bill ought to be dismissed on the further ground that its essential allegations and those of the accompanying affidavits are made on information and belief, or by a person who has no actual knowledge of the facts alleged.

This application is based mainly upon the bill of complaint. The bill, however, is positive in many of its allegations, and being verified, may therefore be considered an affidavit as a basis for provisional remedy. *Hecker v. Mayor, etc.*, 28 How. Prac. 212, and cases cited. The defendants' counsel contend that the allegations of complainant's papers are not made in such a direct and positive manner that the writ of injunction may issue. An examination of the averments of the bill and the affidavits submitted convinces me, however, that this objection is untenable. I deem it quite uniformly settled by the courts of the United States and by the state courts, where the question has been considered, that a common carrier has a right to issue and sell tickets along and over its line or road at reduced rate of fare in consideration of the purchaser's agreement to on his part conform to conditions and stipulations expressed by the ticket and furnished to the purchaser. The conditions to which the purchaser of complainant's ticket assented were, substantially, that the ticket should not be transferred to another for use; that the purchaser would present the return portion of the ticket for use within a specified time; that he would affix his signature in the presence of the joint agent on the reverse side of the return portion on or before the day limited for return use. It was held in the case of *Railroad Co. v. McConnell* (C. C.) 82 Fed. 65, that the right to make and issue a special form of ticket, furnishing a reduced rate of fare, and thereby aiding in a great public purpose, is fully recognized both at common law and by legislation, and that the use of one of these tickets in violation of the contract by a person other than the original purchaser is a fraud upon the common carrier. It follows that the right to impose conditions upon its passengers in consideration of the acceptance of a ticket at reduced fare carries with it a right to limit the ticket as to time, the train on which it is to be used, and to prohibit a sale and transfer thereof to another person. Defendants admit a right of limitation as to time, restrictions as to train to be used, and that a railroad company may require the ticket issued by it to be stamped. They insist, however, that, as the ticket is property, a prohibition of its sale is equivalent to depriving its owner of acquired property; that he obtains by the purchase thereof an assignable right, and also the right to authorize another to indorse his name

on the ticket whenever it is required by the contract of purchase. I cannot accept this view. No substantial reason presents itself why a purchaser of transportation from a common carrier in consideration of the reduction of fare from the ordinary rate should not abide faithfully by reasonable restrictions and limitations contained in the contract of purchase. While a person may obtain an assignable right in a railroad ticket, yet, when the right obtained is curtailed or limited, the purchasing party, assenting to the limitation for a valuable consideration, must hold his obligation as inviolate as he has a right to hold that of the railroad company. In consideration of the price paid for the ticket the purchaser obtains the right of passage, and as well obligates the common carrier to other responsibilities. Where a right of passage is obtained by special contract and at a reduced rate of fare, carrying with it restrictions and limitations, the purchaser receives a consideration which makes it obligatory on him to in good faith carry out his agreement. A violation of the contract of transportation by the common carrier lays it open to legal liabilities and consequent remedies. The contract is binding on both. If the time in which a return part of the ticket may be used has lapsed, the purchaser of the ticket has failed to accept a right guaranteed him by the contract. Failure to use the return portion of the ticket by him must be deemed his own voluntary act or neglect. The common carrier is required to transport the purchaser on his return without additional compensation. It may be required to provide for his use such comfort and conveniences as are usually allotted to the traveling public. This question was only recently before the Fourth department, appellate division of the supreme court of New York. *People v. Caldwell*, 71 N. Y. Supp. 654. Justice McLennan, speaking for the court, said:

"We think the decision in the case of *People ex rel. Tyroler v. Warden*, 157 N. Y. 116, 51 N. E. 1006, 43 L. R. A. 264, 68 Am. St. Rep. 763, must be regarded as decisive of the proposition that it is not competent for the legislature to prohibit the purchase and sale of passage tickets over transportation lines when such sale is not in violation of any contract made with the transportation companies upon the sale of such tickets by them."

This was a case brought before the court on appeal from a final order in habeas corpus proceeding discharging the relator from arrest. The relator was arrested for violating an act of the legislature passed in 1901, which by its terms provided, in substance, that no person shall sell a passage ticket giving any right to a passage or conveyance upon any railroad train, unless it be an authorized agent of the company running such train, or unless he has received a certificate of authority therefor, in writing, from such company. The court followed a decision of the court of appeals (*Tyroler v. Warden*, *supra*) holding such a penal statute unconstitutional. It will be seen that the appellate division limited its decision, and interpreted the decision of the court of appeals, to tickets issued over railroad lines whenever such sale is not in violation of contractual obligations. It is clear that a limitation upon the use of a ticket as to time and its use by another than the original purchaser may be restricted and limited to the fair and true intendment of the contract. When, therefore, a subsequent purchaser of a ticket from a broker, who pur-



chased the ticket from the original purchaser, uses the same, he becomes liable to the railroad company wronged, in an action at law, for any damage sustained. No obligation exists on the railroad company to transport a passenger holding such a ticket. *Mosher v. Railway Co.*, 127 U. S. 390, 8 Sup. Ct. 1324, 32 L. Ed. 249. It is equally clear that the interference of the ticket broker in inducing a person holding the return part of a ticket purchased by him from the railroad under special contract arrangements not to transfer or permit the use of such ticket by another person, in consideration of the sale of such ticket at a reduced rate of fare, in order to break the contract, is actionable. *Angle v. Railway Co.*, 151 U. S. 1, 14 Sup. Ct. 240, 38 L. Ed. 55; *Railroad Co. v. McConnell*, *supra*. An examination of the authorities convinces me that it is quite well settled that jurisdiction may be retained over defendants as to whom a diversity of citizenship exists, and a dismissal of the complaint may, and in a proper case will, be permitted against defendants who are not found to be within the jurisdiction of the court, unless such defendants are indispensable to the entry of a decree against the remaining defendants, and when it may be done without prejudice. *Horn v. Lockhart*, 17 Wall. 570, 21 L. Ed. 657; *Oxley Stave Co. v. Coopers' International Union of North America* (C. C.) 72 Fed. 695; *Mason v. Dullagham*, 27 C. C. A. 296, 82 Fed. 689; *Grove v. Grove* (C. C.) 93 Fed. 865; *Smith v. Oil Co.*, 30 C. C. A. 103, 86 Fed. 359.

The contention of counsel for defendants that the bill imperfectly and defectively charges fraudulent and wrongful acts by 61 defendants, rendering it impossible to separate any one of them or dismiss the bill as to any of them without injury and prejudice to the remaining defendants, is untenable. The defendants who are not diverse citizens from the complainant are not indispensable.

The question now arises, can this proceeding be maintained against the remaining defendants, and by a single bill? These objections are removed by the language of Judge Clark in the *McConnell* Case, where the facts are similar to the case at bar, at page 75, where he says:

"I think the defendants may properly be joined in one suit. Plaintiffs' business is the subject-matter in each bill, and the right claimed is exactly the same against all the defendants. The injury complained of is the same, and is being inflicted by defendants in the same method and at the same time."

The objection that the suit fails of jurisdiction because it is not shown that the defendants against whom the action may be continued have damaged complainant in a sum in excess of \$2,000 is overruled. It has been frequently held that in a suit in equity, where an injunction is sought, the amount in dispute is not the amount in controversy, but the value of the object to be gained by the bill. In the case of *Humes v. City of Ft. Smith* (C. C.) 93 Fed. 862, where an objection was made to the jurisdiction of the court because the amount in controversy did not exceed the sum of \$2,000, the court said:

"Jurisdiction is not determined in that way. Jurisdiction is determined by the value of the right to be protected, or the extent of the injury to be prevented, by the injunction."

A court of equity will not require a pursuit of a legal remedy which foreshadows annoyance, accompanied by uncertain results and multiplicity of suits, to recover small sums from irresponsible defendants, where, as in this case, the damages caused by the alleged wrongful acts are not clearly susceptible of proof, and where the legal remedy that is afforded falls short of being complete and efficient. *Railroad Co. v. McConnell*, *supra*; *Insurance Co. v. Clunie* (C. C.) 88 Fed. 167; *Smith v. Bivens* (C. C.) 56 Fed. 352; *Smyth v. Ames*, 169 U. S. 466, 18 Sup. Ct. 418, 42 L. Ed. 819; *De Forest v. Thompson* (C. C.) 40 Fed. 375. The complainant's papers, standing alone, disclose a proper case for the exercise of equitable relief.

I now come to consider a ground of objection to a preliminary injunction, not free from difficulty. I have given the subject most serious consideration, and am conscious of the great importance and far-reaching effect that its decision involves. Defendants contend that the complainant, in determining on the reduced rate of fare for a round-trip ticket on its road during the continuance of the Pan-American Exposition at Buffalo, ending with October 31, 1901, in conjunction with other railroad lines having facilities for transportation of passengers over its road to Buffalo, violated the provision of the act of congress of July 2, 1890, by which it is provided:

"Every contract, combination in the form of trust or otherwise, or conspiracy in restraint of trade or commerce among the several states, or with foreign nations, is hereby declared to be illegal." 26 Stat. 209.

It appears from the affidavit of Mr. Lansing: That the complainant is a party to a combination which is engaged in pooling railroad rates and in fixing fares for railroad transportation in order to avoid competition between the several lines constituting the association known and distinguished as the "Trunk Line Association." This association has among its membership a constituted committee known as the "Trunk Line Committee." It is claimed that its membership consists of the complainant and eight other railroad corporations, citizens of different states, operating in the Middle states. The Trunk Line Association acts through a trunk line passenger committee, which is composed of the general passenger agents of the principal railroads operating in the territory reached by the several railroads which they represent. That the special Pan-American tickets referred to in the bill of complaint have been issued pursuant to such combination and conspiracy. That the rates and conditions of the tickets were previously arranged, and are a product of this combination organized to stifle competition in railroad rates. It further appears that the complainant and other railroads in combination are pooling the first and second class passenger business of their respective roads upon an agreed division of the receipts. The representative of the joint agency testified before the police court of the city of Buffalo in a proceeding brought against a ticket broker. It appears from his testimony, which is produced by the defendants, that the rates are fixed by the association, and that the complainant is a member thereof; that he is employed by this association in conjunction with the Central Passenger Association. The defendants' affidavits and exhibits have not been questioned or controverted on

the part of complainant. They stand admitted, therefore, upon this application for a continuance of the injunction. Defendants charge that the very ticket which is the ground of this application is the result and the evidence of an unlawful agreement between the different railroads composing the Trunk Line Association. This is not denied. The court cannot at this time pass upon the existence of this unlawful agreement, other than as it appears in the papers submitted. Were this at final hearing, when all the facts known to the complainant were divulged, the court might not be bound to seemingly protect the defendants in the pursuit of their nefarious practices, for such they admittedly are. The defendants do not deny the charges of wrongdoing. A court of equity would therefore be bound to raise its arm in defense of a complainant suffering wrongs which could be properly righted by the exercise of its power. But can the aid of a federal tribunal be invoked to protect the complainant in the issuance of a ticket over its railroad, which, as far as it appears to the court, is the culmination as well as the evidence of an agreement between railroad corporations specifically forbidden by an act of congress which has been sustained by the supreme court of the United States? *U. S. v. Trans-Missouri Freight Ass'n*, 166 U. S. 290, 17 Sup. Ct. 540, 41 L. Ed. 1007; *U. S. v. Joint Traffic Ass'n*, 171 U. S. 505, 19 Sup. Ct. 25, 43 L. Ed. 259. The complainant contends that this charge made by the defendants does not avail, as the wrongdoing, if any exists, does not relate to the subject-matter. I am not convinced as to the soundness of this contention. Can the railroad complainant conspire unlawfully to fix rates, and then come into a court of equity and invoke its aid to protect those rates which are represented by the ticket presented to the court, and which is wrongfully used by the defendants? The evil practice which stands admitted by the papers is the very practice in which the court's protection is invoked. As was well said in *Insurance Co. v. Clunie* (C. C.) 88 Fed. 170:

"The maxim that he who comes into equity must come with clean hands has its limitations. It does not apply to every unconscientious act or inequitable conduct on the part of the complainants. The inequity which deprives a suitor of a right to justice in a court of equity is not general iniquitous conduct, unconnected with the act of the defendant which the complaining party states as his ground or cause of action, but it must be evil practice or wrong conduct in the particular matter or transaction in respect to which judicial protection or redress is sought."

See, also, *Beach*, Mod. Eq. Jur. 14-16; *Pom. Eq. Jur.* 397, 398; *Beck v. Real Estate Co.*, 12 C. C. A. 497, 65 Fed. 30; *Weiss v. Herlihy*, 23 App. Div. 608, 49 N. Y. Supp. 81; *Sinsheimer v. Garment Workers*, 77 Hun, 215, 28 N. Y. Supp. 321.

In the *Sinsheimer Case* an injunction was sought by plaintiffs, who were a combination of clothing manufacturers formed for mutual protection from the demands for higher wages of their employes, who were also organized for protection and for advancing their wages. The court said:

"Under the circumstances disclosed by the papers in this case, if the defendants were guilty of any violation of law, the plaintiffs were certainly equally implicated, and under this condition of affairs it is difficult to see

how they would have a right to the intervention of a court of equity. In dealing with questions of this nature the court should be studious to see that the rights of all parties are protected, and that the forms of law should not be permitted to be used on behalf of one party against another, when the party seeking the intervention of the court has been endeavoring to secure his ends by means similar to those which he seeks to enjoin on the part of his antagonist."

The wrongdoing of complainant, admitted by the papers, is not remote. It has given birth to the combination whose tickets have been wrongfully diverted by the defendants. This court has no sympathy with, nor would it lend its aid willingly to, those indulging in practices admitted by the defendants. But, sitting as a court of equity, it is bound by those rules which are the very foundation of that branch of our jurisprudence. The complainant does not come before the court with clean hands in the transaction complained of. The court can, therefore, not grant it equitable relief upon the state of facts before it at this time. The complainant must therefore be relegated to its remedies at law, and the injunction vacated. Let an order be entered accordingly.

#### On Rehearing.

(October 14, 1901.)

Motion for reargument on notice to defendants was heard by me September 30, 1901. Affidavits were read in behalf of complainant, denying the charge of violation of the anti-trust act, the alleged pooling of business, and the apportionment or division of money received by various railroads for sale by them of reduced-rate Pan-American tickets. Defendants, in reply, read additional affidavits, corroborative of their charge of iniquitous conduct by the complainant with respect to the tickets in question. Answers in behalf of 38 defendants were served and filed, denying the commission of the wrongful acts charged in the complaint.

Important and difficult questions of law are involved in the determination of this motion. A disposition of it on the affidavits presented may fail of having the facts carefully examined and deliberately heard. The original motion for injunction was denied, for the reasons stated in the opinion of the court filed August 26, 1901. The Pan-American Exposition, on account of which the reduced-rate ticket was issued by the complainant and other roads associated with it, will close its gates on October 31st,—within 17 days. It is doubtful whether the necessity for immediate protection from alleged wrongful acts now exists. Inasmuch as the defendants have read additional affidavits and filed an answer corroborative of the charge of the existence of a combination in violation of law, the issues now raised ought not at this time to be disposed of summarily.

Motion for reargument denied as to defendants who have appeared and answered. Defendants who have not answered, of course, may be proceeded against in accordance with the ordinary rules of equity procedure.

OTIS STEEL CO., Limited, v. LOCAL UNION NO. 218, OF CLEVELAND,  
OHIO, OF IRON MOLDERS' UNION OF NORTH AMERICA et al.

(Circuit Court, N. D. Ohio, E. D. July 9, 1901.)

No. 6,220.

1. INJUNCTION—LABOR STRIKE—UNLAWFUL INTERFERENCE WITH EMPLOYER'S BUSINESS.

The law governing courts requires them to exercise strict care, in the issuance of injunctions, to respect and protect the legal rights of those against whom they are directed; and by analogy, and for stronger reason, the law will not countenance the action of members of a labor organization, who are on a strike, against their employer, in assuming to issue and enforce an edict that such employer shall not be permitted to operate his plant, and that nonunion men shall not be allowed to enter his employment. Such action is, in effect, the issuance by a self-constituted tribunal of an injunction unknown to any recognized law, and which no court would have authority to grant; and it is the clear right and duty of a court, on proper application therefor, to prevent by injunction the attempted enforcement of such an order by the use of force or a show of force.

2. SAME—MAINTENANCE OF PICKETS—INTIMIDATION OF WORKMEN.

A labor union, whose members are on a strike, has no lawful right to maintain an organized force of pickets around the works of the former employer for the purpose of preventing by force the operation of such works, or of intimidating nonunion men, and preventing them from entering or leaving such works by a show of force; and the fact that for months, during all of which time such pickets have been maintained, the nonunion workmen employed in the plant have either remained in the works or left and returned to them only under the protection of guards is evidence that intimidation, if not actual force, has been employed, and that such is the purpose of maintaining the picket; and a court of equity is authorized to enjoin its further maintenance as an unlawful interference with the rights of both employer and workmen.

In Equity.

Squire, Sanders & Dempsey, for complainant.  
Foran, McTighe & Baker, for defendants.

WING, District Judge (orally). It will be unnecessary, at this time, to go over all of the recitals and allegations of the bill. It contains charges that the defendants, Local Union No. 218 of the Iron Molders' Union of North America, and certain individuals named as defendants, who are said to be members of that union, and others whose names are not known, have attempted by various means, including the establishment and maintenance of "pickets," to interfere with the operation of the complainant's mill, and with its employment of men disapproved by the defendants, and it is also alleged that violence and riotous acts have accompanied these attempts. The answer denies that any violence has been committed by the defendants, and sets up as a defense, at considerable length, a history of what is called the "old strike," which commenced in July, 1900, and alleges that some agreement of settlement of that strike was made, and that such agreement of settlement was broken by the complainant, and that a new strike was instituted about April 1st of this year. Affidavits are filed by the com-

plainant, in which are described instances of violence of recent dates—one occurring on the 6th of April—in the neighborhood of the complainant's plant, and several of the defendants are named as having been engaged in these disturbances. It is also stated in the affidavits that violence has been perpetrated by some of the defendants upon some of the molders now employed by the complainant, and upon their guardians, or special policemen, hired to protect them. Some acts of violence are described in these affidavits as occurring as recently as the 21st of May last, and certain individual defendants are named as having been engaged therein. It is also alleged in these affidavits that threats have been made by unknown people at a boarding house at which some of the employes of the complainant lived. Counsel for the defendants have correctly stated that, so far as any individuals have been named as having been engaged in these acts of violence and riot, such individuals, with the exception of two, have filed affidavits that they know nothing of the doings described, and that they are not guilty of the offenses charged. Whatever the truth may be upon the disputed question as to whether actual violence was indulged in by the defendants, or some of them, it appears from affidavits filed by the defendants, and it is practically an agreed fact in this case, that "picketing," so called, has been employed, as a means of carrying out its purposes, by the defendant association, during all of the first strike, or what is called the "old strike," as also during the second strike, which has been in existence since April 1st; and that such picketing was suspended for some weeks, during the time when it was supposed an agreement had been arrived at between the striking molders and their employer. Counsel for the defendants have gone into a somewhat lengthy history of the writ of injunction, with a view of impressing upon the court the great care that should be exercised by the courts in the use of the writ as a remedy. It is peculiarly appropriate, in the analysis of these strike cases, to consider the great power which the jurisdiction to issue this writ confers, and the strict boundaries which should confine its use, because the beginning of all this trouble was the attempt of the Iron Molders' Union, No. 218, without the assistance of a court, to enjoin the complainant from operating its plant. That injunction was attempted to be enforced, not only against the complainant, but against all nonunion molders; and its terms, as addressed to the complainant, were, in substance, "You must not proceed with your business and the operation of your plant unless you comply with the conditions which we have imposed;" and, as to the nonunion molders, "You shall not work for the Otis Steel Company." It would not be claimed for a moment that there has ever existed any authority in the defendant to so issue its edicts against either the complainant or the nonunion molders. The assumed right to thus dictate to others may be referred to an unfounded notion on the part of this molders' union that it and its members are the exponents of some higher law than that which may be administered by courts. It would not be urged for a moment that this molders' union, or its members, could have rightfully obtained from any court the injunc-

tion against the Otis Steel Company and the nonunion molders, which, in the course of this strike, has been attempted to be enforced. If, from the history of the writ of injunction, it can be gathered that courts should exercise great care in its use, it follows with more force that a self-constituted body of men, deriving no authority from recognized law, should not be permitted to originate edicts for the government of others, and attempt to enforce them by any means whatsoever.

Now, what are the means, in analogy to contempt proceedings, by which this self-constituted court has attempted to enforce its injunction? The one admitted thing is the establishment and maintenance of a system of picketing. Whether this picketing has been accompanied with violence or not we need not consider. It certainly was one of the means used by this defendant organization to enforce its mandate. While picketing may not be an occasion of war, it certainly is an evidence that war exists, and the term is appropriately borrowed from the nomenclature of actual warfare. This system, constantly kept up, in its nature leads to disturbance, and has a tendency to intimidate. That it is used by the defendants as a means of enforcing their unauthorized mandate, and that it accompanies the utterance of it, is an admission by the defendants that it will prove effective in enforcing such mandate. It is therefore a violation of the rights of this complainant, and of all nonunion men, or of any and all men who choose to work in disobedience to the orders of this defendant union. Behind all law there is necessarily force. The orders and judgments of courts would otherwise be futile. Behind the order made by this union is the tacit threat of enforcement by appropriate means. One of the actual means used, and admitted, has been the constant and regular attendance of pickets about the plant of the complainant, with short intermission, for a period of a year. It has been said in decided cases a sufficient number of times to dispense with this repetition, and it is known to every one, whether he belongs to a union or not, or who has had under consideration any of these contests between employer and employé, and their effect upon social life, that it lies at the bottom of every idea of just government that each man has a right to use his life and his ability to labor undisturbed by any interference whatsoever, so long as he does not, in the exercise of that right, disturb the right of any other man to do the same thing. There are at the foundation of all labor organizations, as there are at the foundation of religious organizations, and all the innumerable other forms of social organizations, certain ideas peculiar to each; and there is an undoubted right in the members of such organizations to promulgate their theories by reason, logic, argument, and the persuasive influence of those peaceful weapons, to the end that other men may be brought to think as they do. When that persuasion has been accomplished, the men persuaded may evidence such fact by joining the organization whose principles and theories they have come to believe. These unions have a perfect right, whether they are sound in their beliefs or not, to believe as they do; and the members thereof would be the last to admit that any other body of men had a right to com-

mand and coerce them into the observance of other beliefs. They have, as I have stated, a perfect right to entertain these beliefs, and to promulgate them; but they must not attempt to force them upon any one else by physical demonstrations. It is certainly true that this system of picketing, although it may not have been accompanied by violence on the part of those who have served as pickets, has and will do injury. It appears from affidavits filed that the complainant employs 500 or 600 men, 50 or 60 of whom are molders; that it pays to these molders extraordinary wages in the way of bonuses, these bonuses varying from three to five dollars per day; that it has hired men to accompany the few molders who have left the works while going to and from their homes; and that opportunities to sleep within the works have also been furnished, so that the men engaged as molders, with few exceptions, have stayed within the works, day and night, for a period of at least six months. All the employes of the complainant, other than molders, have gone to and from their homes in the usual way, apparently uninfluenced by any fear of injury. I cannot imagine a company resorting to these extraordinary expenses and pains without there was some cause; nor can I imagine the individual molders submitting to be thus confined unless intimidation of some sort had influenced them. This state of things is evidence of a higher character, in deciding the issue as to whether or not picketing tends to intimidate those against whom it is directed, than the statements in affidavits filed by the individual defendants to the effect that no means of intimidation have been used.

It is admitted that this system of picketing has existed at the instance of the defendants. It is, in a way, admitted that picketing is a means of enforcing the edicts of the defendant union, because it has been used in connection therewith. It goes without saying that this means would not have been used unless it were thought to be effective in some way. The only way in which it could be effective would be to produce in the minds of the nonunion men who have been employed against the wishes and orders of the union a feeling of fear that the menacing eye of this numerous organized body of men composing the union was upon them for some purpose not friendly; that watch was being kept to learn not only who came out, but when they might come out; that such espionage meant that the pickets were present for the purpose of waiting until some one should come out. The absence of violence may be explained by the fact that the nonunion molders did not come out of these works except at rare intervals, and then usually in considerable numbers. In this case there is proof of injury and interruption to the business of the complainant by the acts of the defendants, and it is not a departure from the line of decided cases to grant the injunction prayed for. No harm can result to the defendants by the granting of the injunction, except that they will be deprived of what they apparently conceive to be their right to enforce the unauthorized injunction which they themselves have issued. It has been said in an eloquent and learned decision that it cannot too soon be learned, and learned thoroughly, that, under this government at least, freedom



of action, so long as a man does not interfere with the rights of others, will be protected and maintained; and that it is unlawful for any man to dictate to another what his conduct shall be, and to attempt to enforce such dictation by any form of undue pressure. Nor must intimidation be disguised in the assumed character of persuasion. Persuasion, too emphatic or too long and persistently continued, may itself become a nuisance, and its use a form of unlawful coercion. The injunction will be allowed, substantially as prayed for.

I am asked by counsel for the defendants just what is meant by "picketing." I think these defendants know what "picketing" means, as they have inaugurated it. It is the establishment and maintenance of an organized espionage upon the works, and upon those going to and from them.

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**SAN DIEGO LAND & TOWN CO. v. JASPER et al.**

(Circuit Court, S. D. California. August 26, 1901.)

No. 768.

**1. PARTIES—REGULATION OF WATER RATES—SUITS TO TEST VALIDITY OF ORDINANCE.**

A suit by a company furnishing water, appropriated under the laws of California, to consumers, for irrigation and other purposes, to test the validity of rates fixed by a board of supervisors as required by statute, is properly brought against the board, which, as representing the public generally in the matter, is authorized to defend in behalf of all parties interested.

**2. WATER—REGULATION OF RATES—CALIFORNIA STATUTE.**

Under Act Cal. March 12, 1885, requiring boards of supervisors, on petition of 25 inhabitants who are taxpayers of the county, to fix maximum rates at which any person, company, or corporation may sell, rent, or distribute water appropriated for the purpose under the laws of the state, the validity of an ordinance fixing such rates is not affected by the fact that the petitioners were not consumers of water from the company furnishing the same, nor that they were procured to sign the petition by consumers who did not desire to become petitioners, because of the possible effect such action might have on their rights in pending litigation with the company.

**3. SAME—REASONABLENESS OF RATES.**

In exercising the power delegated by the statute of California to boards of supervisors to fix maximum rates of compensation to be charged to consumers for water appropriated for sale under the laws of the state, the question of the reasonableness of the rates fixed is primarily one for the determination of the boards, and the courts are not authorized to interfere with the enforcement of rates so established unless they are so plainly and palpably unreasonable as to make their enforcement equivalent to the taking of private property for public use without just compensation.

**4. SAME—BASIS FOR FIXING RATES—VALUE OF PLANT.**

Act Cal. March 12, 1885, makes it the duty of boards of supervisors, on petition, to fix maximum rates which may be charged to consumers for water by persons or companies appropriating the same. It provides that the boards "shall estimate, as nearly as may be, the value of the canals, ditches, flumes, water chutes, and all other property actually used and useful to the appropriation and furnishing of such water," belonging to the person or corporation whose franchise shall be so regulated and controlled, and their annual reasonable expenses, and for

that purpose may require the attendance of witnesses and the production of books and accounts; that in fixing such rates they shall, as near as may be, so adjust them that the net annual receipts and profits of the persons or companies so furnishing water shall not be less than 6 nor more than 18 per cent. "upon the said value of the canals, ditches, flumes, chutes and all other property actually used and useful to the appropriation of such water." It also provides for a readjustment of the rates fixed, on petition, to take effect at any time after one year. *Held*, that such act does not make the cost of the plant used in appropriating and furnishing water the test of its value for the purpose of fixing rates, but requires such rates to be based upon its actual value at the time, as determined by the board, notwithstanding a further provision that the cost of extensions, enlargements, and other permanent improvements shall not be included as a part of operating expenses, "but when accomplished may and shall be included in the present cost and value of such work."

5. SAME—DETERIORATION OF PLANT.

The fact that a board, in fixing rates under such statute, made no allowance for the deterioration of the plant, does not authorize a court to declare the rates fixed unreasonable, although such fact of deterioration should properly be taken into consideration, since the court can consider only the final result of the board's action as embodied in the ordinance, and not the processes by which such result was reached.

In Equity. Suit to enjoin the enforcement of rates established by the board of supervisors of San Diego county, Cal., to be charged by complainant for water furnished to consumers for irrigation and other domestic purposes.

For former opinion, see 89 Fed. 274.

Works & Lee and Works & Works, for complainant.

A. H. Sweet, T. L. Lewis, and A. Haines, for defendants.

ROSS, Circuit Judge. The complainant is a corporation of the state of Maine, having succeeded to the rights of a Kansas corporation of the same name in and to the property described in the bill, the object of which is to obtain a decree annulling certain water rates established by the board of supervisors of San Diego county. To a clear understanding of the case, it is necessary to refer to certain prior suits, in which the predecessor in interest of the present complainant was involved, one of which was a suit brought against the city of National City to set aside a certain ordinance fixing the rates at which the San Diego Land & Town Company should furnish that city and its inhabitants with water for domestic purposes and purposes of irrigation. *San Diego Land & Town Co. v. City of National City* (C. C.) 74 Fed. 79. It was there shown—that is partly shown in the present record—that the chief object of the land and town company was the acquiring of land, and the subdividing and selling of it for profit. In pursuance of that purpose the complainant did acquire large tracts in San Diego county in what is known as the "Sweetwater Valley," in Chula Vista, and in National City, all within the boundaries of the National Rancho, and in the Otay Valley, adjacent to that rancho on the south, and in the territory known as the "Ex-Mission Lands," adjacent to National City on the north, aggregating many thousands of acres. Almost all of the lands were dry, and in their natural condition were of but little value.

Principally for the purpose of adding to their value and of enabling the company to sell them to advantage, the complainant in the years 1886 and 1887 appropriated, under and by virtue of the constitution and laws of California, the waters of the stream known as the "Sweetwater River," and, for the purpose of impounding those waters, in order that it might distribute and sell them in connection with its lands, and likewise distribute and sell them to other landowners and individuals within their flow, for purposes of irrigation and domestic and other beneficial uses, proceeded to construct across the bed of the stream a large dam known as the "Sweetwater Dam." Connecting therewith the complainant constructed a system of main and lateral pipes, called "Pipe System No. 1," from which it commenced to serve the consumers of water in February, 1888. As constructed, pipe system No. 1 covered a large territory, much the larger portion of which was owned by the company. Its Chula Vista tract, consisting of about 5,000 acres, it laid out and platted in blocks of 40 acres each, and subdivided those blocks in lots of 5 acres each, to each of which its pipes were extended. National City embraces about 3,375 acres of land, of which about 833 are laid out into 6,691 town lots, of which the complainant in January, 1887, owned 2,849, and of the remaining acreage the complainant then owned 685 acres. When the city ordinance involved in the case of *San Diego Land & Town Co. v. City of National City* was enacted, the complainant still owned 2,671 city lots, and owned about the same acreage within the city. The total population of National City was then about 1,300, and the aggregate number of acres then under irrigation within the city limits was about 747. The complainant's main and lateral pipes were laid in the streets of the city by virtue of a franchise granted by its authorities pursuant to the provisions of section 2 of article 14 of the constitution of the state of California, which declares:

"The right to collect rates or compensation for the use of waters supplied to any county, city and county, or town, or the inhabitants thereof, is a franchise, and cannot be exercised except by authority of and in the manner prescribed by law."

The pipes were so laid as to reach the lots and farming lands of the company within the city, as well as the lots and farming lands of others therein, and were extended through the city to supply a portion of the lands to the north, a part of which were owned by the company and a part by third persons. The pipes of the company's system No. 1 were also so laid as to supply water to the land and its inhabitants adjoining National City on the south, much of which land was owned by the company, and much of it by other persons. As the territory covered by the pipe system was then, and indeed yet is, very sparsely settled, it is manifest that it was laid for the purpose of attracting the purchase and settlement of the lands, and in anticipation of a future demand for the water, and was far in advance of the then demand for it. Naturally and necessarily in carrying into execution those objects a great deal of money was expended by the company. The testimony on behalf of the complainant in the *National City Case* was, and the testimony on behalf of the complainant in the present suit is, to the effect that in acquiring the water and

reservoir system, and in putting in the dam and system of pipes necessary to supply consumers thereunder with water, the company actually expended \$1,022,473.54. The company subsequently constructed another system of pipes, called "Pipe System No. 2," at a cost of about \$65,000, for the purpose of relieving the pressure upon its system No. 1, and thereby to increase its efficiency, and to supply lands not reached by that system. From at least as early as the completion of its pipe system No. 1 the original company, by public advertisement and otherwise, offered and held its farming and orchard lands and its lots in National City for sale, representing the water of its system to be piped to and over its lands and lots, and up to December 18, 1892, represented that an abundance of water would be supplied to purchasers of such lands for their irrigation at the rate of \$3.50 per acre per annum, and for city lots in ample quantity and at cheap rates. Under those representations it sold a large number of acres of farming and orchard lands in separate tracts and widely scattered, to all of which purchasers it furnished water for purposes of irrigation at the rate of \$3.50 per acre per annum. And it also furnished water for purposes of irrigation to various other persons whose lands are within its flow at the same rate of \$3.50 per acre per annum. But commencing with December 18, 1892, and extending to February, 1895, the company demanded of all consumers of water, other than those to whom it had furnished water for irrigation prior to that date, the sum of \$50 per acre, where water is required for purposes of irrigation, in addition to the annual charge, for what it denominated a "water right"; and thereafter it demanded \$100 per acre, in addition to the annual charge, for a so-called "water right" for irrigation purposes from all persons other than those to whom it had furnished water for those purposes prior to December 18, 1892. One of the objects of the suit against National City was the establishment of the validity of the claim of the company to exact a sum of money in addition to an annual charge as a condition on which alone the company would furnish consumers with water for irrigation purposes other than those to whom it had furnished it for such purposes prior to December 18, 1892; and the contest that arose between the consumers and the company over that charge, and the refusal of the municipal authorities of National City to allow the charge in respect to acreage property within the city limits, was one of the principal causes of that suit. This court decided against the validity of the exaction for the so-called "water right," and also held that the rates established by the city council were not so low as to justify the court in interfering with them on the ground that they amounted to the taking of the company's property without just compensation. On appeal to the supreme court the judgment here given was affirmed; the supreme court, however, not finding it necessary to determine the question as to the validity of the exaction for the so-called water right. 174 U. S. 739, 19 Sup. Ct. 804, 43 L. Ed. 1154. Some time after the bringing of the suit of San Diego Land & Town Co. v. City of National City, the property of that company passed into the hands of a receiver, who during the course of the adminis-

tration of his trust raised the rates at which water had theretofore been furnished to the consumers for irrigation purposes from \$3.50 to \$7 per acre per annum; and that action on his part gave rise to the litigation involved in the suit of Lanning v. Osborne, brought in and decided by this court, and reported in 76 Fed. 319. In that case the validity of the exaction of money for the alleged water right as a condition precedent to the furnishing of water by the company for the purposes of irrigation was again considered, and decided by this court as before; and there was also involved and determined by this court the question as to whether the company was estopped from changing the rate, and the further question of power on the part of the company to fix a reasonable charge for the furnishing of such water in the absence of any action under the act of the legislature of the state of California approved March 12, 1885, entitled "An act to regulate and control the sale, rental, and distribution of appropriated water in this state, other than in any city, city and county, or town therein, and to secure the rights of way for the conveyance of such water to the places of use." St. 1885, p. 95. That decision of this court was also under review by the supreme court on an appeal from its judgment dismissing a bill filed for the review of the decision, and resulted in the affirmance of the judgment here given; the supreme court, however, again finding it unnecessary to decide the question as to the validity of the exaction for the so-called water right. *Osborne v. San Diego Land & Town Co.*, 178 U. S. 22, 20 Sup. Ct. 860, 44 L. Ed. 961. A similar ruling was made by this court in respect to the so-called water right in the cases of *Mandell v. San Diego Land & Town Co.*, 89 Fed. 295, and *Souther et al. v. San Diego Flume Co.*, not reported. On appeal from the judgment of this court in the last-mentioned case the circuit court of appeals for this circuit reversed the judgment, and held valid a contract exacting \$9,000 as a condition precedent to the right of a consumer to use water that had been appropriated, under and pursuant to the provisions of the constitution of California of 1879, and of the statutes of the state passed in pursuance thereof, for sale, rental, and distribution, in addition to the legally established rates for its use. *Flume Co. v. Souther*, 32 C. C. A. 548, 90 Fed. 164. But the court of appeals subsequently granted a rehearing of the case, which was pending at the time the supreme court of California decided the case of *Irrigation Co. v. Park*, 129 Cal. 437, 62 Pac. 87, after which the circuit court of appeals again decided the appeal in the case of *Flume Co. v. Souther*, and reaffirmed its former ruling, saying in its opinion (44 C. C. A. 143, 104 Fed. 706), among other things, that the question had been set at rest by the decision of the supreme court of California in the case of *Irrigation Co. v. Park*. Although that case seems to be generally regarded as sustaining the validity of such exactions for the right to use water appropriated under the provisions of the constitution of California of 1879, and of the statutes of the state passed in pursuance thereof, a reference to the case as reported fails to show that any such point was involved. The facts upon which the decision was based are set out in the opinion of the court, at page 439, 129 Cal., and page 87, 62 Pac., as follows:

"The respondent is a corporation organized in February, 1871, for the purpose of straightening, improving, etc., the natural channel of Kings river and its branches, and taking water therefrom by means of canals and ditches for various beneficial uses, and, among others, for the disposition of the waters, and 'collecting annual rents and charges therefor.' On March 28, 1892, respondent and one E. B. Perrin executed a written instrument, which was duly acknowledged by the parties, and was recorded on the 31st of the same month. Plaintiff's canals and ditches run through an agricultural region, and do not furnish water within any city, town, or municipality. The covenants of this instrument necessary to be mentioned here are as follows: 'The respondent, in consideration of a certain sum of money then paid it by Perrin, covenanted to furnish to the latter from its main canal, or from a branch thereof, all the water that may be required for the irrigation of a described piece of land then owned by him for a certain number of years, commencing May 28, 1892, 'not exceeding at any time one cubic foot per second.' The respondent agreed to put a suitable gate in the bank of the canal at the most convenient point for the conveyance of water to Perrin's land, and Perrin agreed to construct a ditch from the gate to his land at his own cost, etc. Perrin agreed that he would not use the water, or permit it to be used, on any land other than that described in the instrument, and would not permit it to run to waste, and would provide means to carry any surplus water back to the respondent's canal. It was declared that the water to be thus furnished was intended to be an appurtenance to and to run with the land, that the right thereto was to be transferable only with the land, and that respondent was to be bound by the instrument only to subsequent owners of the land. Perrin covenanted for himself, his heirs, assigns, and successors in interest, for the payment annually to respondent of the sum of one hundred dollars on the 1st day of September of each of the years mentioned. It was agreed, also, that respondent might make a number of similar contracts with other persons, and that, if at any time the aggregate quantity of water should be insufficient to supply all the contractors, Perrin and each of the others should receive his proportionate share. It was declared that the covenants of Perrin should run with and 'bind the land.'"

It will be readily seen from the facts thus stated that there was nothing to show that the appropriation of the water there in question was made under and by virtue of the provisions of the constitution of California of 1879. On the contrary, the implication is strong, from the fact that the respondent corporation in that case was organized in February, 1871, for the purpose of appropriating water from Kings river for sale, that the appropriation was made long prior to the adoption of the constitution of California of 1879. And that the court must have understood such to have been the fact would seem to appear from its reference to the well-known history of the state,—that from its foundation the waters pertaining to the public lands of both the federal and state governments have been appropriated, used, and sold for mining, agricultural, and other useful purposes, which appropriation and use were from the beginning encouraged, recognized, and sanctioned by the legislature of the state, by its supreme court in numerous cases, and subsequently by the legislation of congress and by the decisions of the supreme court of the United States. All of this was abundantly shown in my dissenting opinion in the case of *Lux v. Haggin*, 69 Cal. 442, 10 Pac. 674. In none of the cases decided by this court to which reference has been made was it ever doubted that the appropriators of water upon the public lands under that condition of the law possessed the right to sell or otherwise dispose of such appropriated water upon any terms and condi-

tions that might be agreed upon; but the question with which this court was called upon to deal in the cases referred to involved appropriations made under and pursuant to the provisions of the constitution of California of 1879, which presented a very different question, and which, as it seems to me, does not appear to have been the case involved in *Irrigation Co. v. Park*, 129 Cal. 437, 62 Pac. 87. It is true that in that case the supreme court of the state does discuss the provisions of the constitution of 1879, and of the legislative acts adopted in pursuance thereof, and does hold that they do not take away the right of a furnisher of water for irrigation purposes to collect rates or compensation fixed by contract, in the absence of statutory provisions prescribing the rates to be charged therefor. It should be remembered, however, that the contract there involved was one by which the parties agreed upon an annual charge of \$100 for the use of the water, which, so far as appeared, had been appropriated long prior to the adoption of the constitution of California of 1879. It did not appear in that case that the appropriator exacted any sum of money or other thing as a condition precedent to the right to use the water, in addition to the rates to be lawfully fixed for its use, and least of all that it exacted any money or other thing as a condition precedent to the right to use water appropriated under the provisions of the constitution of the state of 1879, which declares water appropriated under its provisions (article 14, § 1) to be "charged with a public use." But the decision of the supreme court of the state in the case of *Irrigation Co. v. Park* was treated by the circuit court of appeals in the decision of the case of *Flume Co. v. Souther*, as appears from its opinion reported in 44 C. C. A. 143, 104 Fed. 706, as having construed the constitution of California of 1879 and the state statutes passed in pursuance thereof as declaring that an appropriator of water under and pursuant to their provisions, for sale, rental, or distribution, has the right to exact a sum of money or other thing, in addition to the legally established rates, as a condition upon which he will furnish to consumers water so appropriated; and by that decision of the circuit court of appeals this court is, of course, bound. In California, as has already been shown, the constitution (article 14, § 1) itself provides that the rates or compensation to be collected by any person, company, or corporation for the use of water supplied to any city, town, or municipality shall be fixed in the month of February of each year by the action of the governing body of such city, town or other municipality, "by ordinance or otherwise, in the manner that other ordinances or legislative acts or resolutions are passed by such body, and shall continue in force for one year and no longer." The rates to be charged for water appropriated under and by virtue of the constitution and laws of the state to persons outside of such cities, towns, and other municipalities were, by the constitution, left to be provided for by the legislature; and this the legislature of California did by the act above referred to, approved March 12, 1885. By the terms of that act the boards of supervisors of the several counties of the state are given power, and it is made their duty, in the manner prescribed in the act, to fix the maximum rates at which any person, company, or corporation may sell, rent,

or distribute water appropriated for the purpose. The circumstances and conditions under which such boards are authorized and required to do that thing are prescribed by sections 3, 4, 5, and 6 of the act. The action of the board can only be invoked in the first instance by a petition in writing of not less than 25 inhabitants who are taxpayers of the county. When such a petition, so signed, has been presented, the board, upon giving the notice required, is, by the statute, empowered to hear the petition. What it is thereafter authorized and required to do may be best seen by inserting sections 4 and 5 of the act, which are as follows:

"Sec. 4. At the hearing of said petition the board of supervisors shall estimate, as near as may be, the value of the canals, ditches, flumes, water chutes, and all other property actually used and useful to the appropriation and furnishing of such water, belonging to and possessed by each person, association, company, or corporation, whose franchise shall be so regulated and controlled; and shall in like manner estimate as to each of such persons, companies, associations, and corporations, their annual reasonable expenses, including the cost of repairs, management, and operating such works; and, for the purpose of such ascertainment, may require the attendance of persons to give evidence, and the production of papers, books, and accounts, and may compel the attendance of such persons and the production of papers, books, and accounts, by attachments, if within their respective counties.

"Sec. 5. In the regulation and control of such water rates for each of such persons, companies, associations, and corporations, such board of supervisors may establish different rates at which water may and shall be sold, rented, or distributed, as the case may be; and may also establish different rates and compensation for such water so to be furnished for the several different uses, such as mining, irrigating, mechanical, manufacturing, and domestic, for which such water shall be supplied to such inhabitants, but such rates as to each class shall be equal and uniform. Said boards of supervisors, in fixing such rates, shall, as near as may be, so adjust them that the net annual receipts and profits thereof to the said persons, companies, associations, and corporations so furnishing such water to such inhabitants shall be not less than six nor more than eighteen per cent. upon the said value of the canals, ditches, flumes, chutes, and all other property actually used and useful to the appropriation and furnishing of such water of each of such persons, companies, associations, and corporations; but in estimating such net receipts and profits, the cost of any extensions, enlargements, or other permanent improvements of such water rights or waterworks shall not be included as part of the said expenses of management, repairs, and operating of such works, but when accomplished, may and shall be included in the present cost and cash value of such work. In fixing said rates, within the limits aforesaid, at which water shall be so furnished as to each of such persons, companies, associations, and corporations, each of said board of supervisors may likewise take into estimation any and all other facts, circumstances, and conditions pertinent thereto, to the end and purpose that said rates shall be equal, reasonable, and just, both to such persons, companies, associations, and corporations, and to said inhabitants. The said rates, when so fixed by such board, shall be binding and conclusive for not less than one year next after their establishment, and until established anew or abrogated by such board of supervisors, as hereinafter provided. And until such rates shall be so established, or after they shall have been abrogated by such board of supervisors, as in this act provided, the actual rates established and collected by each of the persons, companies, associations, and corporations now furnishing, or that shall hereafter furnish, appropriated waters for sale, rental, or distribution to the inhabitants of any of the counties of this state, shall be deemed and accepted as the legally established rates thereof."



By section 6 of the act it is provided that at any time after the rates have been once established by the board of supervisors the same may be established anew or abrogated in whole or in part by such board, to take effect one year next after such first establishment, upon either the written petition of 25 of the inhabitants who are taxpayers of the county, or "upon the written petition of any persons, companies, associations, or corporations, the rates and compensation of whose appropriated waters have already been fixed and regulated and are still subject to such regulation by any of the boards of supervisors of this state as in this act provided."

After the views of this court in respect to a money exaction for the so-called water right, and in respect to the alleged estoppel, and in respect to the construction of the provisions of the act of the legislature of California of March 12, 1885, had been expressed in the case of *Lanning v. Osborne*, 76 Fed. 319, upon exceptions filed by the defendants to the bill in that case, and before that suit had been finally disposed of either by the supreme court or by this court, certain of the consumers of water under the company's system, and who were defendants in the suit, procured 25 inhabitants of the county of San Diego, who were not consumers of water from the company's system at all, to institute proceedings before the board of supervisors of that county, under and by virtue of the provisions of the act of California of March 12, 1885, to have the rates to be charged by the company established by the board. This was after the present complainant had succeeded to the rights of the Kansas corporation of the same name. To the proceedings thus initiated before the board of supervisors, the consumers, by their attorneys, who were also consumers of water under the company's system, appeared and filed the following document:

"To the Honorable Board of Supervisors of the County of San Diego: The present consumers of water for irrigation from the system of the San Diego Land and Town Company, who live outside of the city of National City, hereby allege and claim that each of them, respectively, has by purchase or otherwise become the owner of a right to the flow and use of so much of the water appropriated by said company for sale, rental, and distribution as is necessary to irrigate his or her respective tract of land under said company's system; that to each of said tracts of land the said company or its predecessor in title did, by its consent and voluntary act, annex the easement of the right to the flow and use of water from said system for irrigation of such tract in freehold; that each such consumer has fully paid or otherwise satisfied said company and its predecessor for the full price and value of such water right; and that none of said consumers, nor any of the lands of such consumers, are liable to pay to said company any water rate other than their due proportion of the annual reasonable expenses of such company, to cover the cost of repairs, management, and operation of the works used and useful to the appropriation and furnishing of such water to such land. And each and all said consumers protest against the fixing of any rates, as to them, to provide or create net annual receipts and profits upon the value of said company's water system so used, and useful for the appropriation and furnishing of such water to their respective lands.

"Haines & Ward and C. H. Rippey,  
"Attorneys for the Consumers."

Much evidence was given before the board of supervisors by and on behalf of the respective parties to the proceeding. Among other

things, it was shown on behalf of the company what the original cost of the plant was; the percentage of depreciation; the annual expenses of repairs, management, and operation, and the cost of extensions and enlargements and other permanent improvements of the works; and on the part of the protestants it was, among other things, shown that the entire plant was for the year in question assessed upon the county assessment roll of the county at \$155,000, and further that the present complainant acquired the entire property of the Kansas corporation, including its lands, for \$889,163.33. The rate fixed by the board of supervisors for the water for irrigation purposes was \$3.50 per acre per annum, which rate the complainant seeks by the present bill to have annulled on the ground that it is so low as to amount to the taking of its property without just compensation, contrary to the provisions of the constitution of the United States. To the bill the defendants filed exceptions and also demurrers, all of which were overruled by the court, with leave to the defendants to answer. The 25 defendants who initiated by petition the proceedings before the supervisors resulting in the fixing of the rates sought by the bill to be annulled did not answer the bill, and default was entered against them soon after the time for their appearance expired. The members of the board of supervisors alone made answer to the bill, putting in issue many of its material averments, and alleging, among other things, that the complainant's plant was not worth to exceed \$250,000. On the trial of the issues thereby made in this case, evidence was also given on behalf of the complainant as to the cost of the water system, the percentage of the depreciation of the plant, the annual expenses for repairs, management, and operation, and as to the costs of the permanent improvements thereto; and evidence was also given on behalf of the defendants tending to show that the plant cost very much more than it was fairly worth, and that it could be replaced for less than two-thirds of its original cost. At the conclusion of the evidence given before the board of supervisors the complainant filed with the board the following request:

"That in the fixing and determination of the rates to be charged by this company for water to be furnished to its consumers the board find and determine the following matters, to wit: (1) The value of the dam, reservoir, water rights, and distributing system, and all other property actually needed by said company, and useful to the appropriation and furnishing of such water. (2) The annual reasonable expenses of the company, including the cost of repairs, management, and operating its works. (3) The cost of any extensions, enlargements, or other permanent improvements of the water-works of the company since the original construction of its plant. (4) The amount of depreciation of the plant of the company by natural wear from use and the action of the elements, either by way of percentage per annum of such deterioration, or the gross sum thereof for the years since the company commenced to furnish water. (5) The rates for irrigation necessary to be charged, together with the domestic rates, in order to return to the company net annual receipts and profits of not less than six per cent. upon the value of its property as found by the board."

The board refused to make or file the findings so requested, but it appears from the testimony of the only one of its members who was examined as a witness on this hearing that the supervisors pre-

pared and signed the following paper, a copy of which each of them retained, but which was never placed among its records:

"Office of the Board of Supervisors of the County of San Diego,  
State of California.

"In the Matter of Fixing Water Rates for the San Diego Land and  
Town Co. of Maine. Findings.

"This matter coming on regularly to be heard, and the evidence all being presented, the board, after a careful consideration of all the testimony regarding the value of the water plant of the San Diego Land and Town Company of Maine, including the amount at which the entire property had recently been sold, to wit, \$889,163.33, and the proportionate value of the said plant to the whole of the property sold, and the amount at which said plant has been carried upon the assessment rolls of the county for the past eight years, to wit, \$155,000.00— We estimate and determine the value of said plant to be \$350,000.00. We further fix the rate of interest at 6 per cent. per annum, making the sum of \$21,000.00 per annum. We further estimate and determine the amount of the expense necessary to maintain and operate said plant to be \$13,442.00. Making the sum total of revenue to be raised for the company \$34,442.00 per annum. We further estimate and determine the capacity of the reservoir to be 3,000,000,000 gallons. We further estimate and determine that the amount of water used by National City to be about 600,000,000 gallons per annum. We further estimate the amount of water available for outside irrigation purposes to be 2,400,000,000 gallons,—a sufficient quantity to irrigate 6,080 acres of land, allowing 350,000 gallons per acre: and we fix an annual rate of \$3.50 per acre, making a sum total of \$21,280.00 per annum. We further find that the annual sum the company receives from the sale of water to National City is \$13,162.00, which sum, taken together with the above-estimated amount of outside water rental (\$21,280.00), makes a total of \$34,442.00, the whole amount required to produce the interest and operating expenses as above set forth."

It appears from the evidence that at the time the ordinance in question was adopted, which was in the month of October, the water supply of the complainant, by reason of the drought that had then for a long time prevailed in Southern California, was only about one-third of the normal supply, and, the drought having unfortunately continued, that the supply rapidly decreased, until within about a year it was entirely exhausted.

Three points are made on behalf of the complainant: First, that the petitioners who initiated the proceedings before the board of supervisors are, in contemplation of law, the only parties in interest, and therefore that upon the entry of the default against them for failure to answer the bill herein the complainant became entitled to a decree setting aside the rates, and declaring the ordinance fixing them void; second, that the ordinance should be declared invalid because procured in such a way as to amount to a deception upon the board of supervisors, in that it was procured to be prosecuted by interested parties in the name of parties having no interest in the fixing of the rates; and, third, that the rates established by the ordinance complained of are so unreasonably low as to amount to the taking of the complainant's property without just compensation, contrary to the provisions of the constitution of the United States.

The answer to the first point is that each and every person to whom the rates fixed apply—in other words, the public—is interested in the question, and the representative of this public in the matter is the board of supervisors, each member of which was by the complain-

ant made a party defendant to the suit, and all of whom appeared to the bill and interposed a defense in behalf of all parties interested. This practice has been uniformly sanctioned and held to be proper. *Railway Co. v. Minnesota*, 134 U. S. 418, 10 Sup. Ct. 462, 702, 33 L. Ed. 970; *Reagan v. Trust Co.*, 154 U. S. 362, 14 Sup. Ct. 1047, 38 L. Ed. 1014; *Railroad Co. v. Smith*, 128 U. S. 174, 9 Sup. Ct. 47, 32 L. Ed. 377; *Stone v. Railroad Co.*, 116 U. S. 353, 6 Sup. Ct. 349, 29 L. Ed. 651; *Railway Co. v. Gill*, 156 U. S. 649, 15 Sup. Ct. 484, 39 L. Ed. 567; *San Diego Land & Town Co. v. City of National City* (C. C.) 74 Fed. 79; *Id.*, 174 U. S. 739, 19 Sup. Ct. 804, 43 L. Ed. 1154; *Peik v. Railway Co.*, 94 U. S. 164, 24 L. Ed. 97.

In respect to the second point, it is, I think, sufficient to say that it appears from the evidence that the purpose of the consumers of the water under the company's system, all of whom were defendants to the suit of *Lanning v. Osborne*, *supra*, in procuring outside taxpayers to petition the board of supervisors for the establishment of rates, was to avoid any and all acquiescence in the power of the board to establish such rates, and to continue their contention that the company was estopped from changing the irrigation rate of \$3.50 per acre per annum, without subjecting themselves to a charge of inconsistency of position, and at the same time to secure a lower rate than that fixed by the receiver of the company's property. The act of the legislature of California approved March 12, 1885, authorizes any 25 inhabitants who are taxpayers of the county to initiate proceedings, and does not limit the right to those who are actual consumers of the water, the rates of which they may seek to have fixed by the board of supervisors. Under these circumstances, I am of opinion that the point suggested is not well taken.

The last and principal point in the case is, like all questions of the kind, perplexing and embarrassing; for, while I would not hesitate to annul any ordinance that fixes rates which in effect clearly operate to take one's property without just compensation, contrary to the provisions of the constitution of the United States, the court must not lose sight of the fact that the question is primarily one for the determination of the legislature, or of some public agency designated by it,—in the present instance, the board of supervisors of San Diego county. The rule by which the courts must be governed in such cases has been many times declared, and was stated by the supreme court in the case of *San Diego Land & Town Co. v. City of National City*, 174 U. S. 753, 19 Sup. Ct. 804, 43 L. Ed. 1154, in these words:

"That it was competent for the state of California to declare that the use of all water appropriated for sale, rental, or distribution should be a public use, and subject to public regulation and control, and that it could confer upon the proper municipal corporation power to fix the rates of compensation to be collected for the use of water supplied to any city, county, or town, or to the inhabitants thereof, is not disputed, and is not, as we think, to be doubted. It is equally clear that this power could not be exercised arbitrarily, and without reference to what was just and reasonable as between the public and those who appropriated water and supplied it for general use; for the state cannot, by any of its agencies, legislative, executive, or judicial, withhold from the owners of private property just compensation for its use. That would be a deprivation of property without due process of law. *Chicago, B. & Q. R. Co. v. City of Chicago*, 106 U. S. 226, 17 Sup.

Ct. 581, 41 L. Ed. 979; *Smyth v. Ames*, 169 U. S. 466, 524, 18 Sup. Ct. 418, 42 L. Ed. 819. But it should also be remembered that the judiciary ought not to interfere with the collection of rates established under legislative sanction unless they are so plainly and palpably unreasonable as to make their enforcement equivalent to the taking of property for public use without such compensation as under all the circumstances is just both to the owner and to the public; that is, judicial interference should never occur unless the case presents, clearly and beyond all doubt, such a flagrant attack upon the rights of property under the guise of regulations as to compel the court to say that the rates prescribed will necessarily have the effect to deny just compensation for private property taken for the public use."

What the company is entitled to demand in order that it may have just compensation is, as said in the case last cited, "a fair return upon the reasonable value of the property at the time it is being used for the public." And unless the act of the legislature of California of March 12, 1885, makes the cost of the plant here in question the test of its value, that value must be determined upon a consideration of all of the facts and circumstances of the case. In that determination, said this court in *San Diego Land & Town Co. v. City of National City*, 74 Fed. 83—

"Many considerations may enter,—among them, the amount of money actually invested. But that is by no means, of itself, controlling, even where the property was at the time fairly worth what it cost. If it has since enhanced in value, those who invested their money in it, like others who invest their money in any other kind of property, are justly entitled to the benefit of the increased value. If, on the other hand, the property has decreased in value, it is but right that those who invested their money in it, and took the chances of an increase in value, should bear the burden of the decrease. In my judgment, it is the actual value of the property at the time the rates are to be fixed that should form the basis upon which to compute just rates; having, at the same time, due regard to the rights of the public and to the cost of maintenance of the plant, and its depreciation by reason of wear and tear."

I adhere to those views, and think them confirmed by the decisions of the supreme court above cited. The rates, as has been seen, are to be just at the time they are fixed; and what are just rates depends, as has been said, in large measure, upon the reasonable value of the property used in supplying the water to the public. The actual value of such property obviously depends upon a variety of considerations,—among them, the actual and prospective number of consumers,—and is no more unchangeable than the value of any other kind of property; and that fact seems to have been recognized by the legislature of California in enacting the law of March 12, 1885, where provision is made, as has been seen, for the abrogation of the rates once fixed, after the expiration of 12 months, and the establishment of new rates, upon either the written petition of 25 of the inhabitants who are taxpayers of the county, or upon that of the company or person furnishing the water. The evidence before the court shows that at the time the rates in question were fixed the company's supply of water had, by reason of the then prevailing drought in Southern California, very largely decreased, and soon thereafter entirely ceased, so that, while the cost of the system undoubtedly remained the same, it cannot, I think, be justly held that its reasonable value, for the time being, at least, was not largely de-

creased; for, however much a water plant may have cost, its chief value disappears with the disappearance of the water for the transmission and sale of which it was constructed. Upon the return of the normal rainfall, the value of this property, like that of many other properties which have been injuriously affected in value by the unusual and severe droughts that have recently prevailed in this section of the country, will undoubtedly largely increase, which conditions should, and doubtless will, have due consideration when water rates are again required to be fixed. While in such matters, as in some others, absolute justice is, perhaps, unattainable, certainly as near an approach to it ought to be made as is practicable. This can only be done by all parties in interest approaching the problem in a spirit of fairness. It would seem from the testimony of Mr. Cherry, a member of the board that fixed the rates in question, that the board fixed its valuation of the company's plant at \$350,000 largely upon a consideration of its assessed value of \$155,000 for the purposes of taxation, and upon what the board thought was a fair proportion to be attributed to the water plant of the \$889,163.33 for which the complainant acquired the entire property of the Kansas corporation; that it estimated and allowed for the maintenance and operation of the plant \$13,442 a year; and that it estimated that the company's supply of water would irrigate 6,080 acres of land outside of National City, and found that it would receive \$13,162 annually from the sale of water within that city. The board accordingly fixed \$3.50 per acre as the annual rate to be paid for water for irrigation outside of National City, which, together with the amount received by the company for water furnished within that city, would meet the cost of maintenance and operation, and pay a little more than 6 per cent. per annum upon a valuation of the plant of \$350,000. It is insisted on the part of the complainant that the board of supervisors made no allowance for the deterioration of the plant, and that the evidence plainly shows that the soil in which the pipes of this company are laid is of such a nature that the pipes rust and otherwise deteriorate much more rapidly than similar pipes in other soils, and require to be relaid in from 10 to 20 years. The evidence undoubtedly so shows, and that fact should be given due consideration in fixing rates and in determining their reasonableness; but it is not just, I think, to charge all of the consequences of that unfortunate state of affairs to the consumers. To some extent, at least, it goes to lessen the value of the plant itself, and this fact must be given consideration by the court in deciding upon the effect of the action of the board of supervisors; for it must be remembered that it is the result of its action as embodied in the ordinance that is the subject for the determination of the court, not the processes by which it reached its conclusion. In view of all of the facts and circumstances of the case as disclosed by the evidence, and especially in view of the small quantity of water available for use and actually furnished for irrigation outside of National City at the time the rates in question were fixed, which amount constantly decreased to the point of exhaustion, I do not think the court would be justified in holding it to be clear that the rates fixed by the board of supervisors will necessarily have the

effect of depriving the complainant of its property without just compensation, unless it be, as is contended on the part of the complainant in another and similar suit pending in this court, and now under submission, entitled *E. H. Spoor, Receiver, against Board of Supervisors of Riverside County, et al.*, that the statute of California above cited, and by virtue of which the proceedings before the supervisors were had, itself makes the cost of the plant the test of its value. That question remains to be considered. It is quite evident, as urged by counsel in the Riverside case, from the provision of the statute in respect to interest, that the purpose of the legislature was to encourage the investment of capital in such water systems, and thereby promote the development and settlement of the state. That provision is that "said boards of supervisors, in fixing such rates, shall, as near as may be, so adjust them that the net annual receipts and profits thereof to the said persons, companies, associations, and corporations so furnishing such water to such inhabitants shall be not less than six per cent. nor more than eighteen per cent.,"—not, however, as said by counsel, "upon the cost of the system," but "upon the said value of the canals, ditches, flumes, chutes, and all other property actually used and useful to the appropriation and furnishing of such water," etc.; that is to say, the value of the canals, ditches, flumes, water chutes, and all other property actually used and useful to the appropriation and furnishing of such water belonging to and possessed by the company or person furnishing it that the board of supervisors is, by the fourth section of the act, required to "estimate as near as may be"; being given power, to that end, as well as for the purpose of estimating the "annual reasonable expenses, including the cost of repairs, management and operating such works," to require the attendance of persons to give evidence, as also the production of papers, books, and accounts. If the legislature had intended to make the cost of the plant the test of its value, it would have been the simplest sort of thing to have said so. But this it did not do. It is true that in section 5 of the act it does seem to require the board of supervisors, acting in pursuance of its provisions, to accept the cost of "any extensions, enlargements or other permanent improvements" to the system as the value of such improvements; for the provision requiring the board to so adjust the rates as that the net annual receipts and profits shall be not less than 6 nor more than 18 per cent. of the value of the property is followed by this declaration:

"But in estimating such net receipts and profits the cost of any extensions, enlargements or other permanent improvements of such water rights or water works shall not be included as part of the said expenses of management, repairs and operating of such works, but when accomplished may and shall be included in the present cost and cash value of such work."

It is said that the words "present cost," here used, indicate that it was intended by the legislature to make the cost of the entire plant the test of its value. But in view of the other provisions of the act above referred to, and in view of the fact that it would have been a very simple matter for the legislature to have said that the cost of the plant should be taken as its value, if it had so intended, I think the

court would not be justified in giving to the words "present cost," used in the clause quoted, that effect. Those words, in the connection in which they are used, seem to be out of place, and their meaning is very indefinite and uncertain. As already observed, the clause last quoted does seem to require the cost "of any extensions, enlargements or other permanent improvements" to the plant to be accepted as their value. But such permanent improvements in the case at bar constitute but a small part of the complainant's plant.

Looking at the whole case, as the court must, I am unable to say that the rates prescribed by the board of supervisors here complained of will necessarily have the effect to deny just compensation to the complainant for the use of its property. Accordingly there must be a decree dismissing the bill at the complainant's cost. It is so ordered.

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AMERICAN SURETY CO. OF NEW YORK v. LAWRENCEVILLE CEMENT CO. et al.

(Circuit Court, D. Maine. August 23, 1901.)

No. 513.

1. INTEREST—WHEN RECOVERABLE—SURETY.

A surety on the bond of a contractor for government work, which has been ready and willing at all times since the default of its principal to fulfill its obligation to the extent of its liability, but has been obliged to invoke the aid of a court of equity to marshal and adjust the claims, which exceed the penalty of the bond, cannot be charged with interest on the amount of such penalty because of the delay incident to such proceedings.

2. CONTRACTS FOR GOVERNMENT WORK—BONDS OF CONTRACTOR—CONSTRUCTION OF STATUTE.

Act Aug. 13, 1894 (28 Stat. 278), requiring the bond of a contractor for government work to be conditioned that he will promptly make payment to all persons "supplying him labor and materials in the prosecution of the work," should receive the liberal construction necessary to effect its purpose. It is not to be strictly limited, like mechanic's lien statutes, so as to protect only those supplying labor or materials which add to the value of the improvement or structure, nor, on the other hand, should it be extended to claims for labor or materials which only incidentally relate to the prosecution of the work, such as the construction or permanent improvement of the plant or equipment of the contractor, which are capable of use in other work, or to the ordinary claims of a public carrier for freight, for which the law gives a lien; but this limitation does not apply to those making incidental repairs to equipment, or to truckmen or others who transport materials for short distances, and who, although having a lien, are not expected, in the usual course of business, to exact payment before delivery.

3. SUBROGATION—SECURITY TAKEN BY SURETY—PRIVITY.

A creditor of a contractor for public work, whose claim is not within the class secured by the statutory bond given by the contractor, has no privity with the surety on such bond which entitles him to be subrogated in equity to a security taken by such surety to indemnify it against loss by reason of its suretyship.

4. PRINCIPAL AND SURETY—INDEMNITY TAKEN BY SURETY.

A surety for a contractor for government work, who took an indemnity agreement from the contractor and another, cannot be prejudiced by any undisclosed relation between the signers of such agreement,



as that they were partners in the contract; and the fact that the surety has been reimbursed for a payment of one claim through the indemnity does not enlarge its liability to other creditors of the contractor, as to whom, in the marshaling of claims, the claim paid must be treated as though the surety had not been reimbursed.

**5. BONDS—MARSHALING OF CLAIMS AGAINST SURETY.**

In marshaling claims against a contractor, as against the surety on his bond, conditioned for the payment of such claims, where the claims exceed in amount the penalty of the bond, the fact that certain of the claims have been purchased by one who has bound himself to indemnify the surety against its liability on the bond does not increase the amount to which other claimants are entitled, and for the purpose of making distribution to them such claims must be treated as still subsisting.

**6. SAME—FORM OF DECREE.**

Giving form of decree for preliminary marshaling and distribution, pending the disposition of claims, over which the court has not obtained jurisdiction.

**In Equity.**

Henry C. Wilcox and Thomas L. Talbot, for complainant.

Benj. Thompson, for respondents Thos. Laughlin Co. and 83 others.

Libby, Robinson & Turner, for respondent Berlin Mills Co.

Bird & Bradley, for respondents F. N. Temple and A. E. Keizer.

Frank & Larrabee, for respondents Thomas Carlin's Sons.

Payson & Virgin, for respondents Thos. R. Allen and Enos B. Allen.

Wm. H. Looney, for respondent McKiernan Drill Co.

Turner & Connellan, for respondents Snowdell and 8 others.

PUTNAM, Circuit Judge. This is the same cause in which an opinion was passed down on July 17, 1899. 96 Fed. 25. The complainant executed a bond as surety for William Morgan, a contractor with the United States, subject to the provisions of the act approved August 13, 1894 (28 Stat. 278), by virtue of which one condition of the bond was that Morgan should "promptly make payments to all persons supplying him" "labor and materials in the prosecution of the work provided for" in his contract. Morgan failed to make such payments, and failed to complete his contract; and the result is that the demands made on the complainant by the United States, and by the persons who allege that they furnished labor and materials within the provisions of the statute and the bond, exceed the penal sum of the complainant's obligation. The complainant was sued in this district, and also in other circuits, and, expressing itself as willing to pay the penal amount of its obligation, asked the aid of this court, by its bill in equity filed in this cause, in ascertaining to whom payments should be made, and in what amounts. The court, in its previous opinion, concluded to hold the bill, and marshal the claims so far as it was in its power so to do. The bill was held to be ancillary to the suits pending in this court and within this district; but other creditors than those who commenced such suits have been properly allowed to intervene, and have been heard before the master, who was appointed by an interlocutory decree entered in accordance with the previous

opinion. That decree directed the master to determine the nature and amount of the various claims against Morgan for labor performed and materials furnished in the prosecution of his contract, estimating the same, so far as concerned the United States, and so far as the parties had not submitted to the jurisdiction of this court, in such manner as would enable us to make a primary distribution that will not jeopardize the complainant. The master's report has been made, and is now before the court, to be heard on various exceptions, which will be disposed of in this opinion. The report shows that the United States have made a claim, by suit at common law in this court against the complainant, for \$11,440.86, which they maintain is protected by the bond in litigation. The United States have not submitted to the jurisdiction of the court in this cause, so that on that account only a primary distribution can be decreed at present. The master's report also shows that, aside from the claim of the United States, there are no claims against the complainant as surety, except of those who are parties to this bill, or who have intervened as already stated.

In using the expression which we have quoted from the statute and the bond, there can be no question that congress had somewhat in mind statutes in various states giving liens on buildings and other property, real and personal, for labor and material. Nevertheless, this statute does not have the same aspect as the ordinary lien statutes referred to, and therefore the latter can afford only very general assistance with reference to the construction of the former. The ordinary lien statutes have been justly and strictly held to cover only what has added to the value of the property against which the lien is asserted, and therefore they are ordinarily administered to protect only what is actually incorporated into its substance. The underlying equity of these statutes requires them to be so limited in their application. Even this underlying equity is not applied with absolute strictness; as, for example, with reference to a bill of lumber sold to one erecting a building, no distinction is made between those portions of it which are actually incorporated into the walls and those portions used in temporary carpenters' stagings necessary to aid in construction. Such statutes commonly use expressions of this character: "Whoever performs labor or furnishes materials in erecting, altering, or repairing a house, building, or appurtenances,"—a form which has direct reference only to the labor or materials and the erection in which they are used; while in the statute under discussion the expression is broader, namely, "in the prosecution of the work." The underlying equity of the lien statutes relates to a direct addition to the substance of the subject-matter of the building, or other thing, to which the lien attaches, while the statute in question concerns every approximate relation of the contractor to that which he has contracted to do. Plainly, the act of congress and the bond in the case at bar are susceptible of a more liberal construction than the lien statutes referred to, and they should receive it. In the one case, as in the other, the dealings of the person who claims the statutory security must approximate the work, and in the one case

as well as in the other there must be a certain margin within which there will be difficulties in discriminating between what is and what is not protected. Nevertheless, we are not concluded by the decisions with reference to the ordinary state statutory liens. We can apply them only in a general way, and we are not so restricted by them as to require a construction inconsistent with the remedial purposes of the statute now in issue.

Before passing on any of the particular claims which are brought to us by the master's report, we will dispose of the general questions affecting all of them. The master has brought down interest to the date fixed by him for receiving proofs of claims, namely, January 24, 1901. It was necessary that the master should compute interest on all claims to the same specific date, in order to secure that equality among the various claims which our previous opinion pointed out to be a necessary equity as between them. If the claims, with interest to the date computed by the master, exceed the amount for which the complainant is liable on its bond, there will be no occasion for a further computation of interest; but, if the reverse is true, the final decree will direct an additional allowance of interest until the penal sum of the bond is exhausted.

Inasmuch as the case shows that the complainant has at all times been ready to discharge the entire amount of its penal obligation as soon as it could be ascertained to whom it should be paid, it cannot now be held in default, and therefore it will be entitled to be discharged on payment of the principal without interest, unless found in default at some subsequent stage of this suit.

In accordance with our former opinion, the complainant has paid into the registry in this cause an amount equal to the costs in the various actions at law, computed as therein directed; so that the decree to be presently drawn in accordance herewith will provide that the same shall be distributed to the respective plaintiffs in the various suits, except so far as it shall be determined herein that any plaintiff in any of such suits is not entitled to share in any part in the amount due on the complainant's bond. With reference to all other matters of costs, the decree to be presently entered in accordance herewith will provide that the master's fees shall be paid by the complainant, and that no other costs shall be taxed in this cause, and that all the plaintiffs in the various suits at law to which this cause relates shall be enjoined from asking for further costs in those suits, reserving, however, for future decrees, further directions as to costs, provided subsequent events shall justly entitle any party thereto.

The decree to be presently entered will perpetually enjoin the prosecution against the complainant of all suits or counterclaims with reference to any demand, or any part of any demand, which such decree rejects; and the decree thus to be presently entered will also provide that the prosecution of the common-law suits with reference to any demand, or any part of any demand, which such decree allows, shall be perpetually enjoined, provided the complainant makes payment of the primary dividend as therein directed, subject to such modifications thereof as may be required by subsequent events,

either in the final decree or in any subsequent interlocutory decree. Such injunction will also restrain any assertion of such claims in any subsequent litigation, either by suit, counterclaim, or otherwise. Such decree will reserve to each plaintiff the right to dismiss his common-law suit without costs. Of course, the decree to be presently entered will make it clear that the injunction will not be perpetuated unless payment is made by the complainant of all subsequent distributions to be hereafter determined.

Except as herein otherwise stated, the report of the master is confirmed. The underlying principle which has governed him is correct, in that he has discriminated between labor and materials consumed in the work or in connection therewith, and labor and materials made use of in furnishing the so-called contractor's plant, and available not only for this, but for other work. This principle was applied by the circuit court for this district in disposing of the common-law suit of Thomas Laughlin Company against Morgan and this complainant, based on the same claims of that corporation which are brought before us by the master's report, as appears by the opinion of Judge Webb, filed in that suit on September 15, 1900. 111 Fed. 474. That decision is, of course, binding on us in this cause; but, in addition thereto, we approve the principle on which it rested, and which, as we have said, was adopted by the master as the basis of the leading principle of discrimination which he has applied in disposing of the claims covered by his report. The necessity of the application of this principle of discrimination becomes at once apparent when we consider the rule of proportion; otherwise a bond given under the statute with reference to a small contract for dredging might be substantially exhausted in protecting the purchase money of an expensive dredge, bought at the particular time of the dredging in question, but useful for continuous dredging to an indefinite amount under other contracts and at other localities. However, this principle of discrimination is so strongly entrenched in the practical rules properly applicable to the construction of this statute that it needs no further exposition. It has, however, no necessary relation to repairs of an incidental and comparatively inexpensive character, made on the plant during the progress of the work, representing only the ordinary wear and tear or the equivalent thereof. Such repairs, under some circumstances, are within the purview of the statute, and are not always excluded by any rules of construction which we must apply to it. In this particular we think the master has been too strict as to some minor claims.

Also we think the master was too strict with reference to some minor claims for transportation. Clearly, he was right in his illustrative suggestion which led up to his conclusion with reference to claims for trucking and water carriage. As stated by him, the carrier ordinarily has a lien for his freight, which is a sufficient protection to him. Therefore, in cases of transportation by a carrier from distant points, or, indeed, from another port than the port at which the contractor's work is being done, the carrier would not ordinarily be protected by the statutory bond, for two reasons: First, transportation for considerable distances in the regular course, by the

ordinary lines of either steam, sail, or rail, cannot easily be brought within the words of the statute, "supplying labor or materials"; and, second, inasmuch as carriage of that character, especially under an ordinary bill of lading, or its equivalent, creates a well-recognized lien for freight, the equitable rule would apply that a carrier, under such circumstances, cannot give up his cargo, and enforce his claim against a mere surety, after he has so placed himself that the surety cannot be subrogated to the security which the law gave. The first objection, however, does not necessarily apply to truckmen who are moving materials from a place of landing to the exact locality of the work under contract, although the distance may be somewhat considerable, nor to water-borne transportation carried on by the servants of the contractor, or for short distances without the aid of steam or a fully-equipped vessel. The second objection, moreover, must not be carried to an extreme, otherwise it would defeat the practical operation of the statute. Every person selling materials for cash holds a lien for the purchase money until he voluntarily waives it by delivery; and every person engaged in transportation, who is not the mere servant of the owner of the merchandise transported, holds a carrier's lien, even though the carriage is of miscellaneous parcels, over short distances in the immediate locality, and at frequent, irregular intervals. Nevertheless, with reference to each, such liens are not ordinarily insisted on, and it would be an unreasonable construction of the statute to hold that it intended to interfere with the convenience of minor dealings in such methods as the usual practices establish. Therefore, as already stated with reference to either class, to insist on the fact that the lien is waived, and short credit given, would defeat the beneficial purpose of the statute, and the practical ends which it is intended to accomplish.

Applying these principles to the master's report, we first observe that the portion of the claim of Thomas Laughlin Company which he rejected related to fitting out a steam launch, used by Morgan in transporting merchandise for the work contracted for by him; the construction of dump cars, skips, grout tubs, and conveyors, and other matters falling into like classes. So far as the matter has been brought to our attention, the claims of Good Roads Machinery Company, Thomas Carlin's Sons, McKiernan Drill Company, Edwards & Walker Company, E. Corey & Co., W. L. Blake & Co., Berlin Mills Company, Deering, Winslow & Co., J. H. Fickett & Co., and James H. Boyd, so far as rejected by the master, fall into the same classes, and were properly rejected. Applying, however, the rules which we have stated, the master's report, in rejecting the claim of the Portland Company, of \$52.77, for sundry repairs to Morgan's plant, and of Henry N. Merrill, of \$38.50, for trucking from the regular steamboat landing on the island where the work was done to the precise locality of the work, is reversed, and these claims are allowed. As to the claims of M. H. Dodge, George L. Cleaves, William D. Post, and Alexander Johnson, for water-borne transportation of materials used in the work, such as coal and lumber, to the island where the work was done, and which were rejected by the master, the record does not disclose enough to enable the court

to apply the rules which it has stated with reference to that particular subject-matter, or to determine on which side of the line the claims fall; and therefore the master's report must stand, so far as they are concerned.

The record shows that one Thomas R. Allen, as surety for William Morgan, and jointly with him, executed to the complainant an agreement to indemnify and save harmless the complainant from all loss by reason of the contractor's bond to which this cause relates. It also shows that Allen was assisting Morgan in raising the money necessary to carry out his contract, and that, in consideration therefor, Allen was to receive from Morgan 40 per cent. of the net profits of the undertaking, and that he was secured by Morgan, through mortgages and otherwise, with reference to all the liabilities which he had assumed in Morgan's behalf. Various claimants whose claims were rejected by the master maintain that they are entitled to be subrogated to, and in some way to receive the benefit of, the security which Allen obtained, and of the indemnifying agreement which he executed to the complainant as surety for Morgan, or that in some way there should be a marshaling to their advantage. It is not necessary to point out that such equities cannot, in any event, be availed of without a cross bill, which is lacking here, because there can be neither subrogation nor marshaling where there is no privity; and, the claimants not being in privity with the complainant, their propositions in this respect entirely fail.

This leaves for consideration the claim of \$6,646.38, which originally belonged to the Lawrenceville Cement Company, and four other claims, which are presented by Robert M. Hutchinson, assignee. The Lawrenceville Cement Company recovered a judgment against the complainant, which was paid by it, but the complainant was reimbursed by Allen. It is claimed that the agreement between Allen and Morgan, by which Allen was to receive 40 per cent. of the net proceeds of the undertaking, made him a partner with Morgan; and the master has found that he was such partner. The law, however, was carried to such an extreme in the other direction by *Meehan v. Valentine*, 145 U. S. 611, 12 Sup. Ct. 972, 36 L. Ed. 835, that it is impracticable to confirm that finding.

As the complainant held the indemnifying agreement executed by Allen as surety, it could not be prejudiced by any contract between Allen and Morgan not disclosed on the face of the bond executed by it, nor by the indemnifying agreement. It was not bound to take notice of the undisclosed relations of Morgan and Allen as between themselves, and, even if advised of them, it was entitled to stand, with reference to the reimbursement by it to Allen, in the position most favorable to itself. It is not holden to account to any claimant for anything realized from any indemnifying security which it held, whether in the way of property or personal suretyship. So far as it paid any portion of any claim which it was bound to pay by virtue of its bond to the United States, and has been reimbursed therefor after payment, either by Morgan, or by any surety in his behalf, or by any property which it may have held as security, it stands, so far as other claimants are concerned,

precisely as though it had not been reimbursed. Therefore, with regard to the claim of the Lawrenceville Cement Company, the marshaling in this suit, with reference to all other creditors, is to be exactly the same as though the Lawrenceville Cement Company had not been in any part paid, or as though the American Surety Company had not been reimbursed. In determining, therefore, the pro rata distribution to the claimants who have been unsatisfied, the proper percentage, or the whole, as the case may be, of the claim of the Lawrenceville Cement Company, will be estimated as though still due from the complainant.

With reference to the claims brought forward in the name of Robert M. Hutchinson, it appears that they were acquired by Hutchinson with funds furnished by Allen, and that any sum received on them by Hutchinson would inure directly to the benefit of Allen. They do not stand like the claim of the Lawrenceville Cement Company in all particulars, although they do in some important respects. Allen, having purchased these claims, is estopped from setting them up against the complainant by his execution of the indemnifying bond already referred to. This is by reason of rules so plain that they need not be stated. This, however, does not increase the equities of the other creditors, and they stand the same as though the claims purchased by Allen were still outstanding in the hands of the original holders. These claims have not been extinguished, and any other rule would compel Allen to now reimburse the complainant the full penal amount of its bond, notwithstanding he had acquired these claims, and it would also give the other creditors a larger percentage than they are equitably entitled to. Therefore, in computing the pro rata to be paid them, both the judgment in favor of the Lawrenceville Cement Company and the claims represented by Hutchinson must be taken into consideration so far as they are of the class which the statute contemplates.

The record shows that a judgment was obtained in favor of the Lawrenceville Cement Company against Morgan and the complainant in the circuit court of the United States for the Southern district of New York, after a verdict by a jury rendered in accordance with the instructions of the court. This establishes *prima facie* the claim as within the statute, though on this point there seems to be no question made. There is nothing in the record, however, to show what were the facts, one way or the other, with reference to the claims brought forward by Hutchinson. The arguments of counsel are at odds as to the nature of these claims; but, undoubtedly, with the assistance of this opinion, the parties can agree into what class each falls, and on the filing of such an agreement the decrees to follow this opinion will be framed accordingly. If no such agreement is filed, the case must be again submitted to the master to determine the matter. The agreement to be thus filed must also compute interest on the claims presented by Hutchinson, and on the judgment in favor of the Lawrenceville Cement Company, and on all claims rejected by the master, but now allowed, all to the date fixed by the master,—that is, January 24, 1901; and this computation must be carried into the various future decrees.

If the claims set up by Hutchinson are sustained, the total amount allowed in accordance with this opinion, with interest to January 24, 1901, will be approximately between \$19,000 and \$20,000. The claim made by the United States is given at \$11,440.86. As it is beyond our power to determine conclusively whether or not this claim will be allowed, and, if yes, whether or not it will have priority over other claims, its entire amount must, for the present, be deducted in making distribution. This will leave for present distribution approximately \$6,000, and therefore the decree presently to be entered will provide for a primary dividend of 30 per cent.

As provided in rule 21, the complainant will, on or before September 2, 1901, file a draft decree in accordance with the opinion passed down this day, and the respondents will file corrections thereof on or before September 6, 1901.

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WEST v. EAST COAST CEDAR CO.

(Circuit Court, E. D. North Carolina. July 31, 1901.)

1. EJECTMENT—EVIDENCE OF TITLE.

As plaintiff in ejectment must recover, if at all, on his own title, evidence to show defendant's title is subject to objection.

2. ESTOPPEL.

Laws N. C. 1889, c. 243, § 2, declaring swamp lands not listed for taxes forfeited to the board of education, does not estop plaintiff in ejectment against a private person from claiming title.

At Law.

Thomas B. Womack, for plaintiff.

E. F. Aydlott and Fab. H. Busbee, for defendant.

PURNELL, District Judge. This action of ejectment is another phase of a controversy between the same parties, determined by the circuit court of appeals, and reported in 41 C. C. A. 528, 101 Fed. 615 et seq., and was instituted in accordance with the intimation at the end of the opinion filed on the rehearing. In the former controversy, which was a suit for partition, plaintiff intervened, and was allotted two-sixteenths of what is known as the "Jarvis-Walker title" to the land in controversy. He now brings an action at law to recover a third interest in the same land, known as the "Spruill title," which both this and the circuit court of appeals held he could not set up in the former suit, having intervened as a tenant in common in a petition for partition. By stipulation in writing it was agreed by counsel "that the matter shall be heard both upon the law and the facts by the judge, a jury trial being waived."

The only issue submitted by counsel was: Is the plaintiff entitled to recover, and, if so, what interest? This issue was not adopted by the court, and is not a proper issue in an action of ejectment. The proper issue would be: "Is the plaintiff the owner, and entitled to the possession, of the land described in the complaint, or any part thereof?" During the hearing nothing was said about possession, but it is alleged in the complaint that the plaintiff is entitled to the immediate possession of one-third undivided interest of the tract of



5,080 acres, and describing it as lot No. 3, and admitted in the answer that defendant is in possession of the entire tract. The title of defendant to two-thirds less two-sixteenths of the land must be taken as *res adjudicata*, and is admitted. Hence the question is narrowed down to what may be termed the "Spence-Spruill third."

Plaintiff now claims under the following chain of title: Grant from the state of North Carolina, MacRae patent, 1776; deed from Hoskins, sheriff, to Armstead, 1809; Armstead to Daniel Sawyer, 1809. That in 1811 Daniel Sawyer conveyed the land, a third of which plaintiff claims, to John Sikes, Thomas Sikes, and Joseph Spence. Nothing need now be said of the Sikes' two-thirds; that was the subject of the controversy before referred to as being *res adjudicata*. That Joseph Spence in 1812 conveyed one undivided third part of the northern half of the MacRae patent, conveyed to him by Daniel Sawyer, to Samuel Spruill, which deed was recorded in the office of register of deeds of Tyrrell county in 1822. That the heirs of Samuel Spruill conveyed their interest or title to plaintiff in 1898. Defendant denies plaintiff's title from the MacRae patent, alleging that title was out of the state, the purpose for which this grant is offered, by a grant to John Gray Blount prior to the date thereof, and attacking every link in the chain of title set up by plaintiff. Defendant also denies that it claims under Daniel Sawyer or Sikes, but says its title, as decided in the case in 41 C. C. A. 528, 101 Fed. 615, was by virtue of adverse possession under color of title, and the Sawyer, Sikes, and Spence deeds were not claimed to be more than color of title. That plaintiff claimed the two-sixteenths interest which was allotted him under the same title matured by such adverse possession, and is estopped now to deny the same. That the plaintiff is further estopped by the provisions of the act of the North Carolina legislature of 1889 (chapter 243, § 2).

Much is said in the pleadings and evidence offered on the trial tending to show defendant's title, but, if he recovers at all, plaintiff must recover on his own title, good against the world. On this principle, objections to evidence offered to show defendant's title as noted in the stenographic notes herewith filed are sustained.

The act of the North Carolina legislature declaring swamp lands not listed for taxes forfeited to the board of education cannot avail defendant. It is unnecessary to decide, as urged, the constitutionality of this act. Conceding this, its purpose was not to benefit private persons or litigants, and were the question pursued, it might prove dangerous to both parties,—a two-edged sword. It is not an estoppel on plaintiff,—has no application to this controversy. Nor is it deemed necessary to decide all the interesting questions discussed in the argument.

Considering all the evidence and argument of counsel, the court answers the issue tendered by counsel and the issue formulated by the court, "No." Thereupon it is considered, ordered, and adjudged that this action be dismissed, the defendant go without day, and recover his costs herein, to be taxed by the clerk of this court. The notes taken by the court's stenographer on the hearing will be attached hereto, and filed as a part of the record.

## WEST v. EAST COAST CEDAR CO.

(Circuit Court, E. D. North Carolina. July 31, 1901.)

## ANCILLARY BILL—DISMISSAL.

A suit for injunction, being ancillary to an action in ejectment which has been decided against complainant, will be dismissed.

In Equity.

T. B. Womack, for plaintiff.

E. F. Aydlett and F. H. Busbee, for defendant.

PURNELL, District Judge. On July 9, 1900, complainant filed his bill in equity in aid of the action at law between the same parties. Defendant demurred, and the demurrer was sustained, with leave to complainant to amend. An amended bill was filed September 13, 1900, in which the title claimed by complainant is set out in detail: from the state of North Carolina by grant, 1776; Hoskins, sheriff, to Armstead, 1809; Armstead to Daniel Sawyer, 1809; Daniel Sawyer to John Sikes, Thomas Sikes, and Joseph Spence, 1811; Joseph Spence to Samuel Spruill, 1812; the heirs of Samuel Spruill to W. A. West, 1898. Defendant denies the validity of this title ab initio, and says even the grant to MacRae was invalid, the land therein described, having been patented prior to 1796 by John Gray Blount; says Sawyer had no title, and his deed to Spence was only color of title. Estoppel is pleaded by both complainant and defendant; the decision of *West v. Cedar Co.*, 41 C. C. A. 528, 101 Fed. 615 et seq., and *Hawkins v. Cedar Works*, 122 N. C. 87, 30 S. E. 13, being relied on, respectively. Defendant in a cross bill alleges, which complainant denies, that the title or interest purchased by complainant from the heirs of Samuel Spruill in 1898 was purchased by him for and in the interest of the Richmond Cedar Works, and, if the same is valid for any purpose, he should be declared a trustee for that corporation and defendant, between whom there was an agreement regarding the purchase of timber lands in North Carolina. The evidence in the action at law was by agreement of counsel to be used in this suit, and, in addition, the examination of Mr. Busbee, hereto attached, and the deposition taken in the case. The basis of the bill in this cause is the title set up in the action at law, this suit being ancillary, and in aid of that cause; the prayer being for injunctive relief, to restrain defendant from cutting timber or committing waste on the land in dispute.

The action at law having been decided adversely to complainant, that he is not the owner, or entitled to the possession, of the land described in the bill, the purpose of this suit in equity fails, and the bill should be dismissed. It is therefore considered, adjudged, and decreed (1) that the bill in equity herein, together with the amended bill and replication, be, and the same are hereby, dismissed; (2) that the injunction herein granted be, and the same is hereby, dissolved and annulled; (3) that defendant go without day, and recover of the complainant and the sureties on the prosecution bond its reasonable costs and disbursements herein to be taxed by the clerk of this court;

(4) that defendant recover of the complainant and the sureties on the injunction bond such damages as defendant has suffered by reason of the issuing of such injunction. It is further ordered by the court that this cause be referred to William M. Bond, Esq., of Edenton, N. C., who is hereby appointed special master for that purpose, to ascertain and report to this court what damages, if any, defendant has suffered by reason of the injunction aforesaid.

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BROWN et al. v. OREGON KING MIN. CO.

(Circuit Court, D. Oregon. August 9, 1901.)

No. 2,655.

1. MINES—LOCATION—INSTRUCTIONS.

Plaintiff having discovered a mine, and attempted a location which was invalid, and defendant having made a location thereof before plaintiff's second location, and there being no contention that defendant had failed to comply with the law, unless his location was invalid, an instruction, in action for the mine, that, plaintiff's first location being invalid, if defendant's location was valid, "I am of the opinion that defendant ought to recover in this case. But I do not so instruct you. I leave the matter open for your own determination,"—is erroneous, as allowing the jury to give a verdict contrary to the law, doing equity according to their own feelings.

2. SAME—NOTICES.

Where the location of a mine by plaintiff was invalid, admission of his location notices to show discovery is prejudicial to defendant, who made a subsequent valid location, defendant not being a trespasser or jumper.

Dolph, Mallory, Simon & Gearin, Albert Abraham, and H. H. Rid-dell, for plaintiffs.

Moody & Long and W. H. Wilson, for defendant.

BELLINGER, District Judge. There are two vital questions in the case: Did the location under which defendant claims mark the claim on the ground so that its boundaries could be readily traced; and, if not, was a copy of Brown's location, made in 1899, filed with the county recorder as required by the Oregon law of 1898? All the other material facts in the case are either admitted, undisputed, or conclusively established. Brown, in 1897, was the first discoverer of the mine. His attempted location in that year was insufficient and invalid. His subsequent location in 1899 was sufficient to vest in him the title which he claims, if he has complied with the law as to filing a copy of his location, unless the location made in 1898, under which the defendant claims, was valid, in which event the defendant has the prior right. Except as to the two questions mentioned, it is undisputed that both parties have complied with the law under which titles to property of this character vest. Such being the case, the court, of its own motion, instructed the jury as follows: "Brown's location in 1897 not being valid, if the defendant's location, or the location of Wilson, under whom the defendant claims, which was made in 1898, was a valid location, then I am of the opinion that the defendant ought to recover in this case. But I do not so in-

struct you. I leave the matter open for your own determination." This instruction is indefensible. The right of the defendant depends entirely upon its location. It is suggested that, notwithstanding a valid location by those under whom defendant claims title, there might still be an adverse finding for failure to comply with the law in other respects,—such as the work required to be done, etc. But, if there are such questions, they are merely formal. They were not matters of controversy on the hearing, and the jury could not have understood the instruction to refer to them. The instruction that the jury might find for plaintiffs although satisfied that defendant's location was a valid one, was especially injurious under the circumstances of the case. Brown's discovery and attempted location in 1897 raised most persuasive equities in his favor. The instruction relieved the jury from the requirements which the law attached to the fact of a prior valid location by defendant's grantor, if such there was, and opened the door to them to do equity agreeably to their own feelings, so far as that question was concerned. The motion for a new trial must be allowed because of this instruction, unless the court can say, as a matter of law, that defendant's location is not a valid one; and this is not claimed by the plaintiffs, who strongly argue that it is a question for the jury; and, if so, it is, as we have seen, a question for the jury to some purpose in the case. But, without this instruction, I should feel compelled to allow this motion, because of error in admitting in evidence the location notice testified to by the witness Wilson,—that being the second location notice offered in evidence by plaintiffs. The ground upon which this notice was admitted was that it tended to prove discovery. If such a notice is admissible for this purpose, the second notice could add nothing to the effect of the first notice, admitted in evidence for that purpose. The multiplication of location notices adds nothing to the legal effect of one such notice. If one notice tends to prove discovery, two notices do not strengthen the proof. Wilson was the locator under whom defendant claims. The value of the second notice to the plaintiffs was not that it contributed anything to their proof of discovery, but that it proved knowledge by Wilson of the prior attempted location, and tended to show that Wilson was a jumper. If Brown had failed to comply with the law, and the property was at the time subject to location, it was wholly immaterial whether Wilson knew of Brown's prior claim. He might lawfully locate a claim himself. And it is in fact, as we have already seen, not disputed that Brown's location of 1897 was invalid, and that the claim was open to location at the time in question by Wilson or others. Wilson was not a trespasser or jumper. He was not seeking to acquire the claim in violation of Brown's right, since it is conceded that Brown at the time had no right. But this testimony gave to Wilson's act that appearance, and may have influenced the verdict. And this appears to have been the object of plaintiffs in the introduction of this testimony, as is inferred from the statement of their counsel referring to this point, on the argument of this motion, to the effect that Wilson was a jumper, and the plaintiffs might properly show that fact. It is argued in support of this motion that the court erred in its instruction

as to the validity of Brown's filing with the county recorder. The law requires a copy of the notice to be filed. Whether the paper that was filed was a copy, or was a different and altogether independent paper relating to the same subject, is a serious question in the case. I assumed, in the instruction given, that it was a "copy" within the statute, because it performed the office of giving the notice which the statute intended to provide. The conclusion reached as to the points hereinbefore discussed renders consideration of this question and of the other questions urged in support of the motion unnecessary. The motion for a new trial is allowed.

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### CONLEY v. MATHIESON ALKALI WORKS.

(Circuit Court, S. D. New York. June 12, 1901.)

#### 1. FOREIGN CORPORATIONS—SERVICE OF PROCESS.

In a personal action against a foreign corporation, which does not do business within the state, service upon an officer or agent temporarily within the state is not a good service on the corporation.<sup>1</sup>

#### 2. REMOVAL OF CAUSES—EFFECT AS APPEARANCE—MOTION TO SET ASIDE SERVICE.

The removal of a cause into a federal court by a defendant does not preclude him from afterwards objecting in such court to the sufficiency of the service.

On Motion to Set Aside Service of Summons After Removal of Cause.

John G. Agar, for the motion.

W. W. MacFarland, opposed.

LACOMBE, Circuit Judge. If the facts are as stated in the affidavits submitted by defendants, namely, that at the time of the service of the summons, and for some months prior thereto, the defendant corporation had entirely ceased doing business within this state, the application should be granted. The cases of *Goldey v. Morning News*, 156 U. S. 518, 15 Sup. Ct. 559, 39 L. Ed. 517, and *Railway Co. v. Brow*, 164 U. S. 271, 17 Sup. Ct. 126, 41 L. Ed. 431, are controlling. Whether or not the defendant owns property within the state which is subject to attachment, as appears to have been the case in *Purdy v. Wallace Muller & Co. (C. C.)* 81 Fed. 513, is immaterial, inasmuch as service in this case was not made upon the garnishees. The affidavits presented by the complainant are mainly on information and belief, but annexed to them is a letter, the genuineness of which is not questioned, which bears date March 15, 1901, two months and a half after the alleged cessation of business at Niagara Falls, and signed by the treasurer of the defendant corporation, in which he speaks of the plant at Niagara Falls as still being operated by the defendant. Under these circumstances, the court would not be warranted in granting this motion, in view of the conflict of fact. If, however, the defendant feels assured that the apparent discrepancy

<sup>1</sup> Service of process on foreign corporations, see note to *Eldred v. Palace Car Co.*, 45 C. C. A. 3.

can be explained, and is willing to pay the expenses of a reference, it may be sent to a master to take testimony, and report to the court whether or not at the time of the service of the summons the defendant corporation was doing business within this state.

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In re EATON.

(District Court, N. D. New York. September 30, 1901.)

No. 25.

1. BANKRUPTCY—DISCHARGE—FALSE OATH.

To render the verification of schedules from which property has been omitted the making of a false oath within Bankr. Act 1898, § 29b, cl. 2, which will defeat the right of the bankrupt to a discharge, the omission must have been knowingly and fraudulently made.

2. SAME—FILING AMENDED SCHEDULE.

The fact that a bankrupt obtains leave and files an amended schedule including property omitted from his former schedule is not conclusive evidence that the omission was not made knowingly, and with fraudulent intent, so as to overcome the charge of making a false oath to the original schedule, though it may be considered as tending to show absence of any wrongful intent.

3. SAME—EVIDENCE CONSIDERED.

A bankrupt omitted from his schedule certain stock which he owned of the par value of \$3,000, which some two years before he had sent to an agent for sale. It was then subject to sale for unpaid assessments made thereon. Subsequently the bankrupt had become insolvent, and all his property had been placed in the hands of a receiver. Pending the bankruptcy proceedings, he was called as a witness in a suit in a state court, and testified to such facts, and that he had forgotten the stock, not having regarded it of value, and did not know what had been done with it. He subsequently filed an amended schedule, in which he included the stock, and offered to surrender it to his trustee. *Held* that, even if the testimony of the bankrupt in the state court be considered, it did not establish the charge of knowingly and fraudulently making a false oath to the original schedule, which would defeat his right to a discharge.

In Bankruptcy. On motion to confirm report of referee recommending the discharge of the bankrupt.

The first and second objections to the discharge are the only ones now in controversy. The first charges that the bankrupt was the owner of thirty shares of the stock of the Park Ridge Land Company, the par value being \$100; that no mention of said stock was made in his schedules and that on the 1st day of June, 1900, he, knowingly and fraudulently, made a false oath by verifying his schedules with the said property omitted. The second objection charges that one Elmer L. Eaton was indebted to the bankrupt in the sum of \$3,000, which indebtedness was omitted from the schedules, knowingly and fraudulently, by said bankrupt, he verifying the schedules with said indebtedness omitted. On the 25th of January, 1901, the bankrupt applied for leave to file amended schedules, and, on the 29th, amendments were filed in which a full statement is made of the property omitted as aforesaid, the bankrupt stating that the certificates of stock in his possession will be delivered to his trustee in bankruptcy. The issues arising upon the bankrupt's petition for a discharge and the objections thereto were referred to the referee, who filed a report on the 30th of August, 1901, holding that the amendments cured the objections to the discharge and recommending that the discharge be granted. Exception having been taken to this ruling the court returned the matter to the referee, holding that

the amendments did not operate ipso facto to relieve the bankrupt from the consequences of having made a false oath. On the second hearing counsel for the objecting creditor offered to prove that in a suit, pending in the supreme court of the state of New York, in which Robert F. Livingston, as receiver, was plaintiff, and the bankrupt and others were defendants, which suit was tried in the autumn of 1900, the bankrupt made statements respecting his property which tend to prove the truth of the allegations of the said objections. The referee held that the testimony of the bankrupt in the said suit was inadmissible, and, further, that no admission of the bankrupt upon that trial could be proved, either by the minutes of the trial or by oral testimony. The referee again overruled the objections and recommended a discharge. The case is now here upon the record made at the second hearing before the referee, upon his report and exceptions thereto.

Myron G. Bronner, for bankrupt.

Walter W. Cooper, for opposing creditor.

COXE, District Judge (after stating the facts). But one question is presented, namely, did the bankrupt knowingly and fraudulently make a false oath in verifying schedules which omitted all reference to the Park Ridge stock and the indebtedness due him from Elmer L. Eaton? There can be no doubt that the verification of schedules from which valuable property has been knowingly omitted constitutes a false oath under subdivision 2, § 29b of the bankruptcy act, but the omission must have been made with fraudulent intent. In *re Becker*, 5 Am. Bankr. R. 438, 106 Fed. 54, and cases cited; In *re Bryant*, 5 Am. Bankr. R. 115, 104 Fed. 789. It being conceded that the Park Ridge stock and the Elmer debt were omitted, the sole question is, was it done knowingly and fraudulently? The filing of the amended schedule, giving a full statement of the property in question and offering to deliver the certificates of stock to the trustee, is evidence tending to show the absence of an unlawful intent, but it is by no means a conclusive answer to the objections. A ruling that a bankrupt may verify false schedules and, upon discovery, avoid the consequences of his act by an amendment, is contrary to the spirit of the law which aims to relieve honest debtors only. If the law were so construed a bankrupt runs no risk in making a fraudulent return of his property supported by a false oath, for, if undiscovered, he secures the fruits of his wrongdoing, and, if detected, he can still obtain his discharge by amending his schedules so as to contain the information which the creditors have unearthed in spite of his efforts at concealment. On the other hand omissions frequently occur inadvertently and a prompt acknowledgment of the mistake, accompanied by a return of the property, are circumstances tending to show good faith. The testimony in the Livingston suit, offered at the hearing before the referee, has been submitted and carefully examined by the court. The following facts appear: In 1893 or 1894 the bankrupt purchased 60 shares of the stock of the Park Ridge Land Company for which he paid \$6,000. In 1896 he considered this stock worth par. Thirty shares were pledged in 1898 as security to pay a note of \$4,000, which the bankrupt owed his wife, and 30 shares were sent, prior to 1898, to Elmer L. Eaton at Buffalo to be disposed of by him. The bankrupt testified that at the time of making out his schedules he did not know what had be-

come of the Park Ridge stock, or its value, or whether Elmer had disposed of it or not; he had in fact forgotten the transaction and did not recall it until called upon to testify in the Livingston suit. In 1898 the bankrupt became involved in financial difficulty and made no further inquiries about the stock in Elmer's hands. The stock was subject to assessment and there were a number of calls, but no payments were made. In February, 1897, the stock was pledged to a trustee for the payment of taxes, interest and expenses, the instrument transferring the stock providing that in case of failure to make payments the trustee might sell the stock at public or private sale. On October 13, 1899, a receiver was appointed by the state court of all the property of the bankrupt. The foregoing is a synopsis of the testimony of the bankrupt in the Livingston case and contains all the salient facts bearing upon the present issue. The testimony in the Livingston case bearing upon the omission of the Elmer L. Eaton indebtedness is absolutely insufficient to establish fraud and need not be discussed. Regarding the omission of the Park Ridge stock the case is not so plain, and yet the court is clearly of the opinion that the testimony falls short of establishing fraudulent intent. There is nothing to show the value of the stock in June, 1900, when the schedules were filed. It may have become utterly worthless at that time. It had been transferred to a trustee who was authorized to sell it to satisfy unpaid assessments. A receiver had been appointed of all the bankrupt's property, including the stock. The account between the bankrupt and Elmer L. Eaton, who held the certificates and who was authorized to dispose of them, was apparently involved in an inextricable tangle. In these circumstances a perfectly honest man might have thought that the stock was of no value and have forgotten to mention it in his schedules. The bankrupt swears that this is precisely what took place. He supposed, he says, that the stock was of no value to himself or his creditors and had forgotten its existence when he verified the schedules.

Assuming that all the testimony offered by the objecting creditor is competent, he has failed to establish the essential ingredients of the offense, namely, that the omission was made knowingly and fraudulently. In fact, the testimony offered, which is the testimony of the bankrupt himself, tends to establish his innocence rather than his guilt. The case has been examined as if this testimony were properly before the court. As stated at the argument the court will not discharge a bankrupt if convinced that legal evidence is at hand which will prove that he is unworthy to receive a discharge. The principal facts referred to in the Livingston case can be established, without recourse to that record, by competent evidence in this proceeding, and if convinced that these facts constitute a valid bar to the discharge an opportunity to present them would be given.

Counsel for the objecting creditor stated at the argument that if the facts in the Livingston case were admitted he would regard his case as closed. The court is convinced that with the case made out precisely as the objecting creditor requests, it would not present a valid reason for refusing the discharge. The situation is somewhat similar to that which arises when an application to present



newly-discovered evidence is denied on the ground that the evidence if received could in no way change the result. The court expressly declines to decide that the testimony of a bankrupt taken in a contemporaneous proceeding in a state court can be introduced in evidence to defeat his discharge. It decides simply that if all the facts stated in the testimony were properly in evidence they would not defeat the discharge.

The request of the objecting creditor that the matter be again sent back for new testimony cannot be granted. He has had two hearings before the referee and, practically, a third hearing before the court upon all the testimony offered. He has been treated with extraordinary liberality and it would be an injustice to the bankrupt to permit the creditor to make another effort to defeat the discharge. The report of the referee is confirmed and the discharge is granted.

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In re MORRISON.

(District Court, E. D. Arkansas, W. D. October 2, 1901.)

**BANKRUPTCY—HOMESTEAD EXEMPTION—HEAD OF FAMILY.**

Under Const. Ark. art. 9, § 3, which exempts the homestead of any resident of the state "who is married or the head of a family," an unmarried man who owns a house, in which he resides with his widowed mother and minor brother, who are not able to support themselves unaided, and to whose support he contributes from his wages, is the head of a family, and is entitled to the exemption of his homestead in bankruptcy.

**In Bankruptcy. On review of decision of referee.**

The facts as found by the referee in bankruptcy, and to which no exceptions are taken, are substantially as follows: The bankrupt is 26 years old, an unmarried man, and the owner of a lot, with a small house thereon, which he claims as exempt as his homestead. He purchased it with the proceeds of a legacy left him by an aunt about 5 years ago. He resides on the property, and has with him his widowed mother and a half-brother, who is now about 16 years of age. The bankrupt is a fireman on a railroad locomotive, and contributes to the support of his mother and half-brother. Immediately after his purchase, he and his mother and her husband, who was the step-father of the bankrupt, as well as her youngest son, moved into the house with the bankrupt. Her husband died soon thereafter, and the mother and half-brother have lived there with him ever since, without paying any rent, but, on the contrary, receiving assistance from the bankrupt, in order to enable them to live with some degree of comfort. The mother has a small income from the sale of milk and butter, she being the owner of a cow, and she is also the owner of a horse. The bankrupt resides there with them, his mother keeping house. The referee also finds that the mother is 57 years old, is in poor health, and has no means of her own. The young brother has about \$200 in money, which has been loaned out by his guardian, and the interest as collected is paid to the mother. He is in poor health, and does not earn sufficient to support himself. On these facts the referee (E. W. Kimball, Esq.) decided that the bankrupt is the head of a family, within the meaning of the laws of the state of Arkansas, and entitled to the homestead exemption. The creditors of the bankrupt ask a review by the court of this decision of the referee.

J. A. Comer, for creditors.

F. G. Fulk, for bankrupt.

TRIEBER, District Judge (after stating the facts). The constitutional provision of the state of Arkansas is as follows:

"The homestead of any resident of this state who is married or the head of a family shall not be subject to the lien of any judgment or decree of any court or to sale under execution or other process thereof, except," etc. (the exceptions not being applicable to the case at bar). Const. Ark. art. 9, § 3.

The only question to be determined is whether the bankrupt, upon the facts of this case, is "the head of a family," within the meaning of this constitutional provision. The question has never been directly passed upon by the supreme court of Arkansas, but a careful review of all the decisions of that court in relation to homestead exemptions shows that these laws have always been liberally construed; and in two instances, while not properly before the court, it was intimated that one situated as the bankrupt is would be deemed "the head of a family." In *Greenwood v. Maddox*, 27 Ark. 648, the court said, where an unmarried man had living with him his sisters who were orphans, that:

"The court below might well have found, upon these facts, that Toms was the head of the family. He succeeded his deceased father in the care of his minor sisters, who continued to live with him in the family mansion when not at school." *Greenwood v. Maddox*, 27 Ark. 658.

In *Patrick v. Baxter*, 42 Ark. 175, the court cites approvingly from *Thomp. Homest. & Exemp.* § 60, that:

"It may be that an unmarried man, who has an aged mother living with him in his house, dependent upon him, and whom he is supporting, is the head of a family, within the meaning of the constitution."

While it is true that these are mere dicta, and were not necessary for the determination of the issues then before the court, yet they are entitled to high consideration from this court, as showing the leaning of the highest court of the state in the construction of these provisions of the state constitution. The term "head of a family" should be given a broader construction than merely applying it to the husband or father, and, while it is true that there is some conflict of authority as to whether an unmarried man can be the head of a family, the weight of authority is in favor of considering every person the head of a family who keeps house, and has living with him and is supporting some persons whom it is either his legal or moral duty to support. *Harbison v. Vaughan*, 42 Ark. 539. Thus, in *Tennessee*, Chancellor Cooper, in *Ex parte Brien*, 2 Tenn. Ch. 33, held that a widow keeping house upon the farm without any children of her own, but with orphan children of a deceased sister, dependent upon her, is the head of a family, within the meaning of the homestead laws of that state, which is limited to the head of a family. To the same effect, see, among other decisions, *Marsh v. Lazenby*, 41 Ga. 153; *Blackwell v. Boughton*, 56 Ga. 390; *Cox v. Stafford*, 14 How. Prac. 521; *Connaughton v. Sands*, 32 Wis. 387; *Wade v. Jones*, 20 Mo. 75, 61 Am. Dec. 584; *Parson v. Livingston*, 11 Iowa, 104, 77 Am. Dec. 135; *Seymore v. Cooper*, 26 Kan. 539; *McMurry v. Shuck*, 6 Bush, 111, 99 Am. Dec. 662; *Moyer v. Drummond*, 32 S. C. 165, 10 S. E. 952, 7 L. R. A. 747, 17 Am. St. Rep. 850; *Thomp. Homest. & Exemp.* §§ 55-60. Even if there be no statutory obligation, there is a moral

obligation on the bankrupt to support his old, widowed mother, which is sufficient, according to these authorities, to constitute him the head of a family, within the meaning of the provisions of the constitution of Arkansas. It may be that the filial affection of the bankrupt for his mother may have prevented him from marrying. To take from him this home would deprive his aged mother and young brother of a shelter, and defeat the beneficent intention of the framers of our constitution. Earning but scant wages as a fireman, his actions in thus furnishing a home for his mother and brother and contributing to their support are commendable, and, in the opinion of this court, constitute him the "head of a family," within the true meaning of the constitution of the state of Arkansas. There was no error in the conclusions of law reached by the referee, and his judgment is approved.

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In re JONES.

(District Court, D. Massachusetts. August, 1900.)

**BANKRUPTCY—PROOF OF CLAIMS—SURRENDER OF PREFERENCES.**

Bankr. Act 1898, § 57g, requiring a creditor who has received preferences to surrender the same before his claim will be allowed, is not confined in its application to preferences received within four months prior to the bankruptcy, but requires the surrender of all preferences, as defined in section 60a, which contains no time limit; the only limitation being the debtor's condition of insolvency when the transfer of property by payment or otherwise was made.

In Bankruptcy. On review of referee's decision.

The following is the opinion of Warner, Referee:

Lovett, the creditor, worked for Jones, the debtor, during a part of the year 1895 and to September 3, 1896, on which date there was a balance due Lovett for wages of \$175, for which amount Jones gave his demand note, on which cash payments have been made as follows: November 14, 1896, \$10; December 26, 1896, \$5; January 16, 1897, \$5; April 23, 1898, \$10,—amounting in all to \$30, and leaving a balance due on the note, with interest to the date of the filing of the petition, March 14, 1900, of \$175.45. Lovett returned to work for Jones in September, 1898, and between the dates of September 7 and December 31, 1898, earned, as wages, the sum of \$94.24. Between these dates Lovett received on account of wages the sum of \$43, in numerous payments, varying from 25 cents to \$5. Between the dates of April 16 and December 14, 1899, Lovett earned as wages the sum of \$181.40, and between the dates of April 18 and November 17, 1899, received on account of wages the sum of \$59.25, in numerous payments, varying from 50 cents to \$5. Within three months of the filing of the petition, December 14, 1899, to March 14, 1900, Lovett earned as wages the sum of \$111.40, on account of which he has received no payment. The last payment received by Lovett from Jones was \$2, on November 17, 1899, and this was the only payment received by him within four months before the filing of the petition. The total amount received by Lovett after July 1, 1898, and before November 14, 1899, was \$100.25. Jones was insolvent, within the meaning of the bankruptcy act, on July 1, 1898, and remained insolvent at all times to the date of the filing of his petition. There is no evidence that at the time any of the payments were made Lovett had reasonable cause to believe that it was intended thereby to give a preference. The creditor offered to surrender the sum of \$2. The referee ruled that no part of the claim could be allowed unless the creditor surrendered all payments received since the bankrupt became insolvent, and refused to allow the claim without the surrender of

\$102.25, and allowed the creditor ten days within which to make such surrender. The creditor excepted seasonably to this ruling, and asked that the same might be reviewed by the judge. The Derby Desk Company, a corporation organized under the laws of the state of Maine, by its treasurer, Frank W. Crocker, offered its proof of claim in the above-named matter, for the sum of \$2,619.47, upon four (4) promissory notes, one dated November 1, 1898, for \$1,000, payable on demand, and three dated November 1, 1899, for \$180.91, \$181.79, \$182.68, respectively, and payable, respectively, four, five, and six months after date, and for an open account for rent, the items for rent being four months' rent to January 1, 1900, \$1,000; one month's rent to February 1, 1900, \$250. On the open account for rent the following items were credited: January 22, 1900, cash, \$100; January 31, 1900, \$75; March 1, 1900, \$0.91. It appeared that the bankrupt was insolvent at the date of these credit items and for a considerable period before. The claim, in this form, was disallowed, on account of the creditor having received a preference. It also appeared that at times since the date of said notes, and while the said notes were held by said creditor as a liability against the bankrupt, the creditor had received on claims not contained in the proof other payments than those credited on the account. The creditor offered to surrender the sum of \$175.91, as credited upon the open account filed with the proof, upon allowance of the claim, but the referee refused to allow this creditor to prove the claim without surrendering all sums received by it in payment of any indebtedness from the bankrupt to it while the bankrupt was insolvent, and during the existence of any of the indebtedness contained in this proof. The creditor excepted to this ruling of the referee, and the referee sets forth these facts to the judge for his decision.

Charles C. Blaney, for Lovett.

Freedom Hutchinson, for Derby Desk Co.

Albert S. Hutchinson, pro se.

LOWELL, District Judge. In these cases the creditors seeking to prove have, according to the decision in *Re Ft. Wayne Electric Corp.*, 3 Am. Bankr. R. 634, 99 Fed. 400, received preferences, unless the fact that the payments were received more than four months before the petition was filed takes them out of the scope of the decision. It was there held that a preference must be surrendered before the creditor could prove, even though he had no cause to believe that a preference was intended. The decision went largely upon the ground that the preference to be surrendered was not that limited in section 60b, but that described more generally in clause "a." This contains no mention of a time limit. A literal construction of sections 57g and 60a makes them include preferences given and received beyond the four-months period, and this literal construction is confirmed by an examination of earlier drafts of the existing act. Section 69 of the original Torrey bill, which dealt with preferences, provided in its first paragraph that a respondent shall be deemed to have given a preference if he has within four months, etc. The second paragraph of the same section provided that if a bankrupt shall have given any preference, and the person receiving such preference shall have had reasonable cause to believe that a fraud on the act was intended, the preference shall be voidable. The fifth clause of section 72 of the Torrey bill provided that the claims of creditors who have received preferences shall not be allowed until the preference is surrendered. Under these provisions, plainly, the preference to be surrendered

must have been given within four months; but in all the subsequent drafts of the act, so far as I have read them, the time limit has been taken out of the first paragraph and inserted in the second. And thus, while no preference given beyond the four-months period is made voidable, all preferences, whenever given, must be surrendered before proof. Perhaps no very great weight should be given to the consideration just stated, as the original Torrey bill seems never to have been before congress; but, for what it is worth, the consideration makes strongly for the literal construction of the language of the existing act. As has been said, the word "preferences," in section 57g, is used generally, and with apparently no more reference to a time limit than in section 60a. There are other places in the act where the same word appears to be without time limitation. See section 5g. It is urged as a strong argument against the literal construction of the act that this construction will unsettle business, by disturbing transactions long since past; but, if the construction contended for by the creditors is adopted, then only those preferences must be surrendered which have been given within the four-months period, and this whether the creditor had or had not knowledge that a preference was intended. Under the act of 1867, all preferences given after the passage of the act, and received with the knowledge of the intent to prefer, must have been surrendered before the creditor could prove. To permit a creditor to prove his debt, while retaining a preference received five months before the petition, with full knowledge of the debtor's insolvency and the intent to prefer, would be an unusual laxity. See, also, section 2, c. 9, of the act of 1841. If the court is compelled to choose between a construction which requires all preferences to be surrendered before proof whenever they are received, whether the creditor has knowledge of the intent to prefer or not, and a construction which permits the preferred creditor to prove, while retaining a preference received more than four months before the filing of the petition, with full knowledge of the intent to prefer, I am brought to believe that the first construction is more consonant with the general spirit of the act. It cannot be said, indeed, that this construction is clear beyond a doubt, but it seems to me to result logically from the case cited, which I am bound to follow. Were I to form a bankrupt act as seemed to me best for the interests of the community, I might differ from congress in some respects. That is not my office. If the construction thus put upon section 57g makes it a real menace to legitimate business, concerning which no opinion is expressed, it is from congress that relief must be sought. For all these reasons, the decision of the referee in above case is affirmed.

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In re ABRAHAM STEERS LUMBER CO.

(District Court, S. D. New York. August, 1901.)

**1. BANKRUPTCY—PREFERENCES—DEBTS SUBSEQUENTLY CONTRACTED.**

The payment by an insolvent of an existing debt, either in full or in part, does not constitute a preference as regards a new indebtedness contracted subsequently, to which the payment could have had no rela-

tion, and the creditor is not required by Bankr. Act 1898, § 57g, to surrender such payment before he can prove the subsequent debt against the estate of the debtor in bankruptcy; but where a note is given for all or a part of the prior debt, which is still held by the creditor when the subsequent debt is contracted, its payment thereafter is a partial payment on the entire indebtedness then existing, of which it is a part, and constitutes a preference which must be surrendered before the remainder of such indebtedness can be proved.

2. SAME—PROOF OF CLAIMS—SURRENDER OF PREFERENCES.

Bankr. Act 1898, § 57g, requiring a creditor who has received preferences to surrender the same before his claim will be allowed, is not confined in its application to preferences received within four months prior to the bankruptcy, but requires the surrender of all preferences as defined in section 60a, which contains no time limit; the only limitation being the debtor's condition of insolvency when the transfer of property by payment or otherwise was made.

3. SAME—NEW CREDITS.

The provision of Bankr. Act 1898, § 60c, allowing new credits to be set off against preferences, is applicable only in cases arising under subdivision "b" of the same section, where it is sought to recover such preferences, and does not affect section 57g, requiring the surrender of preferences to entitle the creditor to prove his claim.

4. SAME—PREFERENCE—CREDIT FOR LABOR OF DEBTOR.

The performance of labor by an insolvent debtor for his creditor, for which he is given credit on his indebtedness, is not a transfer of property which constitutes a preference under Bankr. Act 1898, § 60a.

In Bankruptcy. On review of referee's decision respecting a claim.

The following is the opinion of Olney, Referee:

This is an application for the re-examination of a proof of claim filed by the respondent, Robert R. Sizer, doing business under the name of Robert Sizer & Co., against the estate of the above-named bankrupt, amounting to \$191.25; being the balance due on open account for merchandise sold by the respondent to the bankrupt in March and August, 1900, upon which certain payments have been made. It is sought to vacate proof of claim unless such payment and others made in settlement of a previous independent account, where the debtor was insolvent, be surrendered by the claimant. An involuntary petition in bankruptcy was filed October 22, 1900, and some of the alleged preferential payments were made more than four months prior thereto. The facts are all admitted. The account referred to may be stated as follows:

Abraham Steers Lumber Company in Account with Sizer & Company.

1899.			
Dec. 23.	To mdse.....		\$232 46
1900.			
Jan. 24.	By cash.....	\$ 29 68	
	By bills rec.....	200 00	
Jan. 31.	By cash.....	2 78	
		<u>\$232 46</u>	<u>\$232 46</u>
Mch. 10.			
	To mdse.....		\$231 66
	To mdse.....		126 14
June 26.	By cash.....	\$100 00	
Aug. 16.	To mdse.....		20 62
Aug. 25.	By cash.....	50 00	
Aug. 28.	By charges (hauling, piling, and tallying lumber) .....	37 17	
	Balance (proved).....	191 25	
		<u>\$378 42</u>	<u>\$378 42</u>

It is alleged in the third paragraph of the petition that the payments therein set forth, amounting in the aggregate to \$419.23, were made by the debtor while insolvent, and by the fourth paragraph that the effect thereof was to enable the said creditor to obtain a greater percentage of his debt than other creditors of the same class. These statements, which conform precisely with the statutory definition of a preference, are admitted by the first paragraph of the answer; but it is claimed as to the payments made prior to June 22, 1900, that they were not made within four months prior to bankruptcy, and therefore not within the provisions of subdivision "g" of section 57. The first question, therefore, to be considered, is whether the four-months limitation specified in subdivision "b" of section 60 and subdivision "b" of section 3 apply to the preferences referred to in subdivision "g" of section 57, so as to limit the return of preferential payments to those received during four months prior to bankruptcy proceedings. The question seems to be a new one. The four-months period is often specified by the court and applied without objection to cases of this character, but, so far as I have knowledge, the point has never before been raised or specifically passed upon. The bald theory is whether subdivision "a" of section 60 contains the entire and complete definition of the word "preference," when used generally in the bankruptcy act, as it is in subdivision "g" of section 57. This subdivision "a" says, in substance: "A person shall be deemed to have given a preference, if, being insolvent, he has suffered a judgment against himself \* \* \* or made a transfer of any of his property, and the effect of the enforcement of such judgment," etc. "A person shall be deemed to have given a preference if, being insolvent, he has procured or suffered a judgment to be entered against himself in favor of any person, or made a transfer of any of his property, and the effect of such judgment or transfer will be to enable any one of his creditors to obtain a greater percentage of his debt than any other of such creditors of the same class." As this is the only definition of the word, these two elements, insolvency and payment, made up of a condition and an act, are all that is necessary to constitute a preference under the act. To hold that there is a limitation of four months in all cases is to hold that preferences cannot be predicated upon any facts arising prior to that period,—in other words, that a payment by an insolvent prior to that period cannot be considered a preference. It is difficult to assume such a construction in the face of the opening clause of the next subdivision: "If a bankrupt shall have given a preference within four months before the filing of a petition," etc. This clearly indicates that a preference may be created for general purposes prior thereto, but for the particular purpose of recovery by the trustee it is limited as therein stated. So in section 3 it is provided by subdivision "a" that a preference with intent, etc., is an act of bankruptcy, and subdivision "b" provides that a petition may be filed if such act of bankruptcy was committed within four months. This language would be surplusage and meaningless if preferences generally were limited to four months. Again, it may be well urged that, if it was necessary to confine by specific language the period of preferential acts for the purposes of sections 3 and 60b, then it was also necessary in the case of section 57g, if it was intended to limit that case to the same period. In the case of *Carson, Pirie, Scott & Co. v. Chicago Title & Trust Co.*, 5 Am. Bankr. R. 814, 21 Sup. Ct. 906, 45 L. Ed. 1171, the United States supreme court held that the element of intent, as contained in section 60b, did not enter into the definition of a preference, as used in the clause under consideration, because such element did not form a part of the requirements of a preference as specified in section 60a. It is difficult to distinguish in principle between that case and the present one. It is significant that in sections 3b and 60b the four-months limitation is connected with the element of intent, and that and the period of time are both specific limitations upon the general effect of a preference defined in section 60a. One is a limit of time, and the other of character. The same rule should apply to each of them. If we must borrow from subdivision "b" to complete the definition in subdivision "a" in the point of time, we could equally borrow therefrom in the other case. As it has been determined by supreme authority that it cannot be done in one case, it is safe to say that it cannot in the other. Standing alone, subdivision "a" does not confine the meaning of the word "preference" to

any period except that of insolvency. That is a limit of time, not by days or months, but by an event. That section 60a contains a general definition of a preference, while subdivision "b" sets forth a special kind of a preference and the results flowing therefrom, is evident not only from the reading of the statute, but from the opinion in the Carson Case. Thus the court says: "Subdivisions 'a' and 'b' are concerned with a preference given by a debtor to his creditor. Subdivision 'a' defines what constitutes it, and subdivision 'b' states a consequence of it, gives a remedy against it. \* \* \* Provided, however, that the preference was given four months before the filing of the petition in bankruptcy or before the adjudication, and the creditor has reason to believe that a preference was intended." See opinion of court in Carson, Pirlie, Scott & Co. v. Chicago Title & Trust Co. The question at bar did not arise in the Carson Case, but counsel referred to the four-months limit for the purpose of showing that, if that was allowed, the court "could travel outside" for the purpose of taking in the connecting element of intent also. This argument was met by the court as follows: "The argument is strong which is urged to support a four-months limitation, but it can be argued in opposition that subdivision 'a' needs no explanation from other parts of the statute in order to obtain a time limit on the question of preference. It can be argued that subdivision 'a' gives such limit in the existence of insolvency. But we are not required to decide either way on this record. If the element of 'intent' is not to be interpolated into subdivision 'a' of section 60, it must seem that the element of time is not to be so interpolated." I am of the opinion that the payments received from the bankrupt while insolvent, though more than four months prior to the commencement of bankruptcy proceedings, were preferences, within the meaning of section 57g.

The next claim on the part of the respondent to be considered is that a complete settlement and discharge of the original liability for merchandise purchased by the debtor having been effected by the receipt of cash and note, both treated as payment, the transaction is canceled and ended, and the payments made therein, being bona fide, can no more be questioned than they could have been if no subsequent transactions had been entered into between the parties,—in other words, that the right to prove a claim for the balance due upon a subsequent and distinct sale can in no wise be affected by the settlement of the prior indebtedness, as it constituted no part of the particular debt existing at the time of bankruptcy. There is much force to this plea, which is entirely distinct from the question of the applicability of the provisions of section 60c relating to the effect of subsequent credit upon "recoverable" preferences. It is urged by the learned counsel for the creditors that the word "debt," as used in subdivision "a" of section 60, refers solely to the particular indebtedness existing at the time of the bankruptcy, and excludes previous matters not then in esse. Applying the argument to the case at bar, it is claimed that, the payment of the first debt having been made before the second was contracted, there was an interim when the claimant was not a creditor, and that as to the new debt subsequently created the former payment could not be considered a preference, enabling this—in a sense—new creditor to obtain a greater percentage of his debt then existing than any other creditor of the same class. So far as the question relates to separate and contemporaneous debts, it has already been passed upon in several well-considered cases. In re Flick, 5 Am. Bankr. R. 465, 105 Fed. 503; In re Conhaim, 3 Am. Bankr. R. 249, 97 Fed. 923. The question presents some difficulties. In the absence of any controlling authority, my opinion is that where a transaction has been closed in good faith, and the bankrupt's debt fully paid up, and the dealings between the creditor and the bankrupt thus closed, in case thereafter their dealings are resumed, and a debt results which is in existence at the time of the bankruptcy, the act does not contemplate the opening of the transaction that was entirely closed. In other words, I do not think the payment made in that transaction should be considered a preference. It seems to me very unlikely that congress intended to throw open transactions of that kind. The inconvenience and uncertainty that would result from such a construction of the act appear to me so great as to render it improbable that such was the intention of congress.



If I am wrong in the foregoing conclusion as to independent transactions which have been closed, then it is also urged by counsel for creditor that section 60c applies to the preferences mentioned in section 57g as well as to those recoverable under section 60b. If this be true, then the cash payment made upon the first sale would be offset by the subsequent credits. I am prepared, however, to admit the application of section 60c to the case at bar. Judge Shiras, in confirming a very able opinion by Referee James in the case of *In re Christensen*, 4 Am. Bankr. R. 202, 101 Fed. 802, held that the word "recoverable," in section 60c, confined the operation of that subdivision to section 60b, which latter contains the only provisions for recovering preferences. This ruling was followed, but without comment, by the district court in the case of *In re Arndt*, 4 Am. Bankr. R. 773, 104 Fed. 234. Later decisions in both the circuit and district courts have applied it also to section 60a. See *McKey v. Lee*, 5 Am. Bankr. R. 267, 105 Fed. 923; *In re Ryan*, 5 Am. Bankr. R. 396, 105 Fed. 760; and *In re Sechler*, 5 Am. Bankr. R. 579, 106 Fed. 484. These later decisions might be considered controlling on the referee, were it not for a paragraph in the still later *Carson Case*. There is nothing in the record of the *Carson Case*, so far as it has come to my attention, which shows the pertinency of this particular question; but it certainly was discussed by counsel, and disposed of by the court in the following language: "Nor, again, do we find anything which militates against our conclusion in section 60c. That subdivision is applicable to the cases arising under 'b,' and allows a set-off which otherwise might not be allowed." In view of the facts of the case as disclosed by its record, this remark of the court seems to be obiter; hence, upon authority, I conclude that the set-off allowed in section 60c is available to the respondent here.

The counsel for the trustee makes the point that the item of credit to the bankrupt of \$37.17 arising by reason of work and labor preferred by the bankrupt for the creditor constitutes a preference. I do not think the performance of labor by the debtor for the creditor constitutes a "transfer of property," in the ordinary meaning of these words, or in the sense in which the words are used in the bankruptcy act, and hence the performance of this work did not constitute a preference. An order may be entered in accordance with the foregoing opinion.

Kneeland, La Fetra & Glaze (Stillman F. Kneeland, of counsel),  
for trustee.

McKelvey & Mattocks, for respondent.

THOMAS, District Judge. This is a review of the decision of the referee respecting the claim of Robert R. Sizer. Petition in bankruptcy was filed October 22, 1900.

On December 23, 1899, Sizer sold to the bankrupt merchandise of the value of \$232.46, for which he received:

January 24, 1900. Cash.....	\$ 29 68
January 24, 1900. Note payable and paid April 23d.....	200 00
January 31, 1900. Cash.....	2 78

Total ..... \$232 46

At subsequent dates Sizer sold the bankrupt merchandise as follows:

March 10. Merchandise .....	\$357 80
August 16. Merchandise .....	20 62
	<hr/> \$378 42

Upon which Sizer received the following payments:

June 26. Cash .....	\$100 00
August 23. Cash .....	50 00
August 28. Labor of bankrupt .....	37 17
	<hr/> \$187 17

Leaving a balance of..... \$191 25

The sum of \$232.46 need not be returned as a condition of proving debts arising on and after March 10, 1900, provided the note may be regarded as a payment at the date of its delivery; for in such case the payments ending January 31st could have no relation to the subsequent account, for before the indebtedness of March 10th accrued the relation of creditor and debtor would have ceased. It is considered that a full or partial discharge of the debt does not impair the right to prove a debt contracted subsequently. Thus, if A. owe B. \$500 in January, and pay \$500 or \$250 thereon in February, this is not a preference as regards a debt contracted in March for \$500. There is no reason for denying the right to prove the subsequent debt, inasmuch as the prior payment could not have any reference to or influence upon a debt contracted thereafter; nor could such payment be appropriated to the payment of a then nonexisting debt, either by the creditor or debtor, or both, unless there was some special collusion or arrangement for that purpose. But in the usual course of business a payment of money is appropriable only to an existing debt, and, in the nature of the case, can be related as a preference to such debt alone. In February a debtor cannot prefer a creditor on an indebtedness that is not contemplated and that will be nonexistent until March, and when the March debt arises the credit cannot be transposed from its whole or partial discharge of the first item of the indebtedness so as to discharge partially the second item of indebtedness. These views are expressed for the purpose of approving the referee's holding that the full discharge of the items amounting to \$232.46 before March 10th would not have been a preference. But it is considered that the referee erred in applying the note as a payment at the time that it was delivered; for it was not a payment, even if it may be deemed to have extended the time of payment of the account. Had Sizer transferred the note without indorsement, or done some other act from which it might be inferred that the note was accepted or regarded as payment, a different rule might apply. After the giving of the note, and before its maturity and payment, to wit, on March 10, 1900, the bankrupt bought goods amounting to \$357.80, so that at such date the bankrupt owed Sizer the note representing an account for goods sold, and the additional sum of \$357.80. While the payment was distinctly on the note, and for the purpose of extinguishing it, yet it was a partial payment of a portion of the whole amount of the indebtedness owing from the bankrupt to the creditor. Although the payment of the note was more than four months previous to the filing of the petition in bankruptcy, nevertheless it created a preference under sections 60a and 57g. It is also concluded that section 60c does not avail the claimant, as it has apparent reference to section 60b, and not to section 60a.

The court is constrained to the conclusion that there is no time limit to the operation of section 60a. The suggestion of the supreme court in *Carson, Pirie, Scott & Co. v. Chicago Title & Trust Co.*, 5 Am. Bankr. R. 814, 21 Sup. Ct. 906, 45 L. Ed. 1171, tends in such direction; and the discussion of Judge Lowell in *Re Jones*, 4 Am. Bankr. R. 563, 110 Fed. 736, states the view that may be adopted

most reasonably. Some limitation of time upon the operation of section 60a may be advisable, but an examination of the act and of the different parts thereof fails to disclose that it exists. The labor, credited August 28th, and amounting to \$37.17, may be offset, as it cannot be regarded as a transfer of property.

It results that the payments of \$29.68 and \$2.78, respectively, on January 24th and January 31st, were not preferences as to subsequent items of indebtedness, but the payments of the note on April 23d, and of \$100 and \$50, respectively, on June 26th and August 23d, were preferences as to all indebtedness preceding such several payments. Therefore it would seem that the only payments not creating a preference were \$29.68 and \$2.78 and item for labor. The decision of the referee will be modified in accordance with the views here expressed.

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In re LEVY.

(District Court, W. D. Pennsylvania. July, 1901.)

**BANKRUPTCY—COMPOSITION—WITHDRAWAL OF ACCEPTANCE BY CREDITORS.**

Creditors of a bankrupt, who have signed an acceptance of an offer of composition, and invoked the action of the court thereon, will not be permitted to withdraw their signatures, where it is not alleged that they were procured by fraud or misrepresentation.

**In Bankruptcy.**

A majority in number and amount of bankrupt's creditors signed an acceptance of the offer of composition, whereby it was agreed to pay 25 cents on the dollar. Subsequently a number of the creditors who had agreed to accept such composition came into court, and desired to file a paper, asking leave to withdraw their acceptance, and that the application for the composition be dismissed; stating that when they signed the acceptance they were not aware of all the facts in the case.

Way, Walker & Morris, for petitioning creditors.  
Spiro & Sachs, for bankrupt.

BUFFINGTON, District Judge (orally). These creditors voluntarily came into court, accepted the proposed composition, and asked the court to act in the matter, and confirm the composition. They procured the court to act, and they are now estopped from interfering with the further conduct of the case in the matter of this composition. Had they alleged fraud or misrepresentation in the procuring of their signatures to the acceptance, the case would be different. They are presumed to have had the same knowledge when they signed as they have now. The application for their withdrawal will be refused, and the court will proceed to pass upon the merits of the proposed composition. If it is not for the best interests of the creditors, it can be shown on the hearing before the referee.

## In re DANIELS.

(District Court, D. Rhode Island. September 13, 1901.)

No. 94.

1. **BANKRUPTCY—DEBTS ENTITLED TO PRIORITY—STATE LAWS.**

Costs incurred in an action against a bankrupt, prior to the bankruptcy, which would constitute a preferred claim, under the insolvency laws of the state, are entitled to priority against the estate in bankruptcy, under Bankr. Act 1898, § 64b (5).

2. **SAME—ESTATE OF PARTNER—PREFERRED DEBT OF FIRM.**

Under Bankr. Act 1898, which preserves the distinction between the estate of a partnership and the estates of its members and administrators, each with reference to the prior rights of its own creditors, a provision of a state insolvency law, giving priority to a claim for costs incurred in an action against the insolvent, does not bring a claim for the costs of an action against a partnership, within section 64b (5), as a debt entitled to priority, by the laws of the state, as against the estate in bankruptcy of one of the partners, where neither the firm nor the other partner has been adjudged bankrupt; such claim being subordinate to those of the individual creditors of the bankrupt, even though there are no firm assets.

In Bankruptcy. On review of referee's decision.

John Henshaw, for petitioning creditor.

Alfred S. Johnson, for trustee.

BROWN, District Judge. The claim of Congdon & Carpenter Company, which the referee has disallowed as a claim having priority in the settlement of the individual estate of George F. Daniels, bankrupt, is for costs incurred in a suit against Daniels and one Slocum as co-partners, under the firm style of the Providence Spring Bed Company. Neither the partnership nor the other partner has been adjudged a bankrupt.

In support of the referee's ruling, the trustee contends that there is no provision in the bankruptcy law whereby costs incurred by a creditor in an action to recover a debt prior to the filing of the petition in bankruptcy can be allowed priority of payment. In re Beaver Coal Co., 5 Am. Bankr. R. 787, 107 Fed. 98; In re Allen (D. C.) 96 Fed. 512; In re Young (D. C.) 96 Fed. 606,—seem to support this contention. The decision of Judge Lowell in Re Lewis (D. C.) 99 Fed. 935, however, is to the contrary. In that case priorities for costs given by the state insolvency law were held to be recognized by the bankruptcy act. Section 64b (5).

It has been established by the circuit court of appeals for the First circuit in Re Worcester Co., 42 C. C. A. 637, 102 Fed. 808, that section 64b (5) may apply to priorities established by the insolvency laws of Massachusetts, and that the insolvency law of Massachusetts continued an operative law after the bankruptcy act went into effect; and the conclusions of Judge Lowell in Re Wright (D. C.) 95 Fed. 807, upon this point were fully affirmed. It must, therefore, be accepted as the law of this circuit that, in determining what laws of a state are in force for the purpose of fixing priorities, we may look to the insolvency laws. This being the case, it seems to me that the

general principles of the decision in *Re Lewis* (D. C.) 99 Fed. 935, should be followed in this circuit, whatever may be the conflict of authority upon the questions there involved.

The decision of the circuit court of appeals to the effect that the insolvency law of a state still remains a law for the purpose of fixing priorities seems to me a substantial reaffirmance of the grounds upon which Judge Lowell based his decision in *Re Lewis* (D. C.) 99 Fed. 935. It is said that the Rhode Island statute (chapter 422, Pub. Laws R. I.) differs from the Massachusetts statute in that it provides for priority only when a dissolution of the attachment is made by virtue of the Rhode Island law; but this is not a sound distinction, and does not avoid the effect of the decision of the circuit court of appeals in *Re Worcester Co.*, 2 C. C. A. 637, 102 Fed. 808.

The decision of the referee, then, cannot be supported upon the broad ground that in no case can the costs which are preferred under the insolvency law of Rhode Island be entitled to priority, under section 64b (5) of the bankruptcy act. It is necessary to examine the particular character of the claim for costs in the present case. Assuming that, had costs been incurred in a suit against the bankrupt individually, and that under the insolvency laws of Rhode Island such costs were given priority, and therefore should be given priority, under section 64b (5) of the bankruptcy act, these assumptions would not lead to the conclusion that the referee's finding is erroneous. The costs were incurred in a suit against the bankrupt and one Slocum as co-partners. They must be treated as a debt or obligation of this firm, and not as an individual debt of the bankrupt. Where a member of a co-partnership is adjudged a bankrupt in his individual capacity, creditors of the firm are not entitled to receive dividends out of his individual estate until his individual creditors have been paid in full; and this rule prevails notwithstanding the fact that there are no firm assets. In *re Wilcox* (D. C.) 94 Fed. 84. The bankruptcy law fully recognizes the distinction between the individual estate and the co-partnership estate. Section 64b says: "The debts to have priority, except as herein provided, and to be paid in full out of bankrupt estates, and the order of payment," etc. This clearly provides a rule of priority or order of payment out of the particular estate before the court, and cannot be construed as overriding the provisions of section 5f-h, and the rules for the application of the partnership and individual property. It would confound all distinctions between partnership and individual estates to hold that a particular firm creditor, who was given a priority over other firm creditors, should also have a like priority over individual creditors.

The construction for which the creditor contends does not seem to me warranted, in view of the explicit rule laid down in section 5. The decision of the referee, disallowing priority to this claim for costs, is affirmed.

## KEASBEY &amp; MATTISON CO. v. PHILIP CAREY MFG. CO. et al.

(Circuit Court, S. D. New York. July 17, 1901.)

## PATENTS—SUIT FOR INFRINGEMENT—PRELIMINARY INJUNCTION.

Proof of acquiescence in an unadjudicated patent should be very clear to warrant the issuance of a preliminary injunction where there is a serious dispute as to validity; and it will not be deemed sufficient that the complainant has for a number of years had a monopoly in the manufacture and sale of the article, where it appears that it practically controlled all of the supply of a material essential to such manufacture, and also that the article was difficult to make, and complainant held a patent on a machine for its manufacture.

In Equity. Suit for infringement of patent. On motion for preliminary injunction.

Edwin K. Jones and Robert G. Dyrenforth, for the motion.  
William H. Kenyon and William C. Witter, opposed.

LACOMBE, Circuit Judge. This is a motion for an injunction pendente lite to restrain defendants from making or selling certain nonconducting coverings or jackets, composed of a major portion of carbonate of or calcined magnesia and asbestos. The motion is based on three grounds: First, that the defendants' product infringes United States patent No. 345,843, July 20, 1886, to H. M. Hanmore and others, now owned by complainant; second, that defendants in selling such product designate the same as 85 per cent. magnesia, which is alleged to be unfair competition; and, third, that defendants have cut or reduced the market price for such magnesia covering, and have thus unfairly broken in and trenched upon the plaintiff's business.

The third of these propositions is an entirely novel one, and the argument advanced in its support is unpersuasive. A manufacturer may certainly sell his product at any prices he chooses, unless he has voluntarily, for a valuable consideration, contracted with some one else not to do so.

As to the second ground the evidence leaves little doubt that defendants' product is substantially 85 per cent. magnesia. If they have the right to manufacture such product, they have also the right to sell under such truthful description, even though the complainant describes its product in the same way.

The essential question in the case is whether the patent is valid. There is great conflict in the affidavits, expert and other,—sharp dispute as to fairness of certain samples introduced to show prior art, and the patent has not been adjudicated. Nevertheless the weight of evidence seems to sustain the proposition that complainant has enjoyed a monopoly of the manufacture of this particular magnesia jacket for some 14 years; and if this were because the public during that period acquiesced in the validity of the patent, it might be sufficient ground for granting the motion. Proof of acquiescence, however, should be very clear to warrant the issuance of a preliminary injunction where there is a serious dispute as to validity. There should be acquiescence "under such circumstances as to induce a

belief that infringements would have occurred but for the fact that a settled conviction existed in the minds of manufacturers, venders, and users that the patent was valid, and must be respected." Consolidated Fastener Co. v. American Fastener Co. (C. C.) 94 Fed. 523. The defendants contend that their affidavits show that the complainant and its predecessor practically controlled the manufacture and sale of the variety of magnesia in the condition commercially essential to produce the jacket of the covering, and refused to sell to any one whom they had reason to believe intended to use it for that purpose. It further appears that the manufacture of the covering is difficult and cumbersome. The patent, beyond a statement of components and proportions, and directions to "thoroughly incorporate by stirring," and to mold the "suitable paste" thus obtained into tiles or sections, gives no detailed instructions as to how this high percentage of magnesia can be made to hold together with the small percentage of fibrous material. Much time, attention, and money were expended in devising a practical and convenient method of manufacture, and, as complainant's affidavits show, one of its predecessor firms, "among other things, invented a certain new and useful improvement in machines for molding tubes or cylinders to economically make the said magnesia covering," for which improvement he took a patent February 12, 1889, which is now owned by complainant. Whether the alleged acquiescence was induced by this patent or by the one in suit, it seems impossible, in the present state of the proofs, to determine. The whole subject had therefore best be left for final hearing. Motion denied.

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KEASBEY & MATTISON CO. v. PHILIP CAREY MFG. CO. et al.

(Circuit Court, S. D. New York. July 25, 1901.)

**PLEADING—DEMURRER—MOTION TO STRIKE OUT.**

A court will not enter upon a full investigation of the merits of a demurrer on a motion to strike it out as frivolous, but if after a hearing the court entertains doubts upon the issue raised, the motion should be denied.

In Equity. On motion to strike out demurrer as frivolous.

Edward K. Jones, for complainant.

Kenyon & Kenyon, for defendants.

THOMAS, District Judge. This motion is to strike out the defendants' demurrer as frivolous and interposed for delay. The presumption that the defendants' solicitors would not interpose a demurrer for delay, and without due consideration, is supported by an examination of the questions involved by the issue thus raised. While the court might be inclined to overrule the demurrer, yet, after a due study of the questions involved, it appears that the defendants' contention is not without some force. A careful examination of the question affecting the jurisdiction of the court to entertain the bill for the cause of action relating to unfair competition will be required, and the court is not expected to make such exam-

ination upon the hearing of a motion of this nature. Under the guise of a motion to strike out the demurrer as frivolous, a serious investigation of the merits of the demurrer may not be demanded. If after full hearing and inspection of briefs the court entertains doubts, the motion should be denied, and for that reason it is denied in the present instance.

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FOWLER v. CITY OF NEW YORK et al.

(Circuit Court, S. D. New York. August 1, 1901.)

1. PATENTS—SUIT FOR INFRINGEMENT—DEMURRER.

Where a bill for infringement makes profert of the patent, it will be considered as before the court for the purposes of a demurrer, on the ground that the patent is invalid on its face.

2. SAME—INVENTION—RAILWAY SYSTEM.

The Carpenter patent, No. 570,451, for a bitransit railway system, which consists of employing four tracks, two for through, and two for local, trains, with transfer stations at intervals, is void on its face for lack of patentable invention.

In Equity. Suit for infringement of letters patent No. 570,451, issued November 3, 1896, to Benjamin F. Carpenter for what is called a "Bitransit Railway System." On demurrer to bill.

Timothy D. Merwin and John R. Bennett, for demurrer.  
William W. Dodge, opposed.

LACOMBE, Circuit Judge. The patentee points out in the specifications that when in any system of transit there is but one track with turnouts, or two tracks only in one or adjacent streets,—one track for cars running in one direction, the other for cars running in an opposite or returning direction,—but one kind of traffic can be maintained, either rapid trains, stopping at long intervals, or slow trains, stopping at shorter intervals. A mixed service on such a road is secured by running the slow trains on sidings, and thus clearing the tracks for an occasional fast train, which is unsatisfactory and dangerous. The remedy he suggests is to use four tracks, two for express trains running in opposite directions, and two for local trains running in opposite directions, with local stations at frequent intervals and transfer stations at less frequent intervals, where the express trains can receive and deliver passengers from or to the local trains; the transfer stations to be located between the express and local tracks, being thus "island stations," which the specification asserts to be an old variety of station. The patentee further explains that if there is a full ten-car train at one side of the platform, and a two-car train at the other, and all the passengers of the first wish to get on the second, there will be a rush, and only one-fifth of the passengers can be accommodated. This he suggests correcting by using partitions on the platforms, thus dividing them into sections appropriate for the travel to be handled. Further subdivisions of these sections are also suggested, if required, the use of sliding gates and of staircases is recommended, and "loops" connecting up and down tracks, so as to avoid running trains over the whole length of the road when there



is greater congestion in part of it. The complaint is in the usual form, and contains the phrase, "which said letters patent, or exemplified copy thereof, your orator will produce, as your honors shall direct." Defendants demur. Upon the question whether on a bill thus phrased the court will on demurrer look into the patent, to see if it is valid on its face, there are conflicting decisions in this circuit. *Warner Bros. Co. v. Warren-Featherbone Co.* (C. C.) 97 Fed. 604; *Lumber Co. v. Maurer* (C. C.) 44 Fed. 618. It seems to be the better practice, as certainly it is the simpler, more expeditious, and more economical, to consider the patent as if it were set forth in the bill.

Upon investigation, and after several attempts to write an opinion which would express more compactly than does the patent itself its utter lack of patentable invention, it seems better to leave that document to speak for itself. The patentee has prepared a most elaborate and careful specification, which sets forth with great clearness precisely what it is which he contends he has contributed to the art. No opinion could fairly state the case presented without embodying everything which goes to make up what the patentee calls his "Bitransit Railway System"; and when that is done, really there is nothing left to say. The demurrer is sustained, with costs.

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CARY MFG. CO. v. PATTERSON et al.

(Circuit Court, S. D. New York. July 17, 1901.)

PATENTS—INFRINGEMENT.

The Cary patent, No. 403,247, claim 2, for a reel for metal box straps, held infringed on a motion for a preliminary injunction, under the construction placed thereon in a prior decision.

In Equity. Suit for infringement of patent. On motion for preliminary injunction.

A. G. N. Vermilya, for complainant.

Kenneson, Crain, Emley & Rubino, for defendants.

THOMAS, District Judge. The complainant moves, pending final hearing, for an order enjoining the defendants from an alleged infringement of letters patent No. 403,247, construed and sustained by this court in *Manufacturing Co. v. De Haven* (C. C.) 88 Fed. 698. In that case the court said: "Nowhere in the prior art, however, is there found the device for 'braking,' whereby the arms are tightened upon the coil or loosened, if required." In the case at bar the defendants' device has every element of the complainant's patent, save that the arms are united at the outer ends by a rivet, and thereby pressed against the coil, and at the extremity a hole is made, through which a nail may be driven to suspend the reel, whereby also the tension of the arms upon the coil may be increased. In the adjudicated case the invention was declared to be extremely narrow, but it was found to exist. In view of such decision, it must be concluded that the defendants' arrangement is an infringement.

## SMIDTH et al. v. GATES IRON WORKS.

(Circuit Court, S. D. New York. June 26, 1901.)

## PATENTS—ANTICIPATION—TUBULAR BALL MILLS.

The Davidsen patent, No. 548,115, for a tubular ball mill for the pulverization of various materials, is void for anticipation.

In Equity. Suit for infringement of patent. On final hearing.

Goepel & Raegener (Louis C. Raegener, Edwin H. Brown, and S. L. Moody, of counsel), for complainants.

J. J. McKelvey (Bond, Adams, Pickard & Jackson, of counsel), for defendant.

HAZEL, District Judge. This is a bill in equity to restrain the alleged infringement of letters patent No. 548,115, which were issued to Joseph Davidsen on October 15, 1895, on a tubular ball mill for pulverization of various materials. The defenses are that the patent is invalid and noninfringed. The patent is for a combination of elements consisting of a rotary drum having an axial inlet at one end and a peripheral outlet at the other, and a body of grinding balls, disposed in mass, overlying one another, in said drum. The purpose and object to be obtained by this method of placing the balls or pebbles is a thorough comminution of the matter to be ground in the mill. The material, when placed in the tubular drum through the axial inlet, fills the interstices of the balls, and is ground or pulverized by the rotating action of the drum causing the mass of balls or pebbles to rub and rerub the material, and by the action of gravity and by the rotating and grinding action of the balls or pebbles the ground material is impelled to gradually move longitudinally towards the outlet in the periphery of the drum, where it is discharged. The mill is revolved at such low rate of speed that the relative position of the grinding material remains in such moving position as will best aid in triturating or comminuting the material. When the application for the patent in suit was considered by the patent office, it was claimed with much earnestness and persistence by the patentee that the construction materially differed from the prior patents, in that it contained a central inlet opened at one end, and a peripheral outlet opening at the other, and a closed periphery between the inlet and outlet openings, and that this operation was different in conveying the material ground diagonally from the inlet to the outlet by its own gravity between the mass of small balls throughout the length of the drum. The patent office repeatedly rejected the application on the ground that the claim to invention was devoid of patentable novelty in view of the prior art, and cited the patents issued to Close, Robertson, Rutherford, Jenisch, and others, as anticipatory. Later the commissioner of patents granted the patent, but expressed doubt as to the patentability of the claim to invention. The validity of the patent in suit and the defenses interposed thereto have been the subject of thorough examination by Judge McPherson in the cir-

cuit court of the Eastern district of Pennsylvania. *Smidth v. Cement Co.* (C. C.) 106 Fed. 930. In that case it was decided that the patent in suit must be narrowly construed, and restricted to the exact device. The British patent to Redfern, granted in 1888, was held to be anticipatory. This patent was not considered by the commissioner of patents. The facts which the complainant proved are substantially the same which it relies upon in this case, except that it is insisted here that the mill in the adjudicated case was of different construction than the defendant's mill in suit, and that no evidence was given by Mr. Davidsen, the patentee, who saw the Redfern mill in operation, as to distinguishing features of the Redfern mill. I have carefully examined the evidence with the view of ascertaining whether the case now presented is distinguishable from the case decided by Judge McPherson. It clearly appears from the opinion of the court that the primary questions were in that case exhaustively examined and carefully considered. No questions are presented now that were not considered by Judge McPherson, except that the alleged infringing device in this case is of somewhat different construction. Of course, if complainants' mill is anticipated by the Redfern mill, or by the Close, Robertson, or Jenisch patents, defendant does not infringe. Complainants insist that in various of the patents relied on by defendant in anticipation, except in the Redfern patent, the inlet and outlet are axial, and that those mills are necessarily provided with an air blast causing the material to gradually proceed from the inlet to the outlet, and insuring the discharge of the ground matter, while in complainants' mill the force of gravity produced in part by the peripheral outlet is relied upon as a means of causing the material to gradually proceed from the inlet to the peripheral outlet, thus obviating the necessity for an air blast. Peripheral outlets, however, are found in other constructions for grinding material. It is found in the Close and Redfern machines. The Robertson, Bruckner, and Rutherford machines disclose a mill with grinding balls disposed in mass, overlying one another in a cylindrical drum. The Davidsen machine when in operation is half filled with balls or pebbles. The Robertson mill when in operation is filled more than half, and others less than half. The efficiency obtained in the Davidsen mill by reason of the drum being filled half full of balls or pebbles only is doubtless readily perceived by one skilled in the art. The patent in suit must be narrowly construed, and therefore the structural differences in the defendant's mill do not involve infringement. The evidence of Mr. Davidsen to the effect that by reason of the corrugation in the Redfern mill a percussive force is given to the rotation of the balls does not disturb my conclusion to concur with the judgment of another court of co-ordinate jurisdiction. It is quite clear to me that the prior art contains all the essential features of the patent in suit. No useful purpose would be served in pointing out the essential characteristics of the Davidsen patent, and found in the patents of prior date granted to Close, Robertson, and Redfern. A decree dismissing the bill may be entered, with costs.

## WESTINGHOUSE ELECTRIC MFG. CO. v. NEW ENGLAND GRANITE CO. et al.

(Circuit Court of Appeals, Second Circuit. August 22, 1901.)

No. 140.

## PATENTS—VALIDITY AND INFRINGEMENT—ELECTRO-MAGNETIC MOTORS.

The Tesla patents, No. 381,968 and No. 382,279, each for electro-magnetic motors, and No. 382,280, for a method of electrical transmission of power, and all relating to the transmission of electrical power by alternating currents, and its utilization at distant points, were not anticipated by anything in the prior art, and are valid. Also *held* infringed.

Appeal from the Circuit Court of the United States for the District of Connecticut.

The complainant brought a bill in equity in the circuit court for the district of Connecticut against the New England Granite Company, a Connecticut corporation, and James G. Batterson, a citizen of Connecticut, which was based on the alleged infringement of three patents granted on May 1, 1888, to Nikola Tesla, and numbered, respectively, 381,968, 382,279, and 382,280. Each of the first two patents is for an electric magnetic motor. The third patent is for a method of effecting the transmission of power by electrical agency. The apparatus by which the system is put into practice is described in 381,968. Patent 382,279 describes a specific and different construction of motor. The bill was dismissed as to the defendant Batterson. The interlocutory decree directed an injunction against the granite company upon all the claims which were in issue, viz. claims 1 and 3 of No. 381,968, the single claim of 382,280, and the three claims of 382,279. 103 Fed. 951. From this decree the granite company appealed.

C. E. Mitchell and H. B. Brownell, for appellant.

F. H. Betts and Thomas B. Kerr, for appellee.

Before WALLACE, LACOMBE, and SHIPMAN, Circuit Judges.

SHIPMAN, Circuit Judge. Each patent relates to the method by which electrical power is transmitted by alternating currents to a distant point, and there safely and efficiently utilized, which was invented by Tesla in 1888; but the patents for the method and for the apparatus are for distinct inventions. The electrical laws under which the force which is called electricity is sent from generator to motor, and is thereafter made useful, are not simple in their character, have compelled the close study of scientists, and cannot be adequately explained with brevity. An explanation of so much of the subject as is demanded by the patents was given by Judge Townsend in his opinion in this case with clearness, succinctness, and, we believe, accuracy, and is as follows:

"The electric current induced by a mechanical generator—a dynamo—is necessarily alternating in character; that is, alternating in direction, so that the current, acting on an armature, first tends to actuate it in one direction and then reverses said effect, and neutralizes such actuation. Such a current flows uninterruptedly and regularly, but rises in intensity from zero to maximum, and falls from maximum to zero, and then repeats said variations in the opposite direction. Its curve of increase or decrease of strength is indicated by a wave line or sine curve. Every mechanically generated current is naturally and originally an alternating current. Formerly it was not considered practicable to use mechanically generated currents until their alternations were straightened out by means of commutators which reversed

the direction of the current so as to make it flow continually through the conductors. A current which is periodically reversed by a commutator, which thus breaks the current between the changes in direction and takes off the current in sections, is known as a reversed or alternated current. This distinction between an alternating and an alternated current should be carefully noted. An alternating current continues to act in opposite directions as originally generated. An alternated current has been so reversed that the whole flows in one direction, and is then known as a continuous current. When so reversed by commutators as to become continuous, the current loses certain characteristics essential to its highest efficiency. Prior to the Tesla inventions, only reversed or alternated electric currents were used for the transmission of power. The application of this system for the transmission of power was limited, for various reasons; among others, because a large current could not be safely used at sufficiently high pressure for long distances. On the other hand, the pure alternating current was practically unlimited in volume and pressure, and a change of pressure could be economically effected by the use of a transformer. Prior to Tesla's inventions, however, these rapid alternations of the alternating current prevented the motor from starting its revolution, and interfered with its continuing in operation, except when in synchronism with the generator. It was therefore impracticable for varying loads. The problem which was presented to Nikola Tesla, and which he successfully solved, was, how to overcome the difficulties attendant upon the use of the alternating currents so that their inherent vitality and untrammelled energy might be utilized for the unlimited transmission of power. In an electric motor the tendency of the armature is always towards the pole or point of maximum magnetic intensity. If a loosely-pivoted or freely-moving magnetic bar or armature be suspended midway between two coils of insulated wire wound in opposite directions on a soft iron bar, and one of the coils is electrically energized, north and south poles will be formed at the ends of the soft iron bar, their location depending upon which coil is energized; but, if both coils be equally energized, the two poles will neutralize each other, and cause a resultant north pole midway between the coils. If, now, the current in one coil be made weaker than in the other, said pole will move towards the coil of greater electrical energy. The magnetic bar or armature will follow the shifting position of the pole, and by thus gradually varying the energy in the coils, the armature may be alternately caused to move from the pole of one coil along towards the pole of the other coil. The alternating current generated by an electrical machine, as before stated, constantly varies from maximum intensity to zero in one direction, and then from zero to maximum intensity in the opposite direction. In the invention of the patents in suit Tesla availed himself of this characteristic feature of alternating currents in the following way: In constructing a motor, he arranged on an annular soft iron core two pairs of magnetizing coils, each pair at right angles to the other,—that is, one coil of one pair at the top, and one at the bottom, and one coil of the other pair at each opposite side of said core,—and mounted an armature in the center. Then, connecting them with an alternating current generator, he caused a current from one pole of said generator to pass through one pair of coils, and a current from the other to pass through the other pair. If the cycles of alternating currents be regarded as divided into 360 degrees, then, as shown in the Tesla illustrations, they will have a relative displacement of 90 degrees. In such position the lines of magnetic force traversing the two coils will be at maximum in one while at minimum in the other. This relative displacement marks the different phase or time relation of the two currents. The effect of passing two equal currents through said coils would be to cause the pole of maximum intensity to pass midway between the poles of the respective pairs of coils. But the effect of the ordinary operation of the generator as before explained was to cause the current in each pair of coils to vary from zero to maximum and to zero, and then to shift in the opposite direction, the intensity of the current flowing to one pair of coils being at maximum while that of the other was at zero, and one increased while the other decreased, and the result being to shift said poles so as to make them travel entirely around said core."

Before the invention of Tesla, electric motors for use with continuous currents were employed for the distribution of power over areas such as were usually occupied by trolley systems, and such motors for electric railways are largely used. Alternating currents were extensively used for electric lighting, but the efficient use in a motor of a pure alternating current, in the form in which it was generated by the dynamo, for the transmission of power to a great distance for manufacturing purposes, was deemed, both by scientists and by electricians, to be impracticable; because if, by any means, by a change of load or otherwise, the speed of the motor got out of step with the generator, the motor would stop. The need was not of a system which would merely produce something to which the name "power" might be given, but of a system which would actually create continuous and uniform rotation of the armature without stoppage, whether loads were increased or decreased. The difficulty in the use of true alternating currents for transmission of power to a distance was that the alternations, which must be rapid in order to put out power, were so fast that the "armature did not have time to reach the proper position," and consequently stopped. As soon as synchronism was impaired, the transmission of power ceased. The difficulties in the use of a continuous current for power transmission are stated by Prof. Main as follows:

"The use of the continuous current in power transmission was limited by the cost of conductors, or by the difficulties which were encountered when high pressures were employed. With moderate pressures no very great amount of power could be transmitted to a considerable distance without incurring prohibitory expense, owing to the large size of copper conductors required under these circumstances. If, on the other hand, the electric pressure was greatly raised, so as to secure the transmission of a considerable amount of power over a comparatively small, and therefore inexpensive, conductor, other difficulties were encountered, such as excessive leakage in both generating and receiving machines, and also along the lines great danger to the life of the attendants, and frequently the destruction of electric machinery by short circuits, with the consequent burning out of coils and commutators. The difficulties of insulation were found to increase in almost geometrical ratio with the rise of potentials necessarily employed with increasing distance. The long-continued and expensive experiments of Deprez and others led to no practical results, although at one time they were eagerly watched as promising a solution of the problem. They served only to point out the serious and apparently insuperable obstacles which were encountered when an attempt was made to transmit power to a great distance by means of continuous currents at high potentials."

The Tesla invention, which was for the purpose of so utilizing true alternating currents that a continuous rotary effort and a continuous rotary result could be produced is described by Prof. Main as follows:

"I understand that the Tesla polyphase system consists in the production of two or more alternating currents, having relatively successive periods of maximum intensity, and their combined use in such a manner as to create a continuous rotary effort upon the armature of the motor. This invention of the means of producing a continuous rotary effort by alternating currents solves the problem of power transmission to great distances, for it added to the known methods of transforming the pressures of alternating currents, the lacking element which conferred upon the motor the power of starting without external aid, and of continuing motion while doing work up to the limit of its capacity."

And by Judge Townsend as follows:

"The underlying thought disclosed and applied in the Tesla patents is such a use of the rapidly successive opposing alternations of the alternating current regularly and constantly recurring in such differing phases as would not only prevent the alternations from stopping the armature, but would become a source of power. It was essential to the practical development of this idea that the alternations should rise and fall and succeed each other progressively and constantly, and should be arranged, as counsel for complainant puts it, 'like the crank on a locomotive, in which there is no dead center, but one crank is always pushing forward.' Tesla's invention, considered in its essence, was the production of a continuously rotating or whirling field of magnetic forces for power purposes by generating two or more displaced or differing phases of the alternating current, transmitting such phases, with their independence preserved, to the motor, and utilizing the displaced phases as such in the motor."

The novelty, importance, and remarkable promise of the invention, if it could be successfully reduced to practice, was immediately acknowledged by electrical scientists, and its ultimate practical and admitted success in the utilization of alternating currents for the transmission of power to a distance has justified the pleasure with which the invention was received when first communicated to the public.

The claims of the patents in suit which are in issue are as follows:  
Patent 381,968:

"(1) The combination, with a motor containing separate or independent circuits on the armature or field-magnet, or both, of an alternating current generator containing induced circuits connected independently to corresponding circuits in the motor, whereby a rotation of the generator produces a progressive shifting of the poles of the motor, as herein described."

"(3) The combination, with a motor having an annular or ring-shaped field-magnet, and a cylindrical or equivalent armature, and independent coils on the field-magnet or armature, or both, of an alternating current generator having correspondingly independent coils, and circuits including the generator coils and corresponding motor coils in such manner that the rotation of the generator causes a progressive shifting of the poles of the motor in the manner set forth."

Patent 382,280:

"The method herein described of electrically transmitting power, which consists in producing a continuously progressive shifting of the polarities of either or both elements (the armature or field-magnets or magnets) of a motor by developing alternating currents in independent circuits, including the magnetizing coils of either or both elements, as herein set forth."

Patent 382,279:

"(1) The combination, with a motor containing independent inducing or energizing circuits and closed induced circuits, of an alternating current generator having induced or generating circuits corresponding to and connected with the energizing circuits of the motor, as set forth.

"(2) An electro-magnetic motor having its field-magnets wound with independent coils and its armature with independent closed coils, in combination with a source of alternating currents connected to the field coils, and capable of progressively shifting the poles of the field-magnet, as set forth.

"(3) A motor constructed with an annular field-magnet wound with independent coils and a cylindrical or disk armature wound with closed coils, in combination with a source of alternating currents connected with the field-magnet coils, and acting to progressively shift or rotate the poles of the field, as herein set forth."

The defendant, in discussing the subject of novelty, does not find the polyphase method of transmitting power, or the combination described in the motor patents for the accomplishment of the new purpose, to have been anticipated in any one mechanism; but it attempts to show that essays and patents prior to Tesla's invention described enough in regard to the effect of the combination of motors with different kinds of currents to deprive the Tesla system of patentable invention. The paper of Walter Bailey read before the Physical Society of London in 1879; the articles by Marcel Deprez in 1880-84, the principal one being "on the electrical synchronism of two rotative motions and its application to the construction of a new electrical compass"; the Siemens English patents of 1878; and the application of May 9, 1887, of Charles S. Bradley, upon which letters patent of the United States were subsequently issued on October 2, 1888, and after the date of issue of the Tesla patents,—are principally relied upon. Many years ago Arago produced in his laboratory an electrical toy, which Mr. Bailey describes as consisting of a copper disk suspended by its center so as to make it lie above the poles of a horseshoe magnet, which was then rotated about a vertical axis, and the copper disk was in consequence rotated, its rotation being due to that of the magnetic field in which it was suspended. Mr. Bailey thought that if a similar motion of the field could be produced by any other means, the result would be a similar motion of the disk. He made another laboratory experiment, which was successful, and the object of his paper was to show "that the disk can be made to rotate by an intermittent rotation of the field effected by electric magnets." So far as is known, the apparatus has been even since confined to its original use as an electrical toy. Bailey's statement of the object and the result of his experiment is sufficient to show that he neither thought of nor unconsciously aided in solving the problem of transmission of power by electrical currents of any kind. It is certain that the use of two true alternating currents of different phase for the purpose of producing a change of the magnetic field was not suggested by him. The Siemens British patent of August 7, 1878, was granted upon a communication by Werner Siemens and Hefner Von Alteneck, two distinguished electricians. The patent was especially for improvements in arc lighting in which alternate currents were used. The drawings showed continuous current machines and those capable of being both continuous and alternating, and the part of the specifications upon which reliance is placed is that:

"It is to be understood, as above stated, that with suitable modifications these apparatus are generally applicable also as electro-dynamic machines, their rotary parts being caused to revolve and give out mechanical power when electricity is applied to them. And thus one of these machines may be driven by any suitable motor power so as to generate electricity, and this electricity may be conducted to a similar machine at a distance, causing it to work and to give out a portion of the power applied in the first instance."

No modifications are described, and there is no suggestion that the patentee thought of such connections between a generator and motor, each of two phases, as to preserve the phases of the two



and the difference of phase, and that currents should act independently, and regularly succeed each other, and thereby keep the armature constantly rotated. The mechanism of the Siemens machine was of the class that, as the complainant's expert says, "could, by properly taking off their currents, have been used as polyphase machines; and also that, if any one had coupled two of these properly arranged machines in a certain way, and used them in a certain way, the system so produced would have involved the inventions afterwards made by Tesla." The way in which to couple these machines together for the purpose of transmission of power by pure alternating currents remained an unsolved mystery for 10 years, although the scientists were eager in the search for the secret, and neither Siemens nor Von Alteneck supposed that they had approached a solution. The hints in the patent respecting the modifications by which the inventors' apparatus for the conversion of power into electricity can be made to give out mechanical power are and were valueless, as no modifications are described, as the kind of mechanism to be modified is uncertain, and as independence of phase was not in the contemplation of the patentees. The defendant, however, says, and the assertion is made of great importance upon the whole question of patentability, that the skilled electrician knew that the dynamo electric generator could be reversed so as to give out mechanical power, and therefore it was not necessary for Siemens or any other person to instruct the public how to make modifications. The point in regard to the principle of reversibility is stated in the defendant's brief as follows:

"It is a principle which is not confined to continuous current machines or to single phase, two phase, or multiphase machines; and, being so recognized, it belonged to those skilled in the art to run such apparatus as generators, or to supply them with currents from similar machines and run them as motors, and all without the exercise of the inventive faculty."

Therefore the defendant thinks that this reversibility of the Siemens or Bradley apparatus is all that there is to the principal patents of Tesla. The assertion in regard to the knowledge of reversibility is true in a certain sense, yet it is misleading, and does not tend to prove the desired conclusion. The proposition is that before the date of the Tesla inventions the reversibility of the dynamo electric generator was universally known, and therefore that, when Tesla saw the use of a two-phase alternating current from a dynamo electric generator, he knew that it would operate in the reverse way, and would generate power, if supplied with the currents which it generates, and therefore he knew that if he reversed it the alternating current would be used to furnish power at a distance. The conclusion does not follow, for there is a wide distinction between the use of an alternating current for what may by courtesy be called power, and the use for transmitting power for manufacturing purposes to a distance. As said by Prof. Main:

"By 'great distance' I mean one considerably greater than that over which power is usually transmitted in trolley systems, for which, as is well known, a moderate potential suffices. The problem of power transmission over great distances remained not only unsolved, but was apparently no nearer

solution, at the time of the commencement of Tesla's inventions, than it had been for several years previously, although it was a subject of constantly increasing interest."

Furthermore, the proposition, while true in regard to direct current machines, was only a matter of theory, and not of practice, in regard to alternating current motors for power purposes. The general statements in the books in regard to the reversibility of dynamo electric machines have particular reference, as a known fact, to a supply with direct currents, but as to alternate currents with alternate current machines as motors the scientists relied upon surmises. For example, the English electrician Hopkinson believed in 1884, and declared in a paper published in 1890, that "alternate currents with alternate current machines as motors may theoretically be used for the transmission of power"; and Prof. Sylvanus Thompson, in the edition in 1886 of his valuable work, declared, what was the universal opinion, that "for the purpose of supplying motors alternate current machines are not yet practically available." Declarations that electric light machines could be so reversed as to furnish power were merely theoretical, and gave no information to the public or to the inventor of the method by which reversibility was to be made useful to accomplish any result. Furthermore, the proposition assumes that the inventor who undertook to use two current alternating machines as motors would naturally and without invention use two transmitting circuits, and that they would be so arranged as to preserve the electrical independence of each phase. Neither part of the assertion is based upon sufficient evidence, and if it is meant that the mechanic would, without the exercise of invention, make such an arrangement in order to preserve the independence of phase, the assumption is very far from the truth, for the conception of the practical way by which alternating currents could be used to transmit power to a distance was the result of inventive thought and study. It is said, however, that Bailey, in 1877, taught the art how to make a two-phase induction motor, and how to connect such motor to a two-phase source. Bailey, in his experiments with reversed currents, did not attempt to produce, what Tesla must have, a continuously rotating field.

Another general proposition on the subject of nonpatentability is that reversed and alternating currents are equivalents, and were known to be such at the date of the Tesla inventions, and that, therefore, there was no invention in substituting an induced alternating current for Bailey's reversed current. The reversed currents which are meant are alternate currents converted by means of a commutator into direct currents, and again reconverted at the motor, by another commutator, to an alternating current. The defendant is again attempting to transfer general expressions used by authors in regard to one subject, which may and may not have been true, to a subject to which they are not at all applicable. Reversed currents and alternating currents, though they may be equivalents for some purposes,—such as electric signaling,—are not equivalents for transmission of power to a distance, because reversed currents cannot practically be used for that purpose. This is pointed out by Tesla in his essay

which will hereafter be quoted at length. The "commutation" of heavy currents, which are necessary for transmission of power to a distance, is dangerous to the machines and to human life, and the use of such reversed currents for power is impracticable, as the experience of experimenters has shown. The principal reason has already been noticed, and is stated in the following sentence in the testimony of the complainant's expert:

"Perhaps the most important one is that in reversing direct currents the source must either be short-circuited—that is, have its terminals directly connected together—or else the circuit must be opened. The first of these is destructive of the generator, and there is a tremendous arc when the short circuit is removed, which destroys the commutator, and the breaking and subsequent sudden reversal of the current is impracticable because of the spark which enables the current still to flow, and which also destroys the commutator."

It is true that in the specification of patent 382,280 Tesla said, "With regard to that part of the invention which consists in acting upon both elements of the motor simultaneously, I regard the use of either alternating or reversed currents as within the scope of the invention, although I do not consider the use of reversed currents as of any practical importance;" but that sentence was subsequently disclaimed and is not now a part of the specification.

The application of Charles S. Bradley for a patent, dated May 9, 1887, is thought by the defendant to have significance on the subject of patentability. Bradley's alleged invention was a dynamo "which will generate an alternating or continuous current as desired." He described two currents obtained from the same machine, and says that they can be employed for any purpose to which alternating currents are applicable, and they may be used separately, one being used to feed one circuit and the other to feed another circuit; but he apparently did not, in his application, understand any benefit resulting from the transmission of two currents of different phase. The fact that they had a difference of phase was not of value as a source of power. It is not necessary to discuss the Bradley application, for its inefficiency, as related to Tesla's invention, is sufficiently stated by Judge Townsend as follows:

"Because Bradley's application is limited to scope, and ambiguous and indefinite; because it fails to show that he had any conception of the Tesla idea of 'the utilization of the motor for the purpose of progressively shifting the magnetic poles of a plurality of alternating currents by circuits which preserve the independence and differing time relation of their phases'; because, even if the idea had been first conceived by Bradley, it was not sufficiently described to disclose the principle or method of operation; because Tesla was the first to reduce this principle to practice Bradley does not anticipate or limit."

The defendant properly puts the most stress on the Marcel Deprez publications, because he disclosed the mathematics which Tesla utilized, and "gave a mathematical demonstration of the rotating field." Complainant's expert's admission on this point is as follows:

"The article demonstrated mathematically the fact, which is also stated in the Tesla patents, that the polar line of an annular magnet may be

shifted about through the entire circumference of the ring by the action of two magnetizing forces properly related."

The articles in "Comptes Rendus" of 1883 "on the electrical synchronism of two relative motions, and its application to the construction of a new electrical compass," describes his mechanism for the production of a resultant magnetic field by winding coils upon a ring in the manner described in the Tesla patent 381,968. The only application of the mechanism or of the rotating field which he suggested was "a new electric compass." This was all that Deprez practically effected by what is called "the theory of the parallelogram of forces," for he had no idea of the utilization of the principle or of alternating currents for the purposes of electrical power; and, indeed, he declared in a paper published in "La Lumiere Electrique" in 1884, "I must further remark that alternating currents are of no use in the transmission of power; they are suitable only for lighting purposes." What Deprez did was to show how a resultant magnetic field could be produced, but, as a matter of course, he did not describe or suggest apparatus for power. His electric signaling apparatus was not adapted for any other object. The armature was placed at the top of a mast. The action of the permanent magnet that served as indicator "was replaced by that of the earth, which is sufficient," and no continuous rotating field was required. His currents were so feeble as to be ineffectual for the transmission of power to a distance that they were not the alternating currents of Tesla. The invention, when Deprez left it, "did not depend upon any constant, regular, progressive currents, and, so far as the evidence shows, it was like the apparatus of Bailey, confessedly a mere laboratory experiment." His result of his remarkable mathematical investigations was summed up by Prof. Sylvanus Thompson, who said: "Deprez's theorem bore no fruit. It remained a geometrical abstraction."

It will thus be seen that attempts to use direct or reversed currents for the transmission of power to a distance had been a failure, and that the use of true alternating currents for that purpose was unknown. This history enables us to understand the character of Tesla's invention as he explained it in the paper which he read about a fortnight after the date of his patents to the American Institute of Electrical Engineers, and which was in part as follows:

"The transmission of power, on the contrary, has been almost entirely confined to the use of continuous currents, and, notwithstanding that many efforts have been made to utilize alternate currents for this purpose, they have, up to the present, at least as far as known, failed to give the result desired. \* \* \* The subject which I now have the pleasure of bringing to your notice is a novel system of electric distribution, and transmission of power by means of alternate currents, affording peculiar advantages, particularly in the way of motors, which I am confident will at once establish the superior adaptability of these currents to the transmission of power, and will show that many results heretofore unattainable can be reached by their use; results which are very much desired in the practical operation of such systems, and which cannot be accomplished by means of continuous currents. Before going into a detailed description of this system, I think it necessary to make a few remarks with reference to certain conditions existing in continuous current generators and motors, which, although gen-

erally known, are frequently disregarded. In our dynamo machines it is well known we generate alternate currents, which we direct by means of a commutator, a complicated device, and, it may be justly said, the source of most of the troubles experienced in the operation of the machines. Now, the currents so directed cannot be utilized in the motor, but they must—again by means of a similar unreliable device—be reconverted into their original state of alternate currents. The function of the commutator is entirely external, and in no way does it affect the internal working of the machines. In reality, therefore, all machines are alternate current machines, the currents appearing as continuous only in the external circuit during their transit from generator to motor. In view simply of this fact, alternate currents would commend themselves as a more direct application of electrical energy, and the employment of continuous currents would only be justified if we had dynamos which would primarily generate, and motors which would be directly actuated by, such currents. But the operation of the commutator on a motor is twofold: Firstly, it reverses the currents through the motor; and, secondly, it effects automatically a progressive shifting of the poles of one of its magnetic constituents. Assuming, therefore, that both of the useless operations in the system—that is to say, the directing of the alternating currents on the generator and reversing the direct currents on the motor—be eliminated, it would still be necessary, in order to cause a rotation of the motor, to produce a progressive shifting of the poles of one of its elements, and the question presented itself how to perform this \* \* \* operation by the direct action of alternate currents? I will now proceed to show how this result was accomplished."

He abandoned the use of reversed currents with their troublesome and dangerous commutators. He employed true alternating currents, differing in phase, and by means of their "rapidly successive opposing alternations" in a motor having corresponding circuits he created a continuously rotating field. The apparatus by which his system was manifested consisted in the use of two or more regularly and rapidly recurring true alternating currents, generated by a dynamo, differing in phase, and not interfering with each other, the alternations so arranged as to regularly succeed each other, connected to a motor having "a plurality of circuits in which alternating currents of different phase are produced" without interference with each other, the currents of the generator being connected to the motor by connections so as to preserve the succession of phase by means of which the magnetic poles of the motor are constantly and progressively shifted. The successive increasing and decreasing alternations of the currents so regularly succeed each other that there never is a "dead center" in the onward movement within the motor. The use of true alternating currents, and the means by which they were made to create a continuously whirling field by their direct action, constituted an invention of a remarkable character. Giving to Deprez's theorem all the value to which it is entitled, its application by Tesla to the production of a new, original, and most beneficial practical result by new and described means and the use of polyphase alternating currents,—in brief, by the polyphase system,—and the apparatus of Tesla was an invention of a very high order. The defense of non-patentability was elaborated in the record in the most painstaking manner, and with abundant reference to statements and theories of scientists who preceded Tesla, and who were trying to discover the laws of a mysterious natural force, the utilization of which is still

far from complete development. Each was prospecting in a mine not thoroughly explored, and dimly lighted, and each produced something of value; but the attempt to minimize Tesla's invention of the method of successfully using electricity for very important purposes by means theretofore thought to be impracticable rested upon a very inadequate foundation.

The question of infringement remains to be considered. The defendant uses at its granite works in Concord, N. H., three motors called "Cushman Motors." The three-phase alternating current by which these motors are operated is furnished from a three-phase alternating generator at a water power station on the Merrimac river a distance of  $3\frac{3}{4}$  miles from the granite quarry. "In this construction no circuit consists of two conductors specially devoted to any one of the differing-phase currents. In the patented apparatus each one of the independent circuits is specially devoted to a single one of the differing-phase currents." Claim 1 of No. 381,968 requires separate or independent circuits on the armature or field-magnet, and each patent also calls for independency of circuits. The defendant therefore insists:

"That the term 'independent,' as used by Tesla, means such separation as is consistent with having the complete circuits traversed by the same currents,—currents which at any and every point are of the same quantity, intensity, and phase,—so that, as Mr. Clarke puts it, each motor circuit receives its current from a corresponding generator circuit, and from no other. It cannot refer to circuits which are interdependent in such sense that two of the circuits are at times strictly in series with one another and in multiple with the third, and so are not 'independent' in any sense. The whole system is an interdependent, and not an independent, system."

In other words, the defendant construes the claim of each patent to require physical independency of circuits. In this connection it is proper to quote one clause of the specification of No. 381,968, in which the patentee said:

"By 'independent' I do not mean to imply that the circuits are necessarily isolated from one another, for in some instances there might be electrical connections between them to regulate or modify the action of the motor without necessarily producing a new or different action."

The meaning of the clause is that independent circuits are not necessarily circuits isolated from each other, and that electrical connections are permitted, if they do not interfere with the electrical independency of the circuits. Upon the question whether the so-called interdependency of the defendant's circuits carries its system outside of the Tesla system much space is occupied in the record, and, if the defendant's contention is correct, the Tesla patents are worthless to their owner, because, in order to accomplish the Tesla result, actual physical separation and isolation of the circuits is not at all necessary. It is an evident fact that the defendant's circuits are operatively independent, and that, as the word "independent" is used by electricians, they are electrically independent. The word was used, as it was wont to be used by electricians, to mean independent in an electrical sense. With the conclusion of Judge

Townsend upon this much-discussed question of the interpretation of the adjective "independent" we entirely agree:

"Inasmuch as the defendants have not invented any new idea, but have adopted an old contrivance which performs the same result in substantially the same way by a formal and unsubstantial change in means, and by circuits which, while in some sense interdependent, are operatively independent, and which preserve and utilize the vital element independence of phase, these circuits must be held to be the equivalents of the independent circuits of the patent, the word 'independent' being interpreted to mean operatively independent, so as to embrace the true spirit and essence of the Tesla invention."

The defendant also makes the point upon the subject of infringement that patents Nos. 381,968 and 382,280 are limited to synchronous motors, and therefore are not infringed by the defendant's non-synchronous motor. The defendant defines the difference as follows:

"Alternating current motors are synchronous and nonsynchronous, depending on whether their armatures rotate at the same speed as the element in the generator which produces the alternations."

The defendant asserts that the two broader patents in this case, one for the Tesla method and the other for the mechanism by which the method was carried into practice, described synchronous motors. On the other hand, it is said that they described both classes, because, the motor of the system shown in Fig. 9 was nonsynchronous. Whether this is true or not, it is not, in our opinion, important to decide, because, assuming that the patents did describe synchronous motors only, and that synchronism was one of the confessed advantages of the system, the claims of patents 381,968 and 382,280 did not make, and did not intend to make, synchronism a part of either claim, but were for the invention which was broadly described in the single claim of patent 382,280 and in claim 1 of patent 381,968. These claims rightfully gave to Tesla the benefit of the use of what he called his "novel system of electric distribution and transmission of power by means of alternate currents," whereas patent No. 382,279 was for the motor specially described therein, having in claim 1 the element of closed induced circuits, and which is said to be nonsynchronous.

Noninfringement of claim 3 of No. 381,968 and claim 3 of 382,279, upon the ground that the defendant's field-magnet is not annular or ring-shaped, is also suggested. Its magnet is ring-shaped, having slots on the inner face for imbedding the conductors, and the objection is without substance.

The defendant attempts to escape the charge of infringement by introducing into the claims limitations which are not called for by their language, or by the scope of the invention, and by forgetting the position of the invention in the development of the use of alternating currents for power purposes. The decree of the circuit court is affirmed, with costs.

## BURNHAM et al. v. UNION MFG. CO. et al.

(Circuit Court of Appeals, Sixth Circuit. July 2, 1901.)

No. 938.

## PATENTS—VALIDITY AND INFRINGEMENT—CRANK HANGERS FOR BICYCLES.

In the Burnham & Alsup patent, No. 550,587, for an improvement in crank hangers for bicycles, claims 1 and 2 cover only combinations of old devices, which perform no new functions, and accomplish no new results, and such claims are therefore void for lack of invention. Claim 4, however, the essential feature of which is the placing of the ball-bearing cones in the hollow hubs in the same plane as the cranks, thus securing the greatest possible distance between the bearings without increasing the width of the tread, embodies a new and useful improvement, and discloses patentable invention. Such claim, however, *held* not infringed.

Appeal from the Circuit Court of the United States for the Northern District of Ohio.

Charles M. Peck, for appellants.

Almon Hall, for appellees.

Before LURTON, DAY, and SEVERENS, Circuit Judges.

DAY, Circuit Judge. This case involves a patent relating to an improvement in crank hangers in bicycles, and is covered by letters patent No. 550,587, issued to Franklin P. Burnham and Jefferson D. Alsup. The inventors state that the improvement has for its object to procure an improved crank hanger, which will allow the maximum distance between bearings with a minimum tread in any given machine. A description of the invention, reference being had to the accompanying drawings, is as follows:

"Fig. 1 is a longitudinal section of the hanger, showing the several parts in their relative positions. Fig. 2 is a cross section on line 2, 2, of Fig. 1. Fig. 3 is an end view of the crank hub. Like letters of reference refer to like parts throughout the several figures. The crank-shaft sleeve, A, to which the frame of the bicycle is connected, is constructed as in ordinary bicycles, and is provided at the ends with the inside cones, A<sup>1</sup>, A<sup>1</sup>. The cranks, B, B, are provided with the hollow hubs, B<sup>1</sup>, B<sup>1</sup>, which contain the outside cones, B<sup>2</sup>, B<sup>2</sup>, and which are preferably integral with said cranks. Connected with the crank hubs, B<sup>1</sup>, B<sup>1</sup>, and preferably integral therewith, are the inwardly projecting portions, B<sup>3</sup>, and B<sup>4</sup>, which are provided with the teeth C and D, adapted to interlock, and connect the two portions together. The balls, B<sup>5</sup>, B<sup>5</sup>, work between the cones, A<sup>1</sup>, and B<sup>2</sup>. A bolt or rod, E, passes through the hubs, B<sup>1</sup>, B<sup>1</sup>, and is held in place by the head, E<sup>1</sup>, and nut, E<sup>2</sup>. The bearings may be adjusted by means of the nut, E<sup>2</sup>. In order to strengthen the connection between the projecting portions, B<sup>3</sup>, B<sup>4</sup>, of the hubs, B<sup>1</sup>, B<sup>1</sup>, we use a sleeve, F, which surrounds said projecting portions, and which is provided with the keys, F<sup>1</sup>, F<sup>1</sup>, adapted to fit into keyways on said portions, B<sup>3</sup>, B<sup>4</sup>. By this construction the torsional strength of the crank connection is greatly increased. It is evident that the teeth, C and D, may be dispensed with when the sleeve, F, is used, and that, when said teeth are used, the sleeve may be omitted; but we prefer to use both the teeth and the sleeve, as shown. The sprocket wheel, G, is fastened in any convenient manner to the flange, B<sup>6</sup>, on the hub, B<sup>1</sup>, as by means of the screws, G<sup>1</sup>, G<sup>1</sup>."

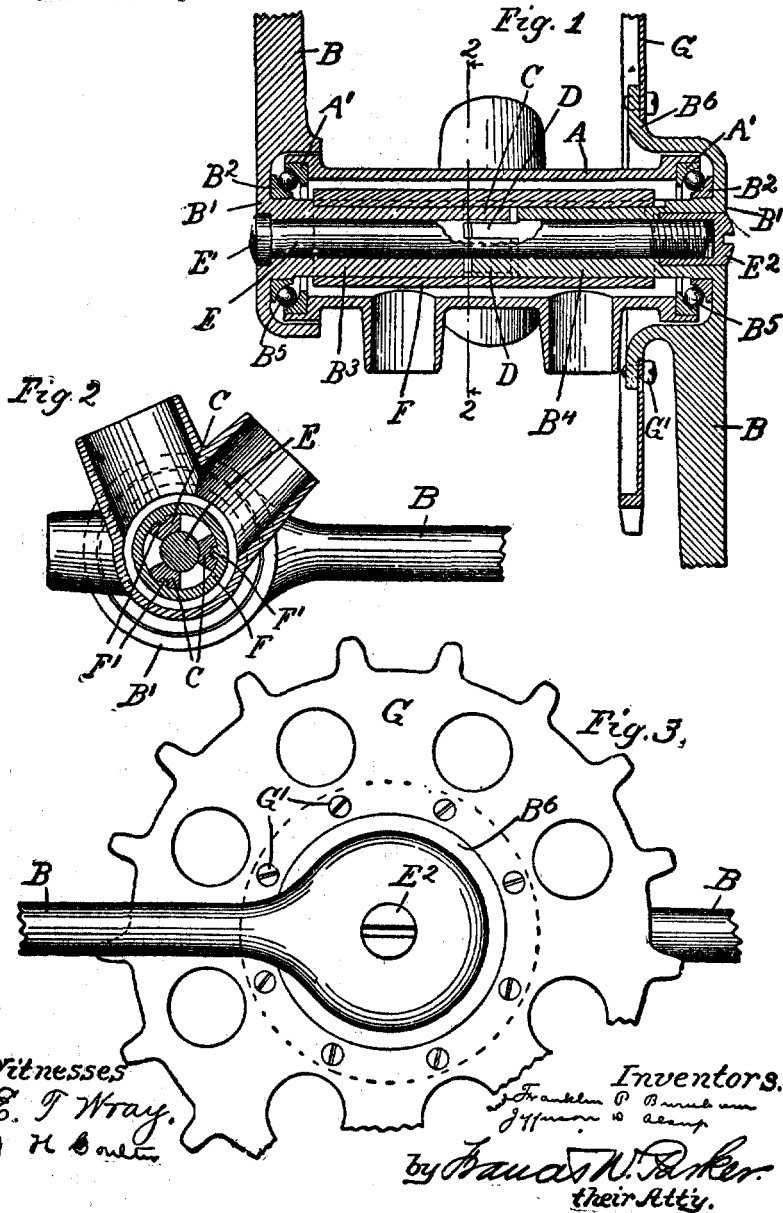


(No Model.)

**F. P. BURNHAM & J. D. ALSUP.**  
**CRANK HANGER FOR BICYCLES.**

No. 550,587.

Patented Dec. 3, 1895.



The patentees add:

"It will be seen we have here a simple, cheap, and light construction by which we secure the maximum width between the bearings, and hence a narrow-tread bicycle is secured without the disadvantages attending the narrowing of the tread in bicycles as ordinarily constructed, such as injury to the bearing and the like. We have described these several parts in detail, but it is evident that they may be varied somewhat in form and construction without departing from our invention, and we therefore do not wish to be limited to the exact construction shown."

The claims alleged to be infringed—Nos. 1, 2, and 4—are as follows:

"(1) The combination, in a bicycle hanger, of a crank shaft, a sleeve surrounding said crank shaft, and provided at each end with a ball-bearing cone; cranks provided with hollow hubs containing ball-bearing cones, and adapted to receive the ends of the crank-shaft sleeve; and a series of balls contained within said hollow crank hubs, and adapted to bear against said bearing cones, substantially as described.

"(2) A bicycle comprising cranks having hollow or recessed hubs integral therewith, and adapted to receive the bearing balls, each hub being provided with an inwardly projecting portion connected rigidly thereto, said inwardly projecting portions connected so as to rotate together, and a sleeve surrounding said inwardly projecting portions, and provided with a bearing surface for said bearing balls."

"(4) A bicycle comprising hollow or recessed hubs having cranks connected thereto, said hubs provided with ball-bearing cones in the same plane as the cranks, and being rigidly connected so as to rotate together; a non-rotatable sleeve associated with said hubs, and provided with ball-bearing cones opposed to the cones in the recessed hubs, and adapted to bear against said bearing cones."

A consideration of the testimony in this case, as well as the construction of the modern bicycle, indicates the desirability of maintaining as narrow a tread—being the distance between pedals—as is practicable. It is obvious that, the more narrow in construction the tread can be made, the better the operation of the machine, because the power can thus be more directly transmitted. It is also obvious that, the wider the distance between the bearings, the greater will be the resistance to strain, because of the increased rigidity of the mechanism. The problem to be solved in making a successful machine seems to be to combine narrowness of tread with the greatest practicable distance between the bearings. This the inventors of the mechanism disclosed by the letters patent in controversy claim to have accomplished in a manner superior to anything theretofore known, and in such wise as to make their invention a valuable and substantial advance in the solution of the problem. The learned counsel for the appellant states the gist of the complainants' patent to be "the placing of the ball bearing within the hubs of the crank hangers, whereby extreme narrowness of tread is secured, and in placing a driving sprocket wheel between the centers of the ball bearings, whereby torsional strain is prevented." The patent under consideration is a combination patent, and it is admitted that all its elements are old. As was said by

the leading expert called for the appellant, "Crank bearings were old, and so are crank shafts and divided and coupled crank shafts, and so were cranks, and so were cranks with hollow hubs, and so were ball bearings." What is claimed for complainants' patent is that it has produced for the first time a combination which, preserving narrowness of tread, has not correspondingly narrowed the distance between the ball bearings. Taking this statement as to the object and purpose of the complainants' patent, and we find that the central ideas therein of placing the ball bearings within the hubs of the crank arms and the driving sprocket wheel between the centers of the ball bearings are not original with the invention disclosed in the letters patent under consideration. In this connection we may remark that, while the location of the sprocket wheel within the planes of the ball bearings is not made a part of any of the claims of the complainants' patent, nevertheless, in the structure shown in the drawing and described in the specifications, having in view the purpose to be accomplished, it is necessary to locate the sprocket wheel within the planes of the bearings. Looking now to what has been accomplished before, we find in the patents set forth in defendants' answer that the hollowing of the hub to receive ball bearings had been frequently undertaken. Other inventors had in mind the advantage of placing the chain pull between the bearings. Grubb, whose patent was applied for before the patent in suit (letters patent No. 555,281, to William I. Grubb), speaks of bringing the strain upon the sprocket wheel between the plane of the bearing, and again says:

"By means of my construction I am enabled to spread the plane of the adjacent ball bearing out to or beyond the plane passing through the center of the sprocket teeth, and thus avoiding any overhanging strain."

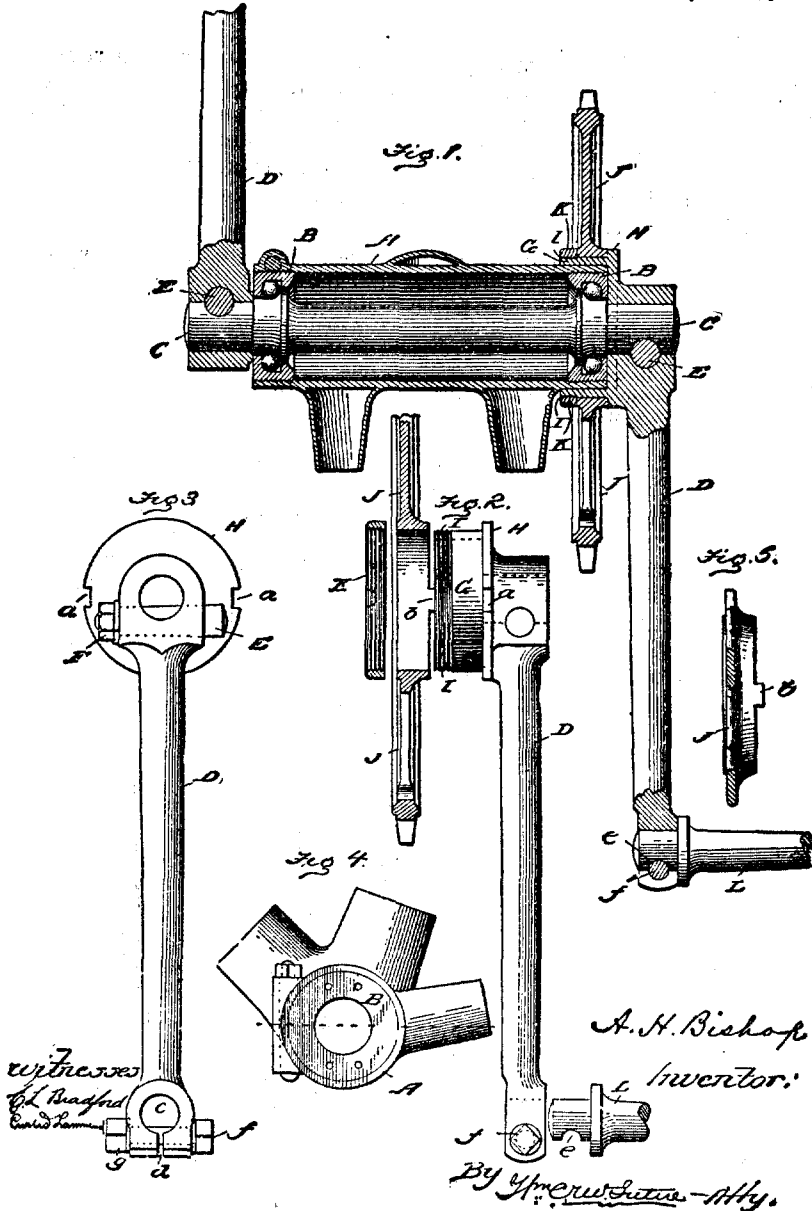
Recessed ball bearings are shown as early as 1888 in the English patent to Boothroyd, No. 8,396 of 1888. In this patent there are shown two hubs having recessed ball bearings at the extremities of the shafts, with the sprocket wheel between the bearings. It is true, the Boothroyd patent is not for a crank hanger, and the attachment described was made to the rear sprocket wheel instead of the front sprocket wheel. But the desirability of keeping the bearings as far apart as possible by means of recessed hubs, inside of which the bearings may operate, is fully indicated. In the patent to Alfred H. Bishop, No. 521,363, which antedates the complainants' invention, we have a crank with a hollow hub to receive the ball bearings, thereby obtaining increased distance between the bearings, without widening the tread. The accompanying drawing indicates the Bishop invention:

(No Model.)

A. H. BISHOP.  
BICYCLE.

No. 521,363.

Patented June 12, 1894.



Of his invention Bishop says:

"My invention has for its object to securely connect the sprocket wheel with the crank or drive shaft in a simple and efficient manner, and so as to secure protection of the ball bearings from dust and dirt, and to bring the said bearing outwardly to or beyond the chain line, as will be hereinafter explained."

Bishop shows in his drawing, at the right hand thereof, a recessed hub, the recess not carried so far into the hub as is shown in complainant's structure, the latter carrying the recessed hub to a point within the vertical plane of the crank arm. Bishop shows, however, a recessed hub carrying the ball bearings further apart, and, if necessary, beyond the plane of the sprocket wheel. Of this construction Bishop further says:

"By the construction and arrangement described, the sprocket wheel is enabled to assume a position over the ball race, and it, together with the hollow boss of the crank, fully protects the ball race from dust and dirt, and enables the ball bearings to be extended outside of the chain line; thus making the whole much more rigid than the ordinary form of yokes. This construction, as will be understood, enables the manufacturer or rider, or any inexperienced person, to readily change the gears of a machine to suit all conditions of riding."

A divided, hollow crank shaft, consisting of two members projecting inwardly from the respective crank hubs and parts of the shaft interlocking so as to compel them to rotate together, is also old in the bicycle art, and is shown in the patent to Latta, No. 301,245, issued July, 1884. What, then, have Burnham and Alsup, in the patent in question, accomplished beyond what is shown in the prior art? They have placed hollow crank hubs, within which ball bearings are located, at both ends of the crank shaft, and located the bearings further within the hub, extending the sleeve of the crank shaft within the same, so as to locate the bearings in the plane of the crank arm; thus carrying out the idea of locating the bearings as far apart as possible without widening the tread. The sprocket wheel, in this construction, is necessarily located within the planes of the crank arms. An examination of claims 1 and 2 in view of prior inventions discloses only an assembling of old elements, performing the old functions in substantially the old way, except that a hollow or recessed hub adapted to receive the bearing balls is found at both ends of the crank shaft, instead of at one end. In the light of the prior art, therefore, these two claims, so far as the combinations have anything new, are the result of duplicating the hollow hub shown in the Bishop patent at one end of the shaft by placing it at the other end also. Mere duplication of parts is not invention. It is true that the assembling of old elements having a new mode of operation producing a more beneficial result does amount to invention. In claims 1 and 2 we find no new mode of operation producing more beneficial results. It is also well settled that there is no invention in merely selecting and putting together parts of different machines in the same art, where each operates in the same way in a new machine producing the same result. The cases holding this doctrine are cited

in *Overweight Counterbalance Elevator Co. v. Henry Vogt Mach. Co.*, 43 C. C. A. 80, 102 Fed. 957.

In the fourth claim the patentees in complainant's patent have embodied the element which provides that the ball-bearing cones shall be in the same plane as the crank arms, and the whole combination, by thus carrying the ball bearings into the same plane with the crank arms, permits the widest possible space between the bearings without widening the tread, and of necessity locates the sprocket wheel within the planes of the bearings. The power applied through the crank arms bears directly upon the ball bearings. This combination seems to effect the desired result, having the greatest possible distance between the bearings consistent with narrowness of tread. This appears to us a distinct advance on what was theretofore shown by Bishop and others in the fact that the ball bearings are placed within the plane of the crank arms in a recessed hub. While a mechanic skilled in the art, with Bishop's and other inventions before him, might place the hollow recessed hubs at both ends of the shaft by simply duplicating Bishop's arrangement, when you add to that the further extension of the ball bearings beyond the plane of the sprocket wheel into a recessed hub in the plane of the crank arms, thereby further widening the distance between bearings while retaining the narrowness of tread, we are not prepared to say that the inventor has not crossed the line which separates the mere assembling of old elements from that degree of invention that consists in putting such elements into such relation that, acting together, they produce a different and more beneficial mode of operation. In view of the testimony in the case, uncontradicted in the record, as to the advantages of the crank hanger thus constructed in practical operation, we think the fourth claim discloses patentable invention. While this is true, the suggestiveness of former inventions, and the short step in advance taken by the patentees, require strict construction of the claim. Are all of the essential elements of this claim found in the defendants' crank hanger? Examining the crank hub upon the right of the shaft as shown in defendants' device, we find it constructed more nearly in accordance with the Bishop hub and crank arm than the complainants'. The sprocket wheel is attached directly to the hub, practically in the plane of the ball bearing, or possibly slightly within the same, as is shown in Bishop's construction. It lacks the element made essential in the fourth claim (in our view, necessary to support the patent) of extending the ball bearings to the plane of the crank arm. In this view of the case, although we think the patent valid for a mechanism constructed as shown and covered by the fourth claim of the patent, we do not think the defendants' mechanism infringes that claim for the reasons stated. We therefore reach the same conclusion as to the liability of the defendants as was arrived at in the circuit court. The decree dismissing the bill is therefore affirmed; costs in this court to be divided.

**J. L. MOTT IRON WORKS v. HOFFMANN & BILLINGS MFG. CO.**

(Circuit Court, E. D. Wisconsin. August 12, 1901.)

**1. PATENTS—PATENTABLE INVENTION—COMBINATION OF OLD DEVICES.**

To render a new combination of old elements or devices patentable, it must not only produce a new and useful result, but such result must be the product of the combination, and not merely an aggregate of several results, each the complete product of one of the combined elements.

**2. SAME—WATER SUPPLY CONNECTIONS FOR BASINS AND BATHS.**

The Hammann patent, No. 449,880, for supply connections for basins or baths, is void for lack of patentable invention; the device shown, which consists of a fixture for supplying both hot and cold water through the same nozzle, being merely an aggregation of old parts, which do not co-operate to produce any new result, as required to constitute a valid combination, and its utility being due solely to the better and simpler arrangement and connection of the parts, involving only the exercise of mechanical skill.

In Equity. On final hearing of bill for infringement of letters patent No. 449,880, for "supply connections for basins or baths," issued April 7, 1891, to Edward Hammann, assignor to the complainant. The specifications and claims of the patent are as follows:

"Bath and basin connections have before been made in which either hot or cold water, or a mixture of the two, can be delivered by one nozzle or bib into the bath or basin, and in these cases the cocks or valves for regulating the water have sometimes been below or behind the bath or basin, and in other instances they have been above the slab. The object of the present invention is to simplify the mode of construction and to facilitate the connection of the respective devices to the slab, and at the same time to combine with the hot and cold water supply pipes and cocks a standpipe and overflow that serve as a foundation or support for the respective parts that supply and regulate the hot and cold water. In the drawings, Fig. 1 is a vertical section through the nozzle or bib and the standpipe, Fig. 2 is an elevation partially in section, and Fig. 3 is a sectional plan at the line, x, x. The hot-water valve or cock, A, and cold-water valve or cock, B, are to be of any desired construction. Usually they are what is known as a 'globe valve,' the water-supplying pipes being connected by couplings at the lower ends, as seen at 2 and 3, and the water passes off laterally above the valve by the pipes, C, C', to the hollow water way, D, from which rises the mixing column, E, that passes through the slab or plate, F, surrounding the upper part of the bath tub, or beneath which the basin is attached; and there is a bib or nozzle, G, the under surface of which may rest upon the top of the slab, F, and the end is turned downwardly into the bath or basin, and the top end of the mixing column, E, passes into the bottom of this bib, and is screwed or otherwise permanently fastened thereinto; and it is usually preferable to pass the lower end of the mixing column, E, through the hollow water way, D, and fasten the lower end thereof by the nut, 4, there being washers between the nut and the surface of the water way and a collar, at 5, around such mixing column, E. The pipes, C and C', are preferably made with the water way, D, and screwed at their ends to the hot and cold water cocks, respectively. The caps, 6, of the respective hot and cold water valves, A, B, are tubular, and extend around the stem, 7, up to the sockets, 8, that pass through the slab, F; and there are flat rings or disks, H, below the flanges of the sockets, 8, and resting upon the slab, F, which rings are usually marked with the word 'Hot' or 'Cold,' to indicate the temperature of the water, and upon the upper ends of the stems, 7, are the hand wheels, I, by which the stems are turned to admit or exclude water by the respective valves. In cases where a standpipe and overflow is not used in connection with the cocks, pipes, and bib described, it is preferable to make use of lock nuts beneath the

slab and around the mixing column, E, and the tubular portions of the caps, 6, to clamp the respective parts to the slab, as at S; and I remark that these parts, thus far described, are easily constructed and attached, either to the slab of the basin or to the rim or plate of the bath tub, and the parts are highly ornamental; but the parts that are above the slab are neither large nor numerous, hence there is but comparatively little area or surface that requires to be plated and finished in the manner now usual with the best class of work. When a standpipe and overflow is made use of in connection with the parts heretofore described, the water way, D, is usually semicircular, to partially surround the standpipe, K, and be steadied thereby, and there is a tubular coupling, L, into which the upper end of the standpipe, K, is screwed, and which tubular coupling, L, passes through the slab, F, and is held in place by a lock nut, 10; and to obtain a more ornamental finish, and to support the nozzle or bib, G, I usually extend such nozzle or bib in the form of a ring, G', around the tubular coupling, L, so that such ring, G', is firmly held to the surface of the slab by the flange, 11, resting upon such ring, G', and being pressed thereto by screwing up the lock nut, 10. The standpipe, K, is to be provided with a connection at the lower end to the waste pipe or drain, and there is also usually a lateral connection to the bottom of the basin or bath tub, as seen at N, and within the standpipe is an overflow pipe, P, having a valve, 12, around the lower part thereof, which rests upon a seat below the lateral pipe, N, and serves to retain water in the basin or bath until the overflow pipe is elevated, and this overflow pipe, P, has holes in it at the level at which the water is to stand, and the pipe extends up through the tubular coupling, L, and there is a cap, Q, at its upper end, and a slot and pin by which the overflow pipe can be held up while the water is running out of the bath or basin. This standpipe, overflow pipe, valve, and cap are similar to those represented in the patent of John Demarest, No. 358,147, or such standpipe and overflow pipe might be similar to those represented in the patent of W. S. Carr, No. 170,709. This fixture, as a whole, is very neat, artistic, easily kept clean, and projects but little above the slab. It will be apparent that in consequence of the mixing column, E, passing into the hollow water way, D, and having lateral openings for the water to pass from the water ways into the column, and being held by the removable nut, 4, the hot and cold water valves can be disconnected from the mixing column and the bib by simply removing the nut, 4, without disturbing any of the other parts of the apparatus. This is a convenience, because it allows the cocks or valves, or either of them, to be separated for grinding or repairing, as may become necessary from time to time. It will also be apparent that the tubular coupling, L, may be formed with the standpipe, K, or permanently fastened thereto, and the ring, G', may be of any desired ornamental shape to surround the upper part of the standpipe, and be held by the flange, 11, when the nut, 10, is screwed up against the under side of the slab. Above the bib, and supported by the same or by the mixing column, there is a fixed cup, R, that is adapted to the reception of rings or jewelry, and, as this is a rigid fixture, there is no risk of an article placed therein being shaken out in moving either valve or the overflow pipe. I claim as my invention: (1) The combination, with the bib or nozzle, G, and the mixing column, E, therewith connected, and passing down through the slab, of the hot and cold water valves, the water ways connecting the respective valves, there being an opening through the water way, D, for the mixing column, E, to pass through, the collar, 5, around the mixing column, and the nut, 4, screwed to the lower end thereof for confining the parts in position, the mixing columns having holes through the same opening into the water way, D, substantially as set forth. (2) The combination, with the hot and cold water valves and the connecting water ways between the same, of the mixing column and the bib or nozzle above the slab, the standpipe, K, the tubular coupling at the upper end thereof, and the lock nut for connecting the standpipe permanently with the slab, and for holding the bib or nozzle to such slab, substantially as set forth. (3) The combination, with the hot and cold water supply valves and pipes, of the bib or nozzle, adapted to rest upon the top of the slab,



and having a ring extending from the rear end of such bib or nozzle, and the standpipe and its coupling, passing through the slab, and through the said ring, and holding the same in position, substantially as set forth. (4) The combination, with the hot and cold water valves and the connecting water ways between the same, of the mixing column and the bib or nozzle above the slab, the standpipe, K, opening through such slab and connected therewith, and the overflow pipe within the standpipe, substantially as set forth. (5) The combination, with the hot and cold water valves and the connecting water ways between the same, of a mixing column and a bib or nozzle above the slab and connected with the mixing column, the standpipe, K, passing through the slab and holding the bib in position, substantially as set forth. (6) The combination, with the hot and cold water supplying valves and pipes, of the bib or nozzle adapted to rest upon the top of the slab, and having a ring extending from the rear end of such bib, the standpipe passing through the slab and through the ring, and the collar for holding the ring in position, substantially as set forth."

The defendant's structure is substantially a reproduction of the patent drawings and specifications, except that "nut, 4," and its functions, specifically referred to as an element in the combination of claim 1, are not included. Infringement of claim 1 is not charged, but the fact of conflict with each of the remaining five claims as set forth is undisputed, and the issue rests upon their validity. The prior art is shown in the following letters patent: Carr's, No. 170,709; Clifford's, No. 238,855; Demarest's, No. 339,386; Demarest's, No. 358,147; Moore's, No. 418,375; Newell's, No. 399,691; Putnam's, No. 344,498; Reid's, No. 391,647.

W. P. Preble, Jr., for complainant.

Winkler, Flanders, Smith, Bottum & Vilas, for defendant.

SEAMAN, District Judge (after stating the facts). The utility and advantages of the complainant's device clearly appear, and its substantial appropriation by the defendant calls for the utmost liberality which can be extended in favor of the grant within the principles of patent law. The single question presented, however, is this: Do the claims thus involved in the infringement show a patentable combination, or a mere aggregation of the several old devices and their results? It is plain, and practically conceded by the specifications of the patent, that the elements which enter into each of the claims are old and well-known. Nevertheless:

"A new combination, if it produces new and useful results, is patentable, though all the constituents of the combination were well known and in common use before the combination was made. But the results must be a product of the combination, and not a mere aggregate of several results, each the complete product of one of the combined elements. Combined results are not necessarily a novel result, nor are they an old result obtained in a new and improved manner. Merely bringing old devices into juxtaposition, and there allowing each to work out its own effect, without the production of something novel, is not invention. No one, by bringing together several old devices, without producing a new and useful result, the joint product of the elements of the combination, and something more than an aggregate of old results, can acquire a right to prevent others from using the same device, either singly or in other combinations, or, even if a new and useful result is obtained, can prevent others from using some of the devices, omitting others, in combination." *Hailes v. Van Wormer*, 20 Wall. 353, 368, 22 L. Ed. 241, 248, and cases noted; *Id.*, 8 Notes U. S. Rep. 319.

The doctrine thus stated is well settled, and the authorities clearly exemplify these distinctions. The combination of old elements, whereby "all the constituents so enter into it as that each qualifies every other," and thus "form either a new machine of a distinct character and function, or produce a result due to the joint and co-operating action of all the elements, and which is not the mere adding together of separate contributions" (*Pickering v. McCullough*, 104 U. S. 310, 318, 26 L. Ed. 749, 752), constitutes patentable invention. On the other hand, the assemblage of old devices, "without securing some new and useful result as the joint product of the combination,—something more than a mere aggregation of old results,"—is not such invention (*Adams v. Stamping Co.*, 141 U. S. 539, 542, 12 Sup. Ct. 66, 67, 35 L. Ed. 849, 851), but is "a mere matter of mechanical judgment, 'the natural outgrowth of the development of mechanical skill, as distinguished from invention.'" *Florsheim v. Schilling*, 137 U. S. 64, 77, 11 Sup. Ct. 20, 24, 34 L. Ed. 574, 579. In practice, however, there is frequent room for controversy in the application of these tests to claims granted for combinations; and the testimony of the experts and arguments of counsel on the part of the complainant, conceding the general rule as recited, seek to distinguish the claims in question as combinations and not mere aggregations. Impressed with the "compactness and simplicity" of the device as a whole, which have given it trade popularity, I have examined the mechanism in question in the light of every suggestion in support of patentability, but can find no tenable ground upon which this assemblage of old devices can be classified as a true combination under the definitions above given. The utmost of the contention to that end is thus stated in the brief for complainant:

"The invention is a supply connection for basins and baths," and "is intended for use in those basins or baths in which the hot and cold water are supplied through a single nozzle, instead of separate nozzles. Of course, this way of supplying hot and cold water was used long before the patent in suit, and the patentee so states. The invention, therefore, is not a new supply, but a new connection for old supplies. \* \* \* The main purpose of the invention in controversy is to provide a simpler and more easily operated connection between the hot and cold water supply and a slab of a basin or bath, and as a secondary or auxiliary object the standpipe or overflow is by means of said connection made to serve the novel purpose of supporting all the supply devices, as well as the overflow devices. The patentee does not claim anything novel in the overflow devices as such. Overflow devices are only incidental to the invention. The invention lies in the novel character, location, and connection of the supply devices. This is prominently shown in the language of the first claim, which would have been a broad and satisfactory claim, and as such would have been infringed by the defendants, had not the solicitor, with the fatal fancy for details which is common to his profession, specified too literally the location of the parts."

And it is thereupon asserted "that each claim recites a number of elements, every one of which is dependent upon or modifies the action of one or more of the others, whereby a new and useful and consequently patentable, supply connection is produced."

The inventor, Mr. Hammann, testifies that he "claimed to have invented a new system of arranging a hot and cold water supply, which system consisted in putting everything except the mere supply

handles and flange below the slab, out of sight, and bringing the hot and cold water together below the slab into a mixing column, by which it rose to the common nozzle, which nozzle I particularly adapted to lie flat on the slab, and reach from the waste or stand pipe forward over the edge of the bowl"; that he thus provided peculiar supporting features, and, "by making the connection between the mixing column and the water ways dependent upon a single coupling nut, [he] devised a means for connecting up the supply" which was "much simpler and more effective than anything before known."

And Mr. Serrell, on the same behalf, as expert, thus describes the invention:

"The novel devices of the patent in suit relate to the nozzle of particular and convenient form, the mixing column connected thereto and supported thereby, the lateral water way extending from the mixing column to the valves for the hot and cold water supply, and a support for these parts, which support is preferably connected to the standpipe as a fixed member. An additional feature of said invention relates to a ring extension of the said nozzle through which the standpipe passes; said part, with the slab, being securely fastened to the standpipe. In this device all of the parts were concealed, except the operating handle for the hot and cold water valves, the nozzle and its ring, and the upper end of the standpipe and upper end of the overflow pipe; this arrangement making it possible to supply substantial and workmanlike devices without expensive finish or design, the parts finished and plated being only those visible."

In these several versions of the alleged invention, as throughout the argument in its support, there is failure to define the feature on which patentability can be predicated. No co-operation is pointed out by these old elements in a new way for a new unitary result. Conceding that the water supply (hot and cold) and the water discharge are well-known devices operating the old way, it is contended in general terms that the supply connection is new. But this is not true, in the sense of patentable novelty, so far as relates either to the means of connection or to its operation, while it may be true, as stated by counsel in the brief, "that nobody, prior to this invention, ever had a water-supply connection for basins or baths in which an unseen supply below the slab was connected through a mixing column to a visible nozzle above the slab, and no supply connection for hot and cold water was ever before known in which the connection became the supporting agent for all the parts, including the basin and slab, instead of being itself a weight which required support from the slab." The water-supply device, as an entirety, is well described in the testimony of Mr. Bates, defendant's expert, as consisting "of four parts: (1) The two valves, one for hot and one for cold water; (2) connecting water ways connecting them; (3) a nozzle or bib; and (4) a channel, called a 'mixing column,' connecting the bib and the water ways,"—and the connection between the water supply and water discharge "is in a ring at the back end of the bib or nozzle, through which ring the tubular coupling of the standpipe extends, thus providing an additional fastening locking the bib to the slab; the bib being already locked to the basin by its connection with the mixing column, connecting water ways, and valves of the water supply." Aside from the "secondary" feature, as mentioned by counsel for complainant, whereby the standpipe "is by means of said con-

nection made to serve the novel purpose of supporting all the supply devices, as well as the overflow devices," no element appears in this assemblage of devices which is not substantially a reproduction from prior structures for like purpose and with like operation. Indeed, the only other element of which novelty is asserted is in the peculiarity of the nozzle and ring device, and that is an obvious adaptation of the Clifford faucet for like purpose, as shown in patent No. 238,855. Moreover, these old water-supply devices and the old water-discharge devices each operate in the old way in the aggregate structure, and neither group modifies in any particular the action of the other. As remarked by Mr. Bates, "There is no sort of interaction between these two."

The so-called "supporting feature," which thus appears as the final contention for patentability, is a plain expedient by obvious means whenever such form of the structure seemed desirable. It is a mere incidental provision, as indicated in the terms of the patent, and there is no such co-operation therein of the several elements entering into the entire structure as required for a valid combination. The provisions to that end act independently of the water supply or water discharge,—each of those parts operating in the same old way without modification; and the remarks in *J. L. Mott Iron Works v. Standard Mfg. Co.*, 3 U. S. App. 386, 404, 4 C. C. A. 28, 53 Fed. 819, and authorities there cited, in reference to a combination claim in *Demarest's* patent, No. 358,147, are equally applicable here. The double use is not patentable. *Reckendorfer v. Faber*, 92 U. S. 347, 356, 23 L. Ed. 719.

The bill must be dismissed for want of equity, and the decree will be entered accordingly.

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PERRY et al. v. SPRECKLES' SUGAR-REFINING CO.

(District Court, E. D. Pennsylvania. July 1, 1901.)

No. 67.

SHIPPING—CONSTRUCTION OF CHARTER—DEMURRAGE.

A charter for a steamer to carry a cargo of sugar required her to proceed with her cargo to a designated port of call in the United States. It allowed 15 days as lay days for loading and for awaiting orders at the port of call, but all such days were consumed in loading. It provided that legal holidays should not count as lay days, and required the owners or master to report to the charterer by telegraph the arrival of the steamer at the port of call. She arrived there on Saturday afternoon, which was a legal half holiday, both at such port and at the charterer's place of business. Notice of her arrival was sent the charterer; but, its office being closed, it was not received until Monday morning, when it was at once acted on. *Held*, that under the provisions of the charter notice of arrival could not be given, which the charterer was bound to receive and act upon, until Monday morning, and that it was not liable for demurrage during the intervening time.<sup>1</sup>

In Admiralty. Suit for demurrage under charter.

Biddle & Ward and N. Dubois Miller, for libelants.

John G. Johnson and J. Wilson Bayard, for respondent.

<sup>1</sup> Demurrage, see notes to *Randall v. Sprague*, 21 C. C. A. 337, and *Hagerman v. Norton*, 46 C. C. A. 4.

J. B. McPHERSON, District Judge. The libelants, who are the chartered owners of the steamship Hutton, entered into a charter party with the American Sugar-Refining Company, in March, 1900, by virtue of which the steamer was to load a cargo of sugar at a certain port or ports and proceed thence to the Delaware Breakwater, there to await orders to discharge either at New York, Philadelphia, Boston, or Baltimore. The following provisions of the charter party concern the present dispute:

"Fifteen working days as lay days are to be allowed to said charterers for loading the said steamer at port or ports of loading, and waiting for orders at port of call; the master engages to take an additional number of native workmen on board at steamer's expense to accelerate the stowing of cargo, and, if desired by charterers or their agents, to give 24 hours' notice beforehand for the quantity of cargo he requires to be shipped day by day, and to pay demurrage, if any, for boat loads so ordered and detained beyond the customary time. Such working days in all ports to commence within the same time and under the same conditions as stipulated in section 1 of this charter party with regard to orders for loading the ship, say 12 hours after the master has given written notice, and the cargo to be taken out with customary dispatch for steamers at port of discharge. Ten days on demurrage over and above said working days at 6d. per net register ton per running day. Time occupied in shifting, ports of loading, and detention of steamer by causes over which charterers have no control, viz. quarantine, ice, hurricane, blockage, clearing of the steamer after the last cargo is taken over, also Sundays, custom-house and bank holidays, or any other holidays according to the custom of the port throughout this charter, not to count as lay days unless so used. The steamer to load on Sundays and/or any holidays if required by charterers, in such case counting as working days."

"The captain or owners are bound to report to charterers' agents, or to the consignees of the cargo in the United Kingdom, or on the continent, or in the United States, the steamer's arrival at port of call in the United States as above by telegraph, and to wait for their orders at the port of call, provided the names of such agents or consignees are given to the captain at the last loading port."

Under the contract, the ship sailed to Java and there took on 4,800 tons of sugar. The loading occupied 15 days and 6 hours, and the master thereupon made a claim for demurrage for a quarter day, which was duly paid. The ship then proceeded to the Delaware Breakwater, where she arrived on Saturday, September 8, 1900, at about 12:50 p. m. As she approached the port, Messrs. Burbage & Co., who are agents of the American Sugar-Refining Company at the Breakwater, telegraphed to the company in New York, as follows: "Steamer Hutton just arrived 1 p. m. Waiting orders." Within the next two hours the agents had an interview with the master on board the ship, and at 3 o'clock telegraphed again to the company in New York as follows: "Steamer Hutton has no time left to await orders. Was quarter day on demurrage loading Java." These telegrams reached New York promptly, and were delivered without delay to the janitor of the building occupied by the American Sugar-Refining Company; but, as the offices of the company had closed at 12 o'clock, and as the next day was Sunday, the telegrams did not reach the hands of the proper official until Monday morning shortly after 9 o'clock. Upon that day, instructions were sent to Messrs. Burbage & Co. as follows: "Please instruct captain of steamer Hutton to receive instructions from

Spreckles' Sugar-Refining Co., Philadelphia." This telegram was received at 11 o'clock, and communication was immediately established between the Spreckles' Sugar-Refining Company and Messrs. Burbage & Co.; the respondent sending instructions both by telephone and telegraph that the Hutton should proceed at once to Philadelphia. The captain began the voyage as soon as possible, and left the breakwater about 2 o'clock, arriving in Philadelphia on September 11th, and entering the ship at the custom house on the same day. The custom of the port of Philadelphia allows a rate of 500 tons per working day for the discharge of sugar, and therefore, according to this custom, the ship would have been permitted to take  $9\frac{1}{2}$  days to unload her cargo. The discharge, however, was completed by the respondent's stevedores in  $3\frac{1}{2}$  working days, thus saving 6 days to the chartered owners.

The dispute concerns the time consumed at the breakwater awaiting orders, a period of 1 day and 23 hours. The demurrage claimed is 6d. per net registered tonnage of 2,346 tons, or \$559.23, and the question is upon whom, under the provisions of the charter party, this loss must fall.

Whatever might have been the obligation of the American Sugar-Refining Company to acquaint itself with the arrival of the ship at the port of call, in case no provision upon that subject had been put into the contract, it seems to me quite clear that, under the express provision above quoted, the American Refining Company was not required to give any sailing orders at the breakwater until the captain or owners had reported to New York that the vessel had arrived at the port of call. This, in terms, is the undertaking of the chartered owners; for I see no room for doubt concerning the meaning of the words used by the parties. When, therefore, the steamship arrived upon a holiday,—for Saturday afternoon is a legal holiday both in the state of New York and in the state of Pennsylvania,—it was impossible for the ship to comply with her agreement upon that day. There was no more obligation upon the American Sugar-Refining Company to keep its offices open during the legal half holiday of Saturday than upon the Sunday following; and, although the result was that the vessel was unable to give notice until Monday morning, it seems to me that this result was not the fault of the refining company, but was an unlooked-for accident, the consequences of which must rest where they have fallen. In the absence of fault upon the part of the refining company, I see no ground upon which I can shift the loss from the vessel to the charterer. In the present case, this conclusion is the more equitable, because the celerity with which the ship was discharged by the respondent's stevedores in Philadelphia benefited the libelants much more than they were injured by the delay for which they are now claiming demurrage.

The libel must be dismissed at the costs of the libelants.

**BROWN et al. v. CORNELL STEAMBOAT CO.**

(District Court, S. D. New York. July 27, 1901.)

**TUG AND TOW—ABANDONMENT OF TOW IN STORM—TOW WITHOUT ANCHOR.**

Respondent's tug, under a general arrangement to perform towage service for libelants on request, took a scow up the Hudson to be loaded with stone at Verplanck's Point, and after she was loaded placed her with others off Grassy Point, where it was customary to make up tows, but which was an exposed and dangerous place in severe storms from the northeast or southeast. This was at 6 p. m., and the tug agreed to return so as to start down with the tow at 9. The weather was stormy, with wind from the northeast and snow, but not so bad as to render it negligent in the tug to leave the scow where she was, or to indicate that it would not be safe to proceed with the tow that night. It became worse, however, and the tug did not return, although she could readily have done so, and taken the scow to a safer place. The scow was not provided with an anchor, as was the case with many of the stone scows, and during the night, after the storm had greatly increased, she broke from the scow to which she was fastened, and drifted upon the rocks, and was injured. *Held*, that the scow was in fault for not having an anchor; that the tug was in charge of the scow from the time she was taken from her moorings where she was loaded, and was charged with notice that she probably had no anchor, and with the duty of returning and taking her to a less dangerous place, and because of the failure to perform such duty was liable for one-half the loss.

In Admiralty. Suit to recover for loss of tow.

MacFarland, Taylor & Costello, for libelants.

Amos Van Etten and J. Parker Kirlin, for respondent.

**BROWN**, District Judge. In a northeast storm of extraordinary violence on the night of November 26, 1898, the libelants' loaded scow, No. 31, which had been made fast in a fleet of six boats at a rendezvous in the Hudson river off Haverstraw, preparatory to being towed to New York, broke adrift and was blown upon the rocks on shore. The above libel was filed to recover the damages.

The scow had been loaded with stone near Verplanck's Point, and towards evening of the 26th was taken from there by one of the respondent's tugs and towed to the usual place of making up such tows off Grassy Point, about two miles below Verplanck's Point, and was there made fast by lines to the scow Katy D, which was attached to a brick scow ahead of her, which had been anchored there in the morning of that day and served as a stake boat for the rest of the tow.

When scow No. 31 was taken from Verplanck's Point the weather was unpromising, the wind being to the northward and eastward with snow, which began to fall two or three hours previously; but there were not then any indications of a storm of special severity, or such as made it probable that the tow would not be able to start at high water, about 9 p. m., the expected time of starting on that evening. In severe northeast and southeast storms, however, this place of making up tows is the most dangerous in the Hudson river, from the great width of the bay there and the absence of any shelter.

No. 31 was left in the fleet by the tug at about 6 p. m., with the promise that the tug would return in about two hours. It was in-

tended, expected and understood that the tug would start down river with the fleet at about high water at 9 p. m.; and when the tug left the boats, at about 6 p. m., her pilot was also informed by some helping tugs that other boats would be brought to join the tow. The tug then went to Grassy Point, about one-fourth of a mile distant, partly to lie up there until the hour for starting, and partly to inquire for other boats. After making some inquiries, the master and pilot on returning to their tug at about 8 p. m. found that the wind had so much increased and that the snow was so thick, as they testify, that they could not see the boats at anchor, and did not know where to find them; and on consultation they agreed that it would be dangerous to start down river with the tow, as expected; and accordingly, without any further attention to the tow, they lay at the dock at Grassy Point until about 1 a. m., when in consequence of the violence of the storm and injuries to the tug by pounding there, the tug left Grassy Point and made her way to Verplanck's Point, where she passed the rest of the night without further damage.

Meantime, between 8 and 9 p. m., three more brick scows, viz. the Townsend, the Mead and the Gladys, were brought up from Haverstraw and placed in line, in the order named, alongside the first three boats, making up a tow of six in all, lying two abreast. All the boats had anchors on board except No. 31, which had none.

By the records of the nearest station of the weather bureau at New York, the wind increased from 16 to 19 miles between 4 and 6 o'clock, to 26 miles between 7 and 8, to 27 miles from 8 to 10 o'clock, to 34 from 10 to 11, and to 48 from 11 to midnight, continuing about the same all the next day. At about 11 p. m., before the storm had reached its height, the head barges, whose anchors had previously held those behind, began to drag and the boats to pound one another. Word was therefore passed that the boats behind must cast off their lines, as they could not be held together any longer. This was accordingly done, and those having anchors cast them over. The captain of No. 31 having his wife on board, obtained permission from the Gladys, the boat alongside of him, which had an anchor, to make fast to her. Her anchor held both for about a half hour, when the anchor dragged, and not long after the Gladys foundered and sunk, and No. 31 soon drifted ashore upon the rocks. So extreme was the violence of the storm that on the next day some 30 wrecks lined the shore of the Hudson. Of the six boats of the tow, the remaining four having anchors appear not to have sustained any very material damage, although three of them dragged their anchors and brought up on the Haverstraw flats. This, as well as the pounding at Grassy Point up to 1 a. m., shows that the wind at Haverstraw continued to the east of north although northwest in New York at that hour.

There was no special contract of towage in this case. The respondent had been in the habit for many years of taking fleets of boats on request and notice from the libelants. No. 31 was taken up to Verplanck's Point for stone, with the understanding that when loaded and ready for return, she would be towed back in a fleet with other boats, in accordance with the ordinary custom and usages as respects Haverstraw tows. Such lawful customs and usages as had



become established in this business, and were known or presumptively known to the libelants, are a part of the implied contract between the parties, and so far as applicable to the case they govern the rights and obligations of each. But no previous practice of carelessness, nor customary neglect of reasonable care, prudence or nautical skill, can be set up as constituting a lawful custom, or as absolving the tug from those obligations.

The burden of proof is undoubtedly upon the libelants to prove the neglect of some duty by the respondent's tug. The evidence is voluminous, and I have carefully considered the elaborate arguments on behalf of the respective parties. The following facts seem to me to be clearly established by the evidence:

(1) The tow was made up off Grassy Point near Haverstraw in accordance with a long established custom, well known to the libelants, and in a manner reasonably safe except in very severe storms, when it was not safe, except for boats supplied with proper anchors; and that one or more such very severe storms are to be expected yearly, if not oftener. See *The Germanic* (D. C.) 107 Fed. 294, 298.

(2) That in merely ordinary storms when it is not deemed prudent to start with the tow at the usual time of tide, the tow previously made up and waiting is customarily left to ride out the storm, each boat being cast off by herself and riding at her own anchor; and this practice in ordinary storms, at least, is reasonably safe.

(3) That in storms of any considerable violence anchors are necessary to every boat in the tow for their security when detached and separate from each other.

(4) That while the Haverstraw brick scows are almost invariably supplied with anchors and several hands, there have been for a number of years past a great diversity in the practice of the scows that load with stone above Haverstraw; many, and perhaps one-half of them, carrying no anchor, and usually only a single working hand, although some have the man's family on board. This diversity in practice was so common that it must have been known to the captain and the pilot of the respondent's tug.

The failure of the scow to carry any anchor was unjustifiable and at the scow owner's risk. The uncertainties of navigation and the weather in riding at Haverstraw manifestly required an anchor. No. 31 was originally supplied with one of 500 pound weight, and when lost it was again replaced. Her captain, May, testified that it "held in a strong wind" and "served him in many a gale off Swinbourne Island," and I find that the scow is in fault for not having any anchor on board. If she had had a suitable anchor, as all of the rest of the fleet had, it is not probable that either the *Gladys* or No. 31 would have suffered serious damage.

(5) When No. 31 was taken from Verplanck's Point towards evening of the 26th, the weather, though doubtful, did not indicate any unusual storm, or that the tow would not be able to start at high water about 9 p. m. as was expected; and that no negligence is attributable to the respondent in taking the scow to the place of rendezvous at that time.

(6) That the contention of the captain and the pilot of the tug Townsend that from 8 to 9 p. m. they could not return to the tow, as promised, because they could not locate it or find it by reason of the thick snow, or go safely to it by reason of the violence of the storm at that time, is untrue, and that they might at that time have gone to the tow to give aid to any boat needing it, without danger or difficulty, as the tugs Mabel and Ingalls went between those hours with additional scows and placed them in the tow. That from 8 to 9 p. m. the wind was a moderate gale, and the snow had so increased and the weather indications were such, that the tug was justified in determining not to start out with the tow, and that no negligence is attributable to her in not proceeding to New York as was intended and expected by both parties when No. 31 was taken from Verplanck's Point.

(7) That in a severe storm for a boat without an anchor, the place of rendezvous is the worst on the Hudson river; and that at least partial protection was obtainable for No. 31, which had no anchor, on the south side of Verplanck's Point one and one-half miles above, where she might and ought to have been taken between 8 and 9 p. m. by the respondent's tug.

Upon the above facts the question of the respondent's liability must depend upon whether the tug owed any further duty to No. 31 after putting her in the tow. The respondent says it did not; and that it was the business of the scow alone to look out for herself and for her own safety until the weather should permit the tug to come back and start for New York. Some of the respondent's witnesses testify to this understanding, and affirm that the tow while in waiting is not in charge of the tug.

I cannot sustain this contention. On the contrary, I must hold that No. 31 in this as in other cases, was in the charge and care of the tug from the time she was taken from her moorings at Verplanck's Point. From that moment she was no longer her own master; she was placed where it suited the tug to place her, and she was thereafter wholly subject to the tug's control. When thus left the tow was helpless, with neither motive power nor means of communication in case of need. The tug had left No. 31 at 6 p. m. under the arrangement to start about 9 p. m. and with the promise to return to her in two hours. When in the meantime the weather so changed for the worse as to make starting that night imprudent, and to require No. 31 to remain overnight in a place that was hazardous to her unless she was fully prepared, it was the duty of the tug to return to her as soon as this change of intention was made, in order to see that the tow was prepared for the change, and if not, to render whatever aid was in her power.

There was the more reason for this attention because of the known and common practice of many of the stone scows not to carry anchors, of which the captain and pilot of the tug must have been aware. The captain says he did not see any anchor on board of No. 31, but denies that he knew that she had none until the next day. This does not excuse him. In view of the known common practice, it

was his duty to attend to the tow to see what might be needed to provide for the change of intention. It is not to be supposed that the scow would have consented to leave Verplanck's Point without an anchor; had it been known that she was to ride out the night at the rendezvous. On going to the tow and upon finding that the tow had no anchor, the tug should have taken her to a less exposed place, if this were possible; and that this was easily possible between 8 and 9 p. m., and that the tug could with reasonable skill have taken No. 31, the only boat needing help, to the southward of Verplanck's Point, only one and one-half miles distant, as the captain says, I have no doubt, notwithstanding the denials, direct or equivocal, of several of the respondent's witnesses. The services of the Mabel and the Ingalls, both of them much smaller tugs than the Townsend, between those hours, are sufficient proof of this.

The duty of the tug to arrange for anchoring the boats separately so as to ride out the storm whenever the weather is so bad as not to permit starting, is testified to directly by Wyant, the pilot of the tug Ingalls, which was employed in bringing boats to the rendezvous. He says:

"If there is a storm when we take them off, we don't put them together, but we have always bunched them up together when the weather permitted. Q. When there is a storm what do you do? A. We anchor them. Q. Separately? A. Yes, if it is so that we can't put them together, we anchor them separately."

The alleged custom that the boats must look out for themselves after being once taken to the rendezvous, without any attention from the tug, or communication from her, notwithstanding any change in intention by the tug as to the time of starting, rests upon much too feeble and uncertain testimony to be accepted as discharging the tug from her ordinary duty of reasonable attention to the tow. It is opposed to the testimony of Wyant just quoted; and if better supported, would, I think, be so unreasonable as not to be admitted. If in bad weather it was the business of the tug to anchor each boat separately on taking her to the rendezvous, the tug would have had no right to take and leave her there in such weather without an anchor; and evidently, therefore, if the tug had taken her there previously without knowing whether she had an anchor or not, and bad weather intervened so as to prevent starting as expected, it was the tug's duty on the necessary change becoming known, to attend the tow and make such provision as was in her power for the changed conditions. This general duty has been frequently enforced in this court. *Connolly v. Ross* (D. C.) 11 Fed. 342; *The Governor* (D. C.) 77 Fed. 1000; *Hughes v. Railroad Co.* (D. C.) 93 Fed. 510; *The Elmira*, 23 Int. Rev. Rec. 338, 8 Fed. Cas. 577.

For the neglect of this obligation the tug is also to blame, and the damages and costs must therefore be divided.

## ST. CLAIR COUNTY V. INTERSTATE SAND &amp; CAR TRANSFER CO.

(Circuit Court of Appeals, Seventh Circuit. October 9, 1901.)

No. 798.

## CIRCUIT COURT OF APPEALS—JURISDICTION—CONSTITUTIONAL QUESTIONS.

Where the sole question arising on a writ of error to review a judgment of a circuit court is whether a state statute is in contravention of the constitution of the United States the circuit court of appeals is without jurisdiction.

In Error to the Circuit Court of the United States for the Southern District of Illinois.

Charles W. Thomas, for plaintiff in error.

Edward C. Kramer, John F. Lee, and George R. Lockwood, for defendant in error.

Before JENKINS and GROSSCUP, Circuit Judges, and SEAMAN, District Judge.

PER CURIAM. The plaintiff in error brought suit to recover certain penalties aggregating \$240,000, being \$3 per car for 80,000 railroad cars carried over the Mississippi river on a ferry maintained by the defendant in error between the city of St. Louis, in the state of Missouri, and the city of East St. Louis, in the county of St. Clair, in the state of Illinois, upon the ground that the defendant in error had failed to procure from the plaintiff in error a license to maintain and operate such ferry, pursuant to the requirements of an act entitled "An act to revise the law in relation to ferries," in force July 1, 1874 (Starr & C. Ann. St. Ill. c. 55). The court below sustained a demurrer to the declaration, holding the act of the legislature to be repugnant to the constitution of the United States. 109 Fed. 741. From final judgment sustaining the demurrer and dismissing the suit a writ of error is sued out from this court to review the judgment.

The sole question arising and presented for consideration goes to the validity of the statute of the state of Illinois. It is claimed upon the one hand and denied upon the other that this statute is in contravention of the constitution of the United States. We are without authority to determine the question. The fifth section of the act creating the circuit court of appeals (26 Stat. 826, c. 517) provides that in such cases a review can only be had in the supreme court. *Holt v. Manufacturing Co.*, 25 C. C. A. 301, 80 Fed. 1, and cases cited; *Ex parte Lennon*, 150 U. S. 393, 399, 14 Sup. Ct. 123, 37 L. Ed. 1120; *Osborne v. Florida*, 164 U. S. 650, 656, 17 Sup. Ct. 214, 41 L. Ed. 586; *Penn Mut. Life Ins. Co. v. City of Austin*, 168 U. S. 685, 694, 18 Sup. Ct. 223, 42 L. Ed. 626; *Town of Westerly v. Westerly Water Works*, 22 C. C. A. 278, 76 Fed. 467.

The writ of error is dismissed.

## HEAD v. SELLECK et al.

(Circuit Court, D. Connecticut. September 26, 1901.)

No. 502.

## REMOVAL OF CAUSES—TIME FOR FILING PETITION—CONNECTICUT STATUTES.

Under the decisions of the supreme court that the time for filing a petition for removal is limited by the time for filing dilatory pleas to the jurisdiction of the court or in suspension or abatement of the particular suit, and the rule of the Connecticut state courts that all pleas in abatement must be filed on or before the opening of the court on the day following the return day of the writ, it is the settled rule in that district that a petition for removal must ordinarily be filed by that day. But Gen. St. § 1251, provides that in cases of foreign attachment, where the defendant is a nonresident of the state and does not appear, the cause shall be continued for three months from the return day, unless the court shall find that defendant or his agent or attorney had actual knowledge of the suit 12 days before the return day, subject, however, to the further limitation that the continuance shall terminate 12 days after such actual notice is received, as found by the court. *Held*, that in such case, conceding that a defendant would have the right to file a plea in abatement or a petition for removal after the return day, such right terminates 12 days after he has actual notice of the suit, and that, where the record shows such notice or knowledge more than 12 days before the filing of his petition, the cause cannot be removed.

On Motion to Remand to State Court.

Tweedy, Scott & Whittlesey and Beach & Fisher, for plaintiff.

H. W. Taylor, for defendants.

TOWNSEND, District Judge. This action was brought by foreign attachment against nonresident defendants in the state court. The garnishee was served on August 22, 1900, and the writ was returned on the first Tuesday of September. Defendants' petition for removal does not allege ignorance of the pendency of the action before the return day. They were not personally served with notice, and did not appear at that time. On October 10, 1900, the bond on petition to remove was executed by defendants, and on November 12, 1900, the counsel for defendants filed said petition for removal to this court, which was allowed.

It is settled in this district by the decisions of the federal and state courts that the time for removal of a cause in this district ordinarily expires at the opening of the court on the day after the return day of the writ. *Security Co. v. Pratt*, 65 Conn. 161, 32 Atl. 396; *Collins v. Stott* (C. C.) 76 Fed. 613. This conclusion follows from the rule of the state court that "all pleas in abatement must be filed on or before the opening of the court on the day following the return day of the writ," and from the decisions of the supreme court that the time to file a petition for removal is limited by the time for filing "dilatory pleas to the jurisdiction of the court, or in suspension or abatement of the particular suit." *Martin v. Railroad Co.*, 151 U. S. 673, 14 Sup. Ct. 533, 38 L. Ed. 311; *Goldey v. Morning News*, 156 U. S. 524, 15 Sup. Ct. 559, 39 L. Ed. 517.

Plaintiff contends (and defendants accept his contention) that the rule in Connecticut as to time of filing pleas in abatement applies to

cases where defendant has no actual notice of the pendency of the action, and that therefore no plea in abatement could be filed in this case after the opening of the court following the first Tuesday of September. Plaintiff further contends that the expiration of the time for filing the plea in abatement absolutely cuts off the right of removal to the United States court. Defendants insist that it cannot be so that a defendant may lose his right of removal while ignorant of the proceeding, and that, inasmuch as they never had opportunity to file a plea in abatement, the first pleading which they are required to file, within the meaning of the statute, is an answer or demurrer. The rule of pleading applying to answers or demurrers provides that they shall be filed within 30 days from the return day, but "this rule shall not be applied to causes which are continued on account of the absence of the defendant from the state"; and the defendants rely on the following provision of the statutes of Connecticut:

"If the defendant does not appear, any garnishee may be admitted to defend his principal; but, if the defendant is not in this state, and does not appear by himself or his attorney, and the garnishee does not appear to defend, the action, if in the superior court, shall be continued for three months from the date on which the writ is returnable," etc. Gen. St. § 1251.

Plaintiff says that this continuance is not made until after the second opening of the court, because it is uncertain until that time whether or not defendant will appear, and that at that time the right to plead in abatement ceases. The continuance, however, is for three months from the date on which the writ is returnable. The continuance apparently relates back to the moment of the case coming into court. In the absence of any decision in the state courts, it ought not to be held that a defendant who has no knowledge whatever of the bringing of a suit waives the right to plead to the jurisdiction, or to plead such matters as infancy, coverture, or nonjoinder. In *Goldey v. Morning News*, supra, it was held that a defendant might remove a case, and then be heard on a plea to the jurisdiction, but this right would be wholly unavailable if such plea could be waived through ignorance of the statute. In case of the continuance for three months, as that statute originally stood, it must be presumed that the court would have held that the defendant, on appearing at that time, might, as matter of right, plead to the jurisdiction or in abatement; but this section was modified by chapter 36 of 1889, which reads as follows:

"The provisions of sections 904 and 1251 of the General Statutes shall not apply to any case in which the court shall find that a defendant, or his duly authorized agent or attorney, has had actual notice of the institution of the case twelve days before the return day thereof, and any continuance of the case ordered or required, under the provisions of said section, shall terminate twelve days after the absent or non-resident defendant, or his duly authorized agent or attorney, shall have received actual notice of the pendency thereof as found by the court."

Defendants claim that there must be an actual finding by the court of the fact of notice before the continuance terminates, and that, as there was no such finding up to the time of their appearance, they could then file their motion. Under this rule, if plaintiff can at any time prove that defendants had actual notice of the suit more than

12 days prior to the time of such proof, with the added day for appearance, he would undoubtedly be entitled to a default; and, on the same principle, it should be held that an absent defendant, learning of a suit against him, should consider the return day thereof as coming 12 days after the receipt of such information, and should plead in abatement, if he desires so to do, before the next opening of court from that time. Applying this principle, it is certain on the face of the pleadings that defendants knew of the pendency of this action at least as early as October 10, 1900. They should, therefore, have entered their appearance on or before October 22, 1900, and should have filed their petition for removal on or before the opening of court on October 23, 1900. If, as is probable, they had actual notice of the action 12 days prior to the return day, it should have been filed on or before the second opening. The question is suggested (not necessary now to be decided) whether in a case like the present the petition for removal should not allege ignorance of the pendency of the action. The motion to remand is granted.

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E. A. CHATFIELD CO. et al. v. CITY OF NEW HAVEN et al.

(Circuit Court, D. Connecticut. October 7, 1901.)

No. 1,057.

1. JURISDICTION OF FEDERAL COURTS—FEDERAL QUESTION.

A suit by private parties to enjoin the maintenance of a bridge across a navigable river, which is wholly within a state, from which complainants allege they suffer special injury, on the ground that such bridge has been declared by the secretary of war, acting under the provisions of a federal statute, to constitute an unreasonable obstruction to navigation, and that it is therefore a public nuisance, is one arising under the laws of the United States, of which a federal court has jurisdiction, without regard to the citizenship of the parties.<sup>1</sup>

2. NAVIGABLE WATERS—STATUTE FOR REGULATION OF BRIDGES—CONSTITUTIONALITY.

Section 18 of the river and harbor act of 1899 (30 Stat. 1153) authorizes the secretary of war to determine, after notice to the parties, whether any bridge which has been constructed over any of the navigable water ways of the United States is an unreasonable obstruction to the free navigation of such waters, and if he so determines to notify the parties owning or controlling such bridge to so alter the same as to render navigation through or under it reasonably free, easy, and unobstructed, within a reasonable time, which he shall prescribe. It further provides that if, at the end of such time, the alteration has not been made, the parties owning or controlling such bridge, who willfully fail or refuse to remove the same or to comply with the order of the secretary, shall be deemed guilty of a misdemeanor, and shall be prosecuted therefor. *Held*, that such provision is not unconstitutional, as delegating legislative or judicial power to the secretary of war, but that the power conferred upon him was administrative; a judicial proceeding in the courts being expressly provided for to enforce his orders, in which the legality of his action may be reviewed, and any rights of the defendants may be raised and determined.

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<sup>1</sup> Jurisdiction in cases involving federal questions, see notes to *Bailey v. Mosher*, 11 C. O. A. 308; *Montana Ore-Purchasing Co. v. Boston & M. Consol. Copper & Silver Min. Co.*, 35 C. C. A. 7.

**3. JURISDICTION OF FEDERAL COURTS—ABATEMENT OF NUISANCE—OBSTRUCTIONS TO NAVIGATION.**

No special statute is required to give a federal court of equity jurisdiction of a suit by private parties, who allege special injury, to enjoin the maintenance of a bridge over navigable waters, on the ground that it is maintained in violation of the laws of the United States, and is therefore a public nuisance, but such suit is within the general equity jurisdiction of the court, where the requisite amount is involved.

**4. PUBLIC NUISANCE—PRIVATE SUIT FOR INJUNCTION—ALLEGATION OF SPECIAL INJURY.**

A bill which alleges that complainant owns and operates a manufacturing plant situated on a navigable river, that it owns and operates vessels for the transportation of its products from its factory by water, and that defendants maintain a bridge across such river in violation of the laws of the United States, which constitutes a public nuisance, and which prevents the passage of complainant's vessels to and from its works, and makes it necessary to transship its products, shows special injury which will sustain a suit to abate the nuisance.

In Equity. On demurrer to bill.

F. L. Hungerford and M. M. Johnson, for complainants.

Leonard M. Daggett, James H. Webb, and S. C. Morehouse, for defendants.

SHIPMAN, Circuit Judge. The bill in equity in this case alleged as follows:

"That the plaintiffs the E. A. Chatfield Company and the Derby Transportation Company are, and during all the time hereinafter mentioned were, corporations organized and existing under and by virtue of the laws of the state of Connecticut. \* \* \* That the plaintiffs Nathan A. Hull, Harold H. Howard, and Gertrude F. Howard, all of New Haven, at all times hereinafter mentioned were, and now are, citizens of the state of Connecticut. That the defendants, the city of New Haven and the town of Orange, are, and during all the time hereinafter mentioned were, municipal corporations, organized and existing under and by virtue of the laws of said state of Connecticut. That the West river is a navigable stream, which empties into Long Island Sound, and which for a long distance flows between the city of New Haven and the town of Orange, aforesaid, and that its waters are navigable from its mouth to a distance of several miles towards its source. That the plaintiff the E. A. Chatfield Company is the owner of a large tract of riparian property on said West river above the purpresture and nuisance hereinafter referred to, upon which property it has a large manufactory, where the plaintiff is engaged in the manufacture and sale of fire bricks, pressed-front bricks, and other mason's supplies in large quantities. That the plaintiffs the Derby Transportation Company, Nathan A. Hull, Harold H. Howard, and Gertrude F. Howard are the owners of vessels registered in accordance with the laws of the United States, engaged in navigating said West river from and to the works of the said E. A. Chatfield Company, in carrying from said works the products of said company, and in carrying to said works the supplies for use therein. That all the plaintiffs are engaged in interstate and domestic commerce in navigating the said West river from its mouth to a considerable distance above the bridge hereinafter referred to. That the said defendants, for a period of many years last past, have maintained, and continue to maintain, an obstruction in the navigable waters of said river near where it empties into Long Island Sound, as aforesaid, such obstruction consisting of a bridge at Kimberly avenue, so called, of the town of Orange, aforesaid, across said West river between said New Haven and said Orange. That said bridge is an unreasonable obstruction to the free navigation of the said West river, which is one of the navigable water ways of the United States, on account of the bridge not being provided with a draw, and is both a purpresture and a nuisance. That the



plaintiffs, by reason of said obstruction, have been prevented from reasonable navigation of said river, as aforesaid, in suitable vessels for the carrying on of said navigation. That they could and can not, in a reasonably free, easy, and unobstructed manner, carry their merchandise by the said navigable way above said obstruction, but have been and are forced to transship the same to smaller vessels. That they have been and are forced to carry some of said merchandise by a longer and more difficult way, to wit, by land. That they have been compelled, at great labor and expense, to construct vessels specially adapted, so that such vessels might be able, under favorable conditions, to pass through and by said obstruction, but which are unsuitable for general navigation, and that the plaintiffs have further been greatly delayed, hindered, and impeded in said navigation, whereby the plaintiffs have been severally damaged, as aforesaid, to an amount many times in excess of two thousand dollars (\$2,000). That the said defendants have not, nor have either of them, obtained permission of the secretary of war of the United States to construct or to maintain said obstruction, and the said obstruction is maintained without the permission of the said secretary of war, and is continued in the said navigable stream aforesaid without his consent. That the said secretary of war on October 4, 1899, upon due notice to the defendants and upon hearing, entered the following order, to wit:

"Whereas, the secretary of war has good reason to believe that the bridge at Kimberly avenue, of the town of Orange, Connecticut, is an unreasonable obstruction to the free navigation of the said West river (which is one of the navigable water ways of the United States), on account of the bridge not being provided with a draw; and whereas, the following alterations, which have been recommended by the chief of engineers, are required to render navigation under it reasonably free, easy, and unobstructed, to wit, "Provide said bridge with a draw having a clear width of opening of forty-five feet at any stage of water, measured perpendicularly to the direction of the current, and having its masonry piers carried to twelve feet below the plane of mean low water;" and whereas, one year from the date of service of this notice is a reasonable time in which to alter said bridge as described above: Now, therefore, in obedience to, and by virtue of, section eighteen of an act of the congress of the United States entitled "An act making appropriations for the construction, repair and preservation of certain public works on rivers and harbors, and for other purposes," approved March 3, 1899, I, Elihu Root, secretary of war, do hereby notify the said selectmen of the city of New Haven, and the selectmen of the town of Orange, Connecticut, to alter the said bridge as described above, and prescribe that said alteration shall be made and completed on or before one year from the date of service hereof.

Elihu Root, Secretary of War."

"That due service of said order has been made on the defendants, much more than one year prior to the bringing of this bill, but the defendants have not complied with said order in any respect, but continue to maintain the said obstruction as it existed prior to and at the time of said order, contrary to the express terms thereof. That the construction and maintenance of said obstruction is a violation of the laws of the United States, particularly of 'An act making appropriations for the construction, repair, and preservation of certain public works on rivers and harbors and for other purposes,' approved March 3, 1899. \* \* \*"

—And prayed for a permanent injunction against the further continuance of the said obstruction or any part of said bridge which obstructs navigation, and cause the same to be removed so as to render navigation through said bridge reasonably free, easy, and unobstructed, in accordance with the order of the secretary of war aforesaid. The defendants have demurred to the bill on the ground that it does not present a case of which this court has jurisdiction, and does not state a case which entitles the complainants to any relief.

Inasmuch as both complainants and defendants are citizens of Con-

necticut, if the court has jurisdiction it is because the suit arises under the laws of the United States. West river is wholly within the state of Connecticut. The bridge which is the subject of controversy was erected by the defendants either by the authority or by the assent of the state of Connecticut, and the United States had taken no statutory action in regard to this bridge prior to the year 1899. It is conceded that "there must be a direct statute of the United States in order to bring within the scope of its laws obstructions and nuisances in navigable streams within a state." *Bridge Co. v. Hatch*, 125 U. S. 1, 8 Sup. Ct. 811, 31 L. Ed. 629. In the year 1888 a section of the river and harbor bill was directed to the prevention, to a certain extent, of injuries to the navigation of the navigable waters of the United States arising from the piers of bridges over such waters, and statutes of a similar character continued to be passed, until in the river and harbor bill of 1899, approved March 3, 1899, a more careful series of statutes in regard to obstructions over navigable rivers was enacted than had previously been passed by congress. 30 Stat. 1151-1154. Section 9 prohibits the construction of any bridge over a navigable river of the United States without the consent of congress, provided that such structure may be built under the authority of the legislature of a state across navigable waters which are wholly within the limits of a single state, if the plans have been submitted to, and approved by, the secretary of war. Section 10 prohibits the creation of any obstruction not affirmatively authorized by congress to the navigable capacity of any waters of the United States. Section 18 is as follows:

"That, whenever the secretary of war shall have good reason to believe that any railroad or other bridge now constructed, or which may hereafter be constructed, over any of the navigable water ways of the United States is an unreasonable obstruction to the free navigation of such waters on account of insufficient height, width of span, or otherwise, or where there is difficulty in passing the draw opening or the draw span of such bridge by rafts, steamboats, or other water craft, it shall be the duty of the said secretary, first giving the parties reasonable opportunity to be heard, to give notice to the persons or corporations owning or controlling such bridge so to alter the same as to render navigation through or under it reasonably free, easy, and unobstructed; and in giving such notice he shall specify the changes recommended by the chief of engineers that are required to be made, and shall prescribe in each case a reasonable time in which to make them. If at the end of such time the alteration has not been made, the secretary of war shall forthwith notify the United States district attorney for the district in which such bridge is situated, to the end that the criminal proceedings hereinafter mentioned may be taken. If the persons, corporation or association owning or controlling any railroad or other bridge shall, after receiving notice to that effect, as hereinbefore required, from the secretary of war, and within the time prescribed by him wilfully fail or refuse to remove the same or to comply with the lawful order of the secretary of war in the premises, such persons, corporation, or association shall be deemed guilty of a misdemeanor, and on conviction thereof shall be punished by a fine not exceeding five thousand dollars, and every month such persons, corporation, or association shall remain in default in respect to the removal or alteration of such bridge shall be deemed a new offense, and subject the persons, corporation, or association so offending to the penalties above prescribed: provided, that in any case arising under the provisions of this section an appeal or writ of error may be taken from the

district courts or from the existing circuit courts direct to the supreme court either by the United States or by the defendants."

On October 4, 1899, the secretary of war, after reasonable notice to the defendants and after a hearing, made the order recited in the bill, which has neither been modified nor complied with.

Inasmuch as the bridge as it still exists has been declared by the secretary of war, under the provisions of this section, to be an unreasonable obstruction to the free navigation of West river, which is one of the navigable waters of the United States, and therefore is a public nuisance, the complainants, who present themselves as suffering "a particular private injury other than the common injury which every citizen suffers from a public nuisance," bring a bill in equity to abate the obstruction because it exists in violation of the laws of the United States. If section 18 is a valid statute, it appears, *prima facie* at least, that New Haven and Orange are continuing to maintain a bridge over navigable waters, which is, in its present form, in violation of a law of the United States. The right of private parties to invoke the aid of the courts of the United States to prevent this unreasonable obstruction to navigation, which produces an especial injury to them depends upon the effect which may be given to this statute. It is therefore a case arising under the laws of the United States, and this court has jurisdiction to determine whether the bill has stated a cause of action which entitles the complainants to relief. *Water Co. v. Keyes*, 96 U. S. 199, 24 L. Ed. 656; *Tennessee v. Davis*, 100 U. S. 257, 25 L. Ed. 648; *Railroad Co. v. Mississippi*, 102 U. S. 135, 26 L. Ed. 96.

The two objections which are urged against the statute are that it is unconstitutional, and that, if valid, its effect is limited to a criminal prosecution by the United States against the defendants.

Its unconstitutionality is asserted upon the ground that it delegated to the secretary of war either judicial or legislative power, and this position was sustained in respect to section 9 of the river and harbor bill of 1888, a statute of different provisions, in a case involving peculiar circumstances, in *U. S. v. Keokuk & H. Bridge Co.* (D. C.) 45 Fed. 178. A similar opinion was expressed, *obiter*, in *U. S. v. Rider* (D. C.) 50 Fed. 406. Section 4 of the act of 1890, which is substantially like section 18 of the act of 1899, came before Judge Grosscup in *U. S. v. City of Moline* (D. C.) 82 Fed. 592, in an information by the United States against the city of Moline, and the constitutionality of the act was assailed. In the opinion of the court, a distinction properly exists between judicial and administrative questions, and it is said with force that, if congress is prohibited from submitting to the decision of the departments administrative questions which are constantly arising, the government would be clogged. The court says:

"In this case two questions alone arise: First. Is the bridge an obstruction to navigation? Second. Is it there by any such legal right that the government may not interfere with it in the respect designated without just compensation? The first question is purely administrative, and is one that congress can certainly delegate to the secretary of war. A thousand ques-

tions of equal moment to the parties interested, and of equal difficulty, are necessarily delegated to the great departments of the government every month. In the very nature of things, congress cannot dispose of them. A government of the size of this, operated upon such a conception, would be clogged immediately. The second question is, undoubtedly, judicial, and for that very reason is not subject, constitutionally, to the decision of congress any more than of the secretary of war. If the bridge be there by legal right,—if it be a franchise or property that cannot be taken except after just compensation,—congress is powerless, either by special or general acts, to touch it. In the face of such property right, congress is as helpless as the war department. In the end, such right, whether it be attacked by special act of congress, or by some action of the war department, will, through some channel, find an appeal to the judiciary. This right of appeal to the judiciary in all questions in their nature judicial is preserved in the sections of the statute under discussion. The secretary of war has no power to carry out his decisions respecting these obstructions except through a court. Any question, whether of law or fact, essentially judicial, may be raised under these informations. A court of the United States stands always, by the clear provisions of the act, between the decision of the secretary and its execution. There is, therefore, in the act, no delegation of judicial power to the secretary that is not open to review in the courts. I hold, therefore, that the act, so far as it is applicable to the case in hand, is constitutional and valid, and the motion to quash will be overruled."

It is apparent that the section does not delegate to the secretary all the power of congress in regard to the construction of bridges over navigable waters, and to declare where bridges shall be built, but it delegates the power only to determine whether an existing bridge is an unreasonable obstruction to navigation, and to direct the manner in which the injury can be obviated. *Lake Shore & M. S. R. Co. v. Ohio*, 165 U. S. 365, 17 Sup. Ct. 357, 41 L. Ed. 747. I see no adequate reason to differ from the views of Judge Grosscup in regard to the construction of the section in question.

The next point is that, as the section does not authorize a suit in favor of private parties, no such authority exists. The question is not whether authority exists to bring an action in the district court in behalf of individuals, or whether authority is given to the attorney general to bring a bill in equity in behalf of the United States. It is conceded that such authority must be expressly conferred. But jurisdiction has always existed in the circuit court to have cognizance of suits of a civil nature between individuals which arise out of the laws of the United States when the matter in dispute exceeds a specified sum, and, if a cause of action has thus arisen, no further or more specific authority is requisite.

It has not been questioned that if congress had authorized the construction of a bridge over navigable waters, in accordance with plans approved by the secretary of war, or by a named board of engineers, and the bridge should be constructed in such defiance of the approved plans as to obstruct navigation, that a bill in equity in behalf of an individual specially injured by such obstruction against the corporations which are constructing the bridge could be sustained in the circuit court upon the ground that the structure is in violation of the laws of the United States. *Miller v. New York*, 13 Blatchf. 469, Fed. Cas. No. 9,585. The bill in this case is based upon the ground that after the construction of the bridge without the au-

thority of the United States it was found, in pursuance of an act of congress, to be an unreasonable impediment to navigation, and that the hindrance had not been removed.

It is next said that the bill does not show that the complainants had suffered a damage special and peculiar to themselves, and that the inconvenience was not of a character which was common to the public generally, and that, therefore, the bill did not show a case sufficient for their individual relief. It is true that "relief will not be granted unless it appears that the party complaining will sustain a special or peculiar damage,—an injury distinct from that done to the public at large." *Frink v. Lawrence*, 20 Conn. 117, 50 Am. Dec. 274. And it is also true that the courts of Connecticut have required that the special injury should clearly appear, but the special injury to the Chatfield Company, at least, is sufficiently averred in the bill. *Frink v. Lawrence*, *supra*; *Stetson v. Faxon*, 19 Pick. 149, 31 Am. Dec. 123.

The demurrer is overruled, without costs, with leave to answer on or before October 19, 1901.

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#### WARD v. FRANKLIN et al.

(Circuit Court, N. D. New York. September 24, 1901.)

No. 3,391.

#### REMOVAL OF CAUSES—SEPARABLE CONTROVERSY—JOINT ACTION FOR TORT.

An action against a number of defendants to recover damages for assault and false imprisonment, charged in the complaint to have been committed by certain of the defendants at the instigation of another defendant, through her agent, is one to enforce a joint liability for the tort, and is not removable by the last-named defendant, on the ground that as to her it involves a separable controversy.<sup>1</sup>

At Law. On motion to remand to state court.

B. & C. B. Johnson, for the motion.

William H. Harris, opposed.

COXE, District Judge. This action was brought in the supreme court of the state of New York, the venue being laid in Delaware county. The defendant Louisa M. Gerry, who is a citizen of Rhode Island, removed the cause to this court upon the ground that there is a separable controversy as to her. All of the other defendants, seven in number, are citizens of New York. The plaintiff now moves to remand.

The act of March, 1887-88, provides that

"When in any suit mentioned in this section there shall be a controversy which is wholly between citizens of different states and which can be fully determined as between them, then either one or more of the defendants actually interested in such controversy may remove said suit into the circuit court of the United States for the proper district." 25 Stat. 433.

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<sup>1</sup> Separable controversy as ground for removal, see notes to *Robbins v. Ellenbogen*, 18 C. C. A. 86, and *Mecke v. Mineral Co.*, 35 C. C. A. 155.

The plaintiff and the defendant Louisa M. Gerry are citizens of different states and the only question, therefore, is whether there is a controversy which can be fully determined as between them. The question is still further narrowed by the concession of the defendant Gerry that if the liability of the defendants can be construed as a joint liability the cause cannot be removed even though the plaintiff might have elected to pursue the defendants separately. *Railroad Co. v. Dixon*, 179 U. S. 131, 21 Sup. Ct. 67, 45 L. Ed. 121. In determining the nature of the controversy recourse must be had to the complaint. The cause of action is what the plaintiff declares it to be. *Powers v. Railroad Co.*, 169 U. S. 92, 18 Sup. Ct. 264, 42 L. Ed. 673. The complaint alleges that the defendants, other than Louisa M. Gerry and George W. Youmans, conspiring together, committed an assault upon the plaintiff on lands owned by the defendant Gerry, and subsequently falsely arrested and imprisoned the plaintiff and extorted money from him by threats and violence to his damage in the sum of \$10,000. It is alleged, further, that the assault and false imprisonment were pursuant to the directions of the defendant Gerry, acting by and through the defendant George W. Youmans, who employed and paid the other defendants to go upon the lands of the defendant Gerry and assault, arrest and imprison the plaintiff, and that the other defendants were the servants and agents of the defendant Gerry acting under instructions from her and the defendant George W. Youmans. The pleader evidently intended to state a cause of action against the defendants jointly for assault and false imprisonment, and it is thought he has succeeded in doing so. The complaint bears evidences of having been hurriedly drawn, but it alleges a conspiracy in which all the defendants were engaged, though in different capacities. The actual assault was made by the six defendants first named in the complaint, but they were incited to commit their unlawful acts by the defendant George W. Youmans who was there as the agent of the defendant Gerry to see that her wishes were carried out and her orders obeyed. After describing the various transactions of the 19th and 20th of April, 1901, the complaint proceeds as follows:

"That the plaintiff was by these defendants in the manner aforesaid \* \* \* imprisoned and deprived of his liberty," etc.

A clause of the complaint marked "second" alleges that the plaintiff

—"Was arrested and imprisoned by the orders and directions of the defendant Louisa M. Gerry acting by and through the defendant George W. Youmans, \* \* \* and that whatever was done by the other defendants \* \* \* was done \* \* \* pursuant to directions and instructions from her and the defendant George W. Youmans."

It would seem that under these averments it is possible for the plaintiff to prove that the assault and imprisonment were with the concurrence and express direction of the defendant Louisa M. Gerry, and that the plaintiff's injuries were received by the joint wrongdoing of the defendants. It matters not that on the trial facts may develop which may exculpate the defendant Gerry, the question must be de-

terminated by what is alleged in the complaint, not what may be proved hereafter.

The cause should be remanded upon the following authorities: Railroad Co. v. Ide, 114 U. S. 52, 5 Sup. Ct. 735, 29 L. Ed. 63; Pirie v. Tvedt, 115 U. S. 41, 5 Sup. Ct. 1034, 1161, 29 L. Ed. 331; Torrence v. Shedd, 144 U. S. 527, 12 Sup. Ct. 726, 36 L. Ed. 528; Fox v. Mackay (C. C.) 60 Fed. 4; Charman v. Railroad Co. (C. C.) 105 Fed. 449. In Pirie v. Tvedt, supra, the court uses the following language, which is applicable to the case at bar:

"There is here, according to the complaint, but a single cause of action, and that is the alleged malicious prosecution of the plaintiffs by all the defendants acting in concert. The cause of action is several as well as joint, and the plaintiffs might have sued each defendant separately, or all jointly. It was for the plaintiffs to elect which course to pursue. They did elect to proceed against all jointly, and to this the defendants are not permitted to object. The fact that a judgment in the action may be rendered against a part of the defendants only, does not divide a joint action in tort into separate parts any more than it does a joint action on contract."

The motion to remand is granted.

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#### In re OLESON.

(District Court, N. D. Iowa, W. D. October 8, 1901.)

#### 1. BANKRUPTCY—ASSETS—RENTAL OF EXEMPT PROPERTY.

Notes taken by a bankrupt after adjudication, for the future rental of land which is exempt, do not constitute assets of his estate in bankruptcy.

#### 2. SAME—REVOCATION OF DISCHARGE—REQUISITES OF APPLICATION.

Where a mortgage given by the bankrupt, covering substantially all his personal property, was shown by his schedules, but its validity was not questioned by any creditor during the pending of the case, and until nearly a year after the bankrupt's discharge, the court is not justified in then entertaining a petition for the revocation of the discharge, on the ground that such mortgage was fraudulent, unless it is made clear that the creditor filing it has not been guilty of laches; and that cannot be done by general averments of conclusions, to the effect that he has not been guilty of negligence, or has acted with due diligence.

In Bankruptcy. On petition asking an order setting aside the discharge granted the bankrupt.

E. M. Sayles, for creditor.

SHIRAS, District Judge. The discharge granted the bankrupt, and which it is now sought to set aside, is dated November 5, 1900. The petition seeking its revocation was filed October 5, 1901, and is based upon the allegation that the bankrupt had concealed from his creditors certain personal property, consisting of notes for \$400 held by the bankrupt for the rental of 160 acres of land, entered by the bankrupt under the homestead laws of the United States, and by him claimed to be exempt from execution, and certain articles of personal property covered by a chattel mortgage for \$1,700 executed by the bankrupt to his father on the 1st day of March, 1900, which was duly recorded, and was set forth in the schedules filed by the bankrupt.

The notes for the rent of the realty were not given until after the adjudication in bankruptcy, nor was the land rented to the lessee until after the adjudication. The right to hold the land as exempt is not questioned, and, if it be true that it was and is exempt, I can see no ground for holding that the rental therefor contracted for and accruing after the adjudication belongs to the creditors.

It is also charged that the chattel mortgage to the father is void as to creditors, being given without consideration. The existence of this mortgage was shown on the schedules attached to the petition in bankruptcy, but it was not attacked in any way. The creditor took no action for the purpose of investigating its validity, but permitted the case to proceed to a final conclusion without raising any question about this mortgage, and now, after the lapse of 11 months from the granting the discharge, asks the court to revoke the discharge, on the ground that this mortgage was without consideration, and given in fraud of creditors. Section 15 of the bankrupt act authorizes the revocation of a discharge upon the application of parties in interest who have not been guilty of undue laches, the application to be filed within one year from its date. The creditor avers that the knowledge of the concealment of the property of the bankrupt had come to the petitioner since the discharge was granted, and that petitioner has not been guilty of undue laches in bringing this proceeding. It is not shown that the creditor has used any diligence whatever, in the premises, nor what facts, if any, have been discovered to show the invalidity of the mortgage, nor how or when these facts were discovered, which are relied upon to prove the invalidity of the mortgage. It is apparent that if the court should approve the practice of allowing a creditor to attack a discharge, months after its date, without making any substantial showing of facts to prove the absence of undue laches, it would open the door to unfair attacks upon the bankrupt on the part of single creditors, who would hope to force payment to them, in order to avoid the cost and possible injury to the bankrupt, who may have entered into new business pursuits, which would be seriously affected if the question of his liability on the debts barred by the discharge were to be reopened. When, as in this case, the existence of the mortgage now claimed to be fraudulent was shown in the original schedules, and the creditors do not question its validity during the pendency of the case, and the discharge is granted, the court will not be justified in entertaining a petition for the revocation of the discharge, unless it is made clear that the creditor has not been guilty of laches; and that cannot be done by general averments of mere conclusions to the effect that the party has not been guilty of negligence, or has acted with due diligence. The rule that should be followed is stated by the supreme court in *Wood v. Carpenter*, 101 U. S. 135, 25 L. Ed. 807, wherein the general subject of laches in connection with the plea of the statute of limitations is discussed, it being therein said:

"It will be observed also that during the long period over which the transaction referred to extended the plaintiff never made or caused to be made the slightest inquiry in relation to either of them. The judgments confessed were of record, and he knew it. It could not have been difficult to



ascertain, if the facts were so, that they were shams. The conveyances to Alvin & Keller were also on record in the proper offices. If they were in trust for the defendant, as alleged, proper diligence could not have failed to find a clew in every case that would have led to evidence not to be resisted. With the strongest motives to action, the plaintiff was supine. If underlying frauds existed, as he alleges, he did nothing to unearth them. It was his duty to make the effort. \* \* \* The discovery of the cause of action, if such it may be termed, is thus set forth: 'And the plaintiff further avers that he had no knowledge of the facts so concealed by the defendant until the year A. D. 1872, and a few weeks only before the bringing of this suit.' There is nothing further upon the subject. In this class of cases the plaintiff is held to stringent rules of pleading and evidence, 'and especially must there be distinct averments as to the time when the fraud, mistake, concealment, or misrepresentation was discovered, and what the discovery is, so that the court may clearly see whether, by ordinary diligence, the discovery might not have been made before.' *Stearns v. Page*, 7 How. 819-829, 12 L. Ed. 928, 932. A general allegation of ignorance at one time and of knowledge at another is of no effect. If the plaintiff made any particular discovery, it should be stated when it was made, what it was, how it was made, and why it was not made sooner. \* \* \* Whatever is notice enough to excite attention, and put the party on his guard, and call for inquiry, is notice of everything to which such inquiry might have led."

There is apparent in the practice under the bankrupt act a tendency, on part of creditors, to take no action in the case until the matter of discharge is reached, and then to rely upon matters which should be investigated during the prior proceedings. The act provides ample means for ascertaining the facts touching the property of the bankrupt and the validity of liens asserted against the same. Take the case now before the court for an illustration. It is now sought to set aside the discharge on the ground that the chattel mortgage to the bankrupt's father is invalid for want of consideration. This mortgage was filed for record in the office of the county recorder on the 1st day of March, 1900. It was set forth in the schedules attached to the petition in bankruptcy, which was filed August 1, 1900. It is not shown that the creditors ever made any examination into its validity. They were content to let it pass, without examining the bankrupt or the mortgagee with respect thereto, and yet they knew that it covered substantially all the personal property of the bankrupt, and certainly were put upon notice if they purposed to question its validity. They took no action during the time the case was pending, and when the whole machinery of the act and of the bankruptcy court was open to them for investigating the validity of the mortgage. When the petition for discharge came up for hearing, it was not opposed by reason of the existence and alleged fraudulent character of this mortgage. The discharge was granted, and now, 11 months thereafter, it is sought to set aside the discharge, on the allegation that this mortgage was given without consideration and as a means for covering up the property of the debtor. No showing of facts is made explaining why the validity of this mortgage was not inquired into during the pendency of the proceedings. The evil that may result from allowing attacks upon the validity of a discharge months after it has been granted is apparent. The bankrupt, having received his discharge, will ordinarily engage in new business enterprises, and may become indebted to many persons, who, in good faith, extend credit to him in the belief that the discharge granted

bars the pre-existing indebtedness, and their rights will be seriously affected if the discharge is revoked and held for naught. Section 15 of the act authorizes the revocation of a discharge upon an application made within one year from its date, but it must appear that the creditor has not been guilty of undue laches, and that the fraud charged has come to the knowledge of the creditor after the granting of the discharge. The burden is on the petitioner to aver in his application the facts showing his freedom from laches, and, as ruled in *Wood v. Carpenter*, supra, it is not sufficient to make, in the application, general averment of conclusions. The facts must be stated, in order that the court, being advised thereof, may determine whether ground is shown for permitting an attack upon the discharge; for a court, in view of the effects to others, is not justified in entertaining an application to set aside a discharge, unless it is clearly made to appear that the creditor has not been guilty of laches in the premises.

The application in this case wholly fails to meet these requirements, is clearly insufficient, and must therefore be refused.

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SIMPSON v. UNION STOCK YARDS CO. OF OMAHA, Limited, et al.

(Circuit Court, D. Nebraska. September 23, 1901.)

No. 264.

1. JURISDICTION OF FEDERAL COURTS—STOCKHOLDER'S SUIT—COLLUSION.

A nonresident stockholder in a domestic corporation, who brings himself within equity rule 94 by showing demand on the corporation to refuse compliance with a state statute, and to contest its validity, and a formal refusal of the corporation by resolution of its board of directors, cannot be charged with being in collusion with the corporation to give a federal court jurisdiction of a suit brought to enjoin the enforcement of the statute, and compliance therewith by the corporation, where, among the principal grounds alleged against the validity of the statute, is that it is in violation of the constitution of the United States; such allegations raising a federal question, which gives the court jurisdiction of the suit, and to determine all the issues made therein, regardless of the citizenship of the parties, and whether brought by the stockholders or the corporation itself.

2. STATUTES—VALIDITY OF ENACTMENT—TITLE AS PART OF ACT.

Under the constitution of Nebraska, as construed by the supreme court of the state, the title to an act of the legislature is an essential part of it, and, to constitute a valid enactment, a bill must have passed each house, and have been signed by the governor, under the same title.

3. SAME—DETERMINING VALIDITY OF ENACTMENT—EVIDENCE.

A printed official statute must give way to, and be controlled by, the official enrollment, and both the official printed statute and the enrolled bill as filed with the secretary of state are controlled in case of dispute by the journals of the legislature.

4. SAME—APPROVAL UNDER DIFFERENT TITLE—NEBRASKA STOCK YARDS ACT.

The Nebraska act of 1897 (Laws 1897, c. 8), commonly known as the "Stock Yards Act" was passed by each house of the legislature under the title "A bill for an act to regulate stock yards and to fix the commission for the sale of live stock therein, and providing punishment for the violation thereof." When signed by the governor, as shown by the official enrollment, the bill bore the title "A bill for an act to regulate certain stock yards by declaring them public markets, and defining the duties of the person or persons operating the same, and regulating all

charges thereof, and providing penalties for the violation thereof." *Held*, that such act was not legally passed in conformity to the state constitution, and is void.

**5. INJUNCTION—SUIT TO RESTRAIN ENFORCEMENT OF STATUTE—DEFENSES.**

In a suit against the attorney general of a state to enjoin him from enforcing a legislative act as required by its provisions, on the ground of its invalidity, a denial by defendant of an intention to enforce such act, coupled with an assertion of its validity, states no defense and raises no issue. The court must presume that, if defendant regards the act as valid, he will perform his official duty, and enforce it.

In Equity. Suit to enjoin enforcement of a statute of Nebraska relating to stock yards.

J. M. Woolworth and W. D. McHugh, for complainant.

F. N. Prout, Atty. Gen., and Norris Brown, Asst. Atty. Gen., for respondent attorney general.

McPHERSON, District Judge. The complainant, a citizen of Massachusetts, is a stockholder of the defendant company, the Union Stock Yards Company, praying that both defendants, citizens of Nebraska, be enjoined from putting in force a statute of Nebraska of 1897, known as "Senate File No. 33." The complainant brings himself within the terms of equity rule 94, by showing that long prior to the date of the act of the Nebraska legislature he became the owner by purchase of his corporate stock of defendant company, and at all times since has owned it, in an amount something like \$80,000 par value, and of a still greater actual value. He alleges with particularity the fruitless effort he made to get the company to bring the action; and he alleges generally that there is no collusion between him and the company to confer jurisdiction upon this court. The bill further alleges that the alleged statute was never legally passed,—a point to be enlarged upon later. The alleged statute attempts to fix the rate for yardage and feeding of live stock at the company's yards at South Omaha, which complainant insists is illegal for two reasons: (a) The company is a private corporation, and is not engaged in a public business, and therefore its business is not subject to legislative control; (b) the rates fixed by the legislature are confiscatory. The defendant company makes no appearance. Atty. Gen. Smythe, by plea and answer, makes the following defenses:

1. That the action is the result of collusion between complainant and the company, so as to vest this court with jurisdiction. Briefly stated, the facts are as follows: Mr. Woolworth for several years had received annually a retainer from the company. The company opposed the passage of the act in question by the legislature, and tried to induce the governor to veto the measure. But in all this Judge Woolworth took no part. After the governor had signed the measure, a fellow stockholder wired complainant that his (complainant's) interest in the stock yards was in jeopardy because of the passage of the act. Complainant wired back to employ Judge Woolworth. Later on complainant and Judge Woolworth had a conference. Judge Woolworth accepted employment to oppose the enforcement of the alleged statute in question, and to do all needful

things to protect complainant and his New England friends, to whom he had sold the company's corporate stock. In obedience to his employment, and as was his duty, he served written notice upon the company to take steps to oppose and refuse compliance with the alleged statute. The company, by resolution, refused to comply with the demand, believing that the act was not a valid law, but, recognizing some doubt about it, could not afford, if mistaken, to be subjected to the large penalties. Thereupon this action was brought by complainant, by Judge Woolworth, as his solicitor. Out of all the evidence upon the subject but two facts can be mentioned as in the most remote degree tending to support the attorney general's plea. The one is that Judge Woolworth was annually retained by the company. It was to the interest of the company to have the statute held invalid by the courts. No doubt every stockholder desired that result. No doubt that every stockholder hoped that able counsel would be employed to defeat the statute. But the board of directors could thus desire, and still refuse to incur the penalties. After the action was brought, in due time, on appropriate proceedings, Judge Munger ordered a temporary injunction against respondents. While this was on complainant's motion, the result was to the benefit of every stockholder, and to the company as an entity. Shortly thereafter the company, recognizing the benefit it had received, paid Judge Woolworth for his services to that date. No other showing than this appears from the evidence; and this is not collusion, and is not in the slightest degree in contravention of the rule in equity. Aside from these facts, there could have been no collusion, because there can be no collusion without reason or motive, or to subserve some purpose. The company, although a corporation and citizen of Nebraska, could have brought this action in this court, as complainant, against the Nebraska citizens and officials. The right of the state to pass the act in question is a federal question, concerning which this court would take jurisdiction regardless of citizenship; and, taking jurisdiction by reason of the federal question, this court would also take jurisdiction of the question of whether the act was legally passed; and it would retain jurisdiction, and adjudicate that question, even though the federal question was held to be wholly without merit. All recognize the correctness of this. Therefore it is wholly immaterial whether Mr. Simpson brought the action in this court, or whether the company brought it.

2. The complainant insists that the act was never legally passed, and is therefore not a statute. Each house or branch of the legislature passed a measure, and the governor signed one. But the question is, did each house pass, and did the governor sign, the same identical measure? Because, if both houses did not pass and the governor sign a measure all in the same and precise language, then the measure is not a law, regardless of what was believed or intended. It is now settled beyond all debate that a printed official statute must give way to and be controlled by the official enrollment; and it is equally well settled, and as free from debate, that both the official printed statute and the enrolled bill as filed with the secretary of state must be controlled and determined, in case of dispute, by the

journals of the legislature and the records in fact made. A few of the authorities on this question are the following: *State v. Brookhart* (Iowa) 84 N. W. 1064; *Koehler v. Hill*, 60 Iowa, 543, 14 N. W. 738, 15 N. W. 609; *State v. Railroad Co. (Neb.)* 84 N. W. 254; and the many cases cited in the three opinions to which I have just referred. The title of the act is very material, and is a constitutional requirement, and without which the act would be utterly void. The title by which the bill passed the senate and the house was as follows: "A bill for an act to regulate stock-yards and to fix the commission for the sale of live stock therein and providing punishment for the violation thereof." The bill originated in the senate with the title above given, and was read each of the three times under said title, and so passed. It then went to the house, and was there read the first and second times by a different title, viz.: "A bill for an act to regulate certain stock-yards by declaring them public markets and defining the duties of the person or persons operating the same and regulating all charges thereof, and providing penalties for the violation thereof." The bill was then read a third time in the house by the first title, and passed the house by the first title. The mere reading of the bill in the house the first and second times by a different title would not vitiate it. But the second title is set out because, when it was signed by the governor, such was the title, as appears from the enrollment. Therefore the governor did not sign the bill as it passed the house and senate, and it is not a law. *State v. Railroad Co. (Neb.)* 84 N. W. 254; *Railroad Co. v. Smyth* (C. C.) 103 Fed. 376. The decision of the Nebraska supreme court as to whether a statute was legally passed and in conformity to the Nebraska constitution is binding upon this court; and, if the Nebraska supreme court had not so held, I would so hold. All provisions of a constitution are mandatory. There is no such thing as a directory provision in a constitution. The title of the act is all-essential. The title as well as all provisions of the act must be the work of the legislature. Not a word can be added to or taken from the title by the governor. I have no doubt but that the engrossing clerk made a mistake, and took a copy of the wrong paper to the governor. Some one made the mistake, and it is not material who made it. The mistake was made, and the paper signed by the governor was not the measure passed by the two houses. He must sign it as passed by the legislature, or it is not a law. Therefore the measure in question is not one of the laws of Nebraska.

3. The answer denies that the attorney general is about to take steps to enforce the alleged statute. This raises no issue. That officer cannot affirm the validity of a statute, and then be heard to say he will not enforce it, or that "as yet he does not know what he will do." The act, if valid, says he shall enforce it. The presumption is that he will enforce it. And the question on the prayer for an injunction is not what has been done, but what may be done, under the alleged statute. At all events, the presumption is sufficiently strong that an officer will enforce a statute, when such statute directs him to enforce it, as to authorize the issuance of a writ of injunction, if one should otherwise issue.

4. Complainant insists that, if the statute had been passed conformably to the Nebraska constitution, that it seeks to fix rates governing stock yards, which are of private concern only, and therefore not subject to legislative control. And he also insists that the rates thus fixed are confiscatory. The importance of each of these questions is great. But I shall not pass upon either of them for each of two reasons, although they are in the record calling for determination: (a) I have already decided that the statute relied on by defendants was never legally passed. This entitles complainant to relief, and all the relief he would be entitled to if all the questions in the record were decided in his favor. (b) From a hurried reading, I find these precise questions were recently decided by Circuit Judge Thayer, of this circuit, sitting as a trial court. *Cotting v. Stock Yards Co.* (C. C.) 82 Fed. 850. From the decree in that case an appeal was taken to the supreme court. I learn that the appeal, in due time, was argued by counsel. And by order of that court I am advised the case has been argued a second time. I assume the case will soon be decided, and, when decided, the decision will rule these two questions in this case. There will be a decree for complainant herein.

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COKER v. MONAGHAN MILLS et al.

(Circuit Court, D. South Carolina. September 17, 1901.)

1. REMOVAL OF CAUSES—SEPARABLE CONTROVERSY.

A complaint in an action in a state court to recover for the death of plaintiff's intestate made two corporations defendants. It alleged that the first corporation was the owner of a building into which it invited the deceased, where he fell down an unguarded elevator shaft, of which he was given no warning, and was killed. It alleged that the second corporation had erected the building under a contract with the first which bound it to complete the same in a proper manner, and that it failed to perform such contract, by negligently leaving the elevator shaft unguarded. *Held*, that the action involved a separable controversy as to each defendant, and was removable by one of the defendants which was a citizen of a different state from plaintiff.<sup>1</sup>

2. FEDERAL COURTS—INJUNCTIONS—STAY OF PROCEEDINGS IN STATE COURT.

A circuit court of the United States is not authorized to grant an injunction to stay proceedings in a state court, in an action brought therein, because of the pendency of a petition for removal, which has not been presented to or acted upon by the state court.

On Petition for Injunction.

Carey & McCullough, for plaintiff.

Haynsworth & Patterson and Wm. G. Sirrine, for defendants.

SIMONTON, Circuit Judge. This case comes up on a petition of the Flynt Building & Construction Company, a corporation of the state of Massachusetts, praying that the plaintiff be enjoined from proceeding any further against it in the state court, because it has filed the record in this court after a petition for removal, with

<sup>1</sup> Separable controversy as ground for removal, see notes to *Robbins v. Ellenbogen*, 18 C. C. A. 86; *Mecke v. Mineral Co.*, 35 C. C. A. 155.

proper bond. This motion has been here before. But it appeared that, although the petition for removal had been filed with the clerk of the state court, it never had been presented to the state court itself, no term of that court having been held since it was filed. Under these circumstances, in deference to the state court, this court declined to entertain the motion, and so anticipate or forestall the action of the state court. But it also appearing that, notwithstanding the filing of the petition and notice thereof, the plaintiff was pressing her case in the state court, and insisting on certain notices, and so assuming to anticipate the action of the state court, this court, having the parties before it on this motion, entered an order enjoining any action on the part of the plaintiff until the state court had received, considered, and decided upon the petition for removal. The case will be stated in full. There are two questions: (1) Is the cause removable at the instance of the petitioner, on the ground that there is a separable controversy? (2) If so, will this court enjoin further proceedings in the state court, which has denied the petition for removal?

The action is brought by Margaret Coker, as administratrix, for damages resulting from the death of her son, James H. Coker, who died intestate. The complaint has 20 paragraphs. The first two set out the corporate character of the two defendant corporations, the Monaghan Mills, a corporation of the state of South Carolina, and the Flynt Building & Construction Company, a corporation of the state of Massachusetts, the two defendants. The third to the fourteenth paragraphs, inclusive, set out the cause of action against the Monaghan Mills as follows: That it is the owner of a certain brick building, three stories high, constructed for the purpose of manufacturing cotton goods, in which it was engaged in having certain machinery and other appliances placed. The east end of this building was shut in by a wooden partition, instead of a brick wall, so as to provide for further extension of the building if this became advisable. Alongside of this partition was a stairway from the bottom to the top floors, out of which doors entered upon the several floors, which doors swing inside of the building, and to the right. Those who had occasion to go from the ground to any floor of this building were permitted and accustomed to use this stairway. Its doors were not locked, and the stairway was free to be used. On 28th January, 1901, plaintiff's intestate was in the employ of the Sacco & Petty Machine Shops, a corporation which had sold certain machinery to the Monaghan Mills, and was bound by contract to place said machinery in such mills as the Monaghan Mills would direct. At the instance and request of the Monaghan Mills the said Sacco & Petty Machine Shops directed the intestate of plaintiff on that day to go to the Monaghan Mills and report for orders, and, having so reported, was directed by it to place certain machinery on the third floor of the building. The intestate had never been in the building before, knew nothing of its interior arrangements, was not apprised thereof by the Monaghan Mills, nor was he warned of any danger in approaching or entering the said third floor by means of said stairway, and through the door entering therefrom. Just inside the building,

within a few inches of said door, was an elevator shaft, an open space 10 feet square and 50 feet deep, leading from the first floor to the third, having no fencing, railing, or other protection around it, totally exposed, in such close proximity to the doorway that one entering it and unaware of its dangerous position, by taking one step forward would fall into it, and through the shaft to the floor beneath. That on this morning the intestate of plaintiff, being so ordered to go to the third floor to place said machinery, unaware of any peril, went up said stairway, opened the unlocked door, took one step forward, and fell into and down the elevator shaft, and was instantly killed. Such is the charge against the Monaghan Mills. The fifteenth paragraph introduced the Flynt Building & Construction Company, as follows: That this company had a contract to erect this building and turn the same over complete to the Monaghan Mills, and under the terms of this contract it was the duty of the building and construction company to see that the premises were safe and suitable, and the elevator shaft securely guarded. The paragraph charges that, under this contract with the Monaghan Mills, it is also liable to the plaintiff for the death of her intestate. The sixteenth paragraph then charges that the death of intestate was caused by the defendants' negligence, in the plural.

Analysing the above, it will be seen that the charge against the Monaghan Mills is that it invited the intestate of the plaintiff into its building to do some work for it. The theory is that under these circumstances it was bound to furnish a safe entrance and place for the intestate to work, and at least to warn him of any existing danger, and that, not having done so, and the intestate having been killed by reason of an unsuspected danger in the entrance, it is liable. The charge against the Flynt Building & Construction Company is wholly of a different character. This defendant did not invite plaintiff's intestate to the building; had no connection whatever with him, or with the machinery which he was instructed to put in place; no connection whatever with the corporation furnishing the machinery. It is charged with having made a contract with the Monaghan Mills, and with having failed to perform said contract, and for such failure it is held responsible to plaintiff. The line of defense of the Monaghan Mills is wholly different from that which the Flynt Building & Construction Company must take, and the question of law upon which its liability depends or may be defeated is entirely distinct from that upon which the liability of the Monaghan Mills must be tested. The allegation of liability on part of both defendants is a conclusion of law, not of fact. Clearly, there is a separable controversy, and the cause is removable.

The petition in this case prays an injunction against the state court, and the plaintiff in the state court, from proceeding any further in the case, as it has been removed into this court. The petition for removal and bond have not as yet been presented to the state court, and the prayer for removal has not been acted upon. Section 720 of the Revised Statutes provides that "the writ of injunction shall not be granted by any court of the United States to stay proceedings in any court of a state, except in cases where such injunction may be



authorized by law relating to proceedings in bankruptcy." It has been held that this section does not apply to cases in which the jurisdiction of the federal court has first attached, and in which that court is proceeding to administer the property involved in the suit. *Fisk v. Railroad Co.*, 10 Blatchf. 520, Fed. Cas. No. 4,830. Or when the rights of the parties have been adjudicated in the federal court, and it is sought to renew the litigation in a state court. *French v. Hay*, 22 Wall. 250, 22 L. Ed. 857. Or when a cause has been removed without question into the federal court, and notwithstanding this the parties seek relief from the state court, as in *Dietzsch v. Huidekoper*, 103 U. S. 494, 26 L. Ed. 497. And there have been obiter dicta on circuit, in which broad rights in this regard have been claimed for the federal courts. But no case has been found which authorizes a circuit court of the United States to issue an injunction against a state court simply upon the ground that the federal court differs from the state court upon the legal question as to the removability of a cause. On the contrary, the supreme court of the United States has distinctly intimated, if not expressed, a contrary opinion. Says the court in *Stone v. South Carolina*, 117 U. S. 430, 6 Sup. Ct. 799, 29 L. Ed. 962: "A state court is not bound to surrender its jurisdiction of a suit on petition for removal unless a case has been made which on its face," that is to say, clearly beyond question, "shows that the petitioner has a right to the transfer, and if it decided against the removal, and proceeds with the case, its ruling is reviewable here after final judgment." "The state court has the right to decide for itself whether, admitting all the facts stated in the petition for removal, the petitioner, as a matter of law, is entitled to the removal." *Railway Co. v. Dunn*, 122 U. S. 516, 7 Sup. Ct. 1262, 30 L. Ed. 1159. See, also, *Railroad Co. v. Daughtry*, 138 U. S. 303, 11 Sup. Ct. 306, 34 L. Ed. 963; *Railway Co. v. Brow*, 164 U. S. 277, 17 Sup. Ct. 126, 41 L. Ed. 431; *Railway Co. v. Fitzgerald*, 160 U. S. 582, 16 Sup. Ct. 389, 40 L. Ed. 536; *Powers v. Railroad Co.*, 169 U. S. 101, 18 Sup. Ct. 264, 42 L. Ed. 673; *Harkrader v. Wadley*, 172 U. S. 148, 19 Sup. Ct. 119, 43 L. Ed. 399. Nor is any wrong done to the petitioning party which cannot be remedied. He has the right to remain in the state court under protest, and, if the cause be decided against him, then he can have remedy for any error in refusing his petition in the supreme court of the United States, after final judgment, or he may enter the record in the circuit court of the United States, and require the adverse party to litigate with him there, even while the state court is going on. *Railroad Co. v. Koontz*, 104 U. S. 15, 26 L. Ed. 643. The application for injunction is refused.

After this opinion was prepared, his honor Judge Klugh, in the court of common pleas at Greenville, S. C., signed an order removing this case, holding the controversy separable.

## JENKINS v. YORK CLIFFS IMP. CO. et al.

(Circuit Court, D. Maine. August 26, 1901.)

No. 532.

## 1. APPEARANCE—EFFECT OF WITHDRAWAL BY LEAVE OF COURT.

While the withdrawal by a defendant of an appearance entered through a misapprehension, by permission of the court, relieves him from an unintended waiver of fundamental questions as to the jurisdiction, it does not authorize him to attack the service made upon him on a mere matter of form.

## 2. SAME—WHEN SPECIAL—PLEA TO JURISDICTION.

The federal courts do not apply the strict rules of the common law to substantial issues relating to jurisdiction, but, especially when the question arises on the face of the bill, such issues may be raised by the parties or by counsel, by plea, motion, or suggestion; and where a plea raising such an issue is signed by counsel his appearance will be considered as limited, and for that purpose alone.

## 3. JURISDICTION OF FEDERAL COURTS—DIVERSITY OF CITIZENSHIP.

In a bill in equity, brought in the United States circuit court, by one complainant against several defendants, in which the only basis of jurisdiction was diversity of citizenship, the complainant was a citizen and resident of a state other than that of the district in which the suit was brought, some of the defendants were citizens and residents of the state constituting the district in which the suit was brought, and one of the defendants was a citizen and resident of a state other than that of such district, and other than that of which the complainant was a citizen and resident. Service was secured on all the defendants within the district where the suit was brought. *Held*, that the court had no jurisdiction over the last-named defendant.<sup>1</sup>

In Equity. On plea to jurisdiction.

Bird & Bradley and Geo. F. & Leroy Haley, for complainant.

G. C. Yeaton, for respondents.

PUTNAM, Circuit Judge. This is a bill in equity, raising on a plea by the respondent Vermeule an issue of jurisdiction. The topic has been before us in this case on several occasions, when we have expressed our views orally from our recollection of the rules laid down by the supreme court. Our examination of the authorities shows that we had them correctly in mind, and we will now make some formal references to them.

The complainant is a citizen and resident of New Jersey, the respondent Vermeule is a citizen and resident of the state of New York, and the other respondents are citizens and residents of Maine. As the matter now comes before us, Vermeule claims that the bill is brought in a district of which neither he nor the complainant is a resident, and that, therefore, this court has no jurisdiction over him. This is the only question now before us, although, as already said, we deem it well, in this opinion, to point out the various steps by which that condition of the issues has ultimately been reached. It is not now questioned by the complainant that the residences of the parties are as claimed by Vermeule. Vermeule passes his summer

<sup>1</sup> Diverse citizenship as ground of federal jurisdiction, see notes to *Shipp v. Williams*, 10 C. C. A. 249; *Mason v. Dullagham*, 27 C. C. A. 298.

vacations in Maine, and he owns or controls a dwelling house there, where the subpoena in this case was served by the marshal. The return states that the subpoena was served by leaving a copy thereof at the dwelling house of Vermeule, in the district of Maine, with his wife, an adult person, and that she was, at the time of service, a member of his family. The facts alleged in the return have not been challenged, by affidavit or otherwise, so that the question whether or not a valid service was made on Vermeule within the district of Maine is raised on the face of the return. Equity rule 13 requires that a copy of the subpoena be left "at the dwelling house or usual place of abode of each defendant, with some adult person who is a member or resident in the family." A cursory examination of the return seems to support it as conforming to this rule, if it is valid. It certainly conforms to its letter, although it would have been more satisfactory if the return had stated that a copy was left at "the dwelling house and usual place of abode" of Vermeule within the district of Maine. However, the question of the proper service of the subpoena is not now before us for two reasons—first, the plea to the jurisdiction presents only the issue of law arising out of the fact that Vermeule is not a resident in the district of Maine, and thus it necessarily waives any question as to the manner of service of the subpoena; and, second, the circumstances attending the appearance entered in the cause in behalf of Vermeule come to the same result.

A member of this bar entered a general appearance for Vermeule on the return day of the subpoena. Afterwards he moved the court that his appearance be stricken out, on the ground that it was made through misapprehension; and we, exercising the broad equity powers always exercised by the federal courts in this regard, granted the application. The complainant maintains, on the one hand, that the respondent, having thus appeared, waived the question of jurisdiction so far as residence in the state is concerned, which, according to well-settled rules, he might have done. On the other hand, the appearance having been stricken out, the question was suggested whether or not the result thereof was not to open all matters with reference to the method of serving the subpoena, as well as the point against jurisdiction arising out of the fact that Vermeule does not reside within the district of Maine. The court expressed its opinion adversely to both propositions, holding, as to the first, that it had broad equitable powers with reference to striking out appearances made under misapprehension, thus relieving parties from unintended waivers of all fundamental questions as to jurisdiction or otherwise, but that, an appearance having been entered, it followed, necessarily, that the respondent for whom it was entered must, impliedly, have received notice of the pendency of the cause, and that, consequently, the mere matter of form of service on him could not be afterwards opened. In all these respects the court is sustained by the propositions announced in *U. S. v. Yates*, 6 How. 605, 606, 608, 12 L. Ed. 575. It is not necessary to refer to that opinion in detail, or to the subsequent opinions of the supreme court showing that our decision on these propositions harmonizes with the settled rules of practice of the federal tribunals. *Rio Grande Co. v. Gildersleeve*,

174 U. S. 603, 19 Sup. Ct. 879, 43 L. Ed. 1106, cited by the complainant, is not in point, because there the court did not use its equitable powers with reference to striking out appearances, but the attorney withdrew his appearance without leave. In the former case the appearance is annulled, and remains of no effect whatever; but, where an attorney merely withdraws his appearance without leave of court, it remains effective so long as it stood, and therefore it continues to operate as a waiver of questions of jurisdiction, so far as such questions can be waived.

Coming to the issue which we have now to determine, the plea of Vermeule raising it was signed by a solicitor, whose appearance for that purpose must be accepted, under the practice of the federal tribunals as settled by the supreme court, to be limited to the purpose of entering the plea. Nevertheless, the complainant seeks to apply to a federal court, with reference to a question of statutory jurisdiction, the technical rules which the common-law courts apply to pleas of abatement; and he maintains that, inasmuch as the plea at bar was signed by counsel of this court, the respondent has necessarily, in accordance with the strict rules of the common law, submitted to its jurisdiction. It is to be borne in mind, however, that the question of jurisdiction in this case appears on the face of the bill; and with reference to such questions thus appearing, and, indeed, with reference to all substantial issues of jurisdiction, the strict rules of the common law are not applied by the federal courts, but they may be raised by the parties, by counsel, by friends of the court, by plea, by motion, by suggestion, and, indeed, often by the court itself. The authorities on this point are so numerous that it is not necessary to refer to them, but the case in which this practice is perhaps most conveniently stated, so far as the want of jurisdiction appears on the face of the bill or declaration, is found in *Coal Co. v. Blatchford*, 11 Wall. 172, 178, 20 L. Ed. 179. Jurisdictional issues, even when they involve questions of fact, may sometimes be disposed of on a mere motion and affidavits. *Wetmore v. Rymer*, 169 U. S. 115, 121, 18 Sup. Ct. 293, 42 L. Ed. 682, and elsewhere.

There are some things in this bill which would indicate that it was drawn with reference to section 738 of the Revised Statutes, as reenacted and broadened by section 8 of the act of March 3, 1875 (18 Stat. 472); but it contains a prayer for relief, by the way of an account, of such a character that it is not appropriate to that provision of statute, and, moreover, the form of proceedings so far has taken no cognizance of the directions which the statute contains. Therefore, we must hold that, for the present, the bill is framed under the general equity powers of the court with reference to suits between citizens of different states. The question, therefore, before us is as follows: Inasmuch as the suit was brought in a district in which the complainant is not a resident, must all the respondents be residents of that district? So far as the present jurisdictional statutes are concerned, it was settled authoritatively in *Smith v. Lyon*, 133 U. S. 315, 10 Sup. Ct. 303, 33 L. Ed. 635, that the circuit court has no jurisdiction on the ground of diverse citizenship when there are divers plaintiffs who are citizens of, and residents in, different states

and districts, if the defendant is also a citizen of, and resident in, a third state and district, though, the action is brought in a district in which one of the plaintiffs resides. This case was restated in *Greeley v. Lowe*, 155 U. S. 58, 68, 15 Sup. Ct. 24, 39 L. Ed. 69. The supreme court has not passed on a state of the record such as we have here, in view of the existing jurisdictional statutes; but the line of reasoning in *Smith v. Lyon* is as applicable here as to a suit where there are several plaintiffs residing in different districts. We understand *Phosphate Co. v. Brown*, 20 C. C. A. 428, 74 Fed. 321, 324, decided by the circuit court of appeals for the Fourth circuit, is directly in point on the case before us; and, if so, it would, in view of the effect given in this circuit to the decisions of the circuit courts of appeals in other circuits, conclude us. Independently of that case, however, we think the line of reasoning of the supreme court in the opinions to which we have referred compels us to sustain the plea.

As the bill suggests matters which are justiciable under section 8 of the act of March 3, 1875, we reserve to the complainant leave to amend his bill, if he desires to do so. In that event, however, the amendments must clearly and positively assert a case within section 8, and clearly and positively limit the relief asked for according to the purview thereof, and it must distinctly pray for forms of proceedings as therein provided.

Unless the complainant, on or before September 23, 1901, amends his bill as permitted in the opinion filed this day, there will be a decree in behalf of Vermeule, sustaining his plea, and dismissing the bill as to him for want of jurisdiction, without costs for either party.

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**SEYBERT v. SHAMOKIN & MT. C. ELECTRIC RY. CO. et al.**

(Circuit Court, M. D. Pennsylvania. June 18, 1901.)

**No. 1.**

**1. JURISDICTION OF FEDERAL COURTS—RESIDENCE OF PARTIES—LOCAL SUITS.**

In a suit in a federal court to foreclose a mortgage on property situated within the district, the jurisdiction of the court is not defeated by the fact that one of the defendants is not a resident of the district.

**2. PROCESS—SUITS OF LOCAL NATURE—NONRESIDENT DEFENDANTS.**

In a suit of a local nature in a federal court to enforce a lien on property, a nonresident defendant cannot be brought in by service of original process upon him in the district of his residence, as provided in Rev. St. § 741, such section having been superseded by section 8, Act March 3, 1875 (18 Stat. 472); but he must be brought in by an order made in accordance with the provisions of the latter section.

Demurrer to Plea to the Jurisdiction. Sur bill in equity to foreclose a mortgage.

Lyman D. Gilbert, F. M. Leonard, and A. B. Weimer, for plaintiff.

S. P. Wolverton, Voris Auten, and John G. Johnson, for defendants.

ARCHBALD, District Judge. The plaintiff, a citizen of Florida, brings this bill to foreclose a mortgage given by the Shamokin &

Mt. Carmel Electric Railway Company, a corporation of the state of Pennsylvania, to the Pennsylvania Company for the Insurance of Lives and Granting Annuities, as trustee for the bondholders, of whom the plaintiff is one. The mortgaged premises consist of 15 miles of street railway, located in the counties of Northumberland and Columbia in the Middle district, where this suit is brought, together with the rolling stock, barns, shops, offices, etc., belonging and appurtenant thereto. The service of the subpoena has been made upon the railway company by the marshal of this district, and an attempted service on the trustee at Philadelphia, where it is located, by the marshal of the Eastern district, under section 741 of the Revised Statutes. According to the views expressed by Mr. Justice Brown in *Greeley v. Lowe*, 155 U. S. 58, 15 Sup. Ct. 24, 39 L. Ed. 69, this section has been superseded by Act March 3, 1875, § 8 (18 Stat. 472), and this latter service is therefore of no effect, and the trustee is not before the court, and will not be until there has been an order for it to appear and plead at a date certain, and due service of the same has been made upon it. This is a special method provided in the statute just cited to meet cases of this character, where the suit, being to enforce a lien, is local in its nature, and one of the defendants is not a resident of the district. 1 *Desty*, Fed. Prac. § 25. The street railway, however, has appeared, and now pleads that the court has no jurisdiction, because the trustee, the other defendant, is not a resident of the district. Reliance is placed upon the decision of the supreme court in *Smith v. Lyon*, 133 U. S. 315, 10 Sup. Ct. 303, 33 L. Ed. 635, where it is held that in a case depending solely upon the diverse citizenship of the parties, where one of the plaintiffs is a citizen of the state where the suit is brought, and the other of another state, they cannot unite in a suit in a district of one of them, even though the defendant be of a state different from both. But that was not a suit to enforce a lien, as the present suit is, and there is the distinction. The bearing of this is plainly pointed out in *Greeley v. Lowe*, 155 U. S. 58, 15 Sup. Ct. 24, 39 L. Ed. 69, already referred to, which governs the case. On the authority of that decision, the plea must be overruled, and the defendant directed to answer over. An order will also be made on the other defendant to appear and plead at the same time. The question whether the rights of the plaintiff as a bondholder can be pursued in the present suit, the trustee being a citizen of Pennsylvania, the same as the street railway, by whom the mortgage is given, is not raised by this plea; the only asserted basis of it being the nonresidence of the other defendant, and is not decided.

The plea of the Shamokin & Mt. Carmel Railway Company, defendant, to the jurisdiction of the court is overruled, and the said defendant is required to answer over within 10 days from this date.

**DOUGLAS CO. v. STONE, Ex-County Treasurer.**

(Circuit Court, W. D. Virginia. May 14, 1901.)

**1. JURISDICTION OF FEDERAL COURTS—AMOUNT IN CONTROVERSY—SUIT TO ENJOIN COLLECTION OF TAX.**

A suit to enjoin the enforcement of a tax levied on lands under authority of a state by the sale of timber from such lands, where it is not alleged that the tax is illegal, but merely that it was erroneously levied, is not a suit to remove a cloud on title, and the amount involved for the purpose of determining the jurisdiction of a federal court is the amount of the tax, and not the value of the land.<sup>1</sup>

**2. EQUITY—FEDERAL JURISDICTION—ADEQUATE REMEDY AT LAW.**

Code Va. 1887, §§ 567-570, provide an adequate remedy at law for the correction of an erroneous assessment of taxes, and a federal court of equity is without jurisdiction of a suit to enjoin the collection of such taxes, levied by authority of the state, on the ground of erroneous assessment.

**3. FEDERAL COURTS—FOLLOWING STATE DECISION—VALIDITY OF TAXES.**

Where the highest court of a state, in an appropriate action, has decided that taxes were properly assessed, and are legal and valid under the constitution and laws of the state, a federal court will not entertain a suit to enjoin their collection.<sup>2</sup>

In Equity. Suit to enjoin the collection of taxes. On demurrer to bill.

Daniel Trigg and J. H. Gilmore, for plaintiff.

A. J. Montague, Atty. Gen., and Geo. W. Richardson, Commonwealth's Atty., for defendant.

PAUL, District Judge. In this suit the plaintiff files its bill praying that it be released from the payment of a claim for taxes assessed under the laws of Virginia, amounting to the sum of \$1,609.25, for which the defendant, who is ex-treasurer of Smyth county, Va., has made a levy on a portion of the standing timber on the lands of the plaintiff. The tract of land on which the taxes are assessed is part of a larger tract that formerly belonged to one George Douglas, of the state of New York. He died many years ago, and this tract of land lying in Smyth county, Va., containing about 18,000 acres, descended to his heirs at law. In the year 1846, James Monroe, and Elizabeth, his wife, a daughter of said George Douglas, instituted in the circuit court of Washington county, Va., a chancery suit for the partition of this tract of land among the heirs of said George Douglas. A decree of partition was entered, and a commissioner was appointed to convey to the several parties in interest the land assigned to them respectively. These conveyances were made in the year 1849, and the land, as thus partitioned and conveyed, went on the books of the commissioner of the revenue for Rich Valley district of Smyth county. The tract on which the taxes in question were

<sup>1</sup> Jurisdiction of circuit courts as determined by amount in controversy, see notes to *Auer v. Lombard*, 19 C. C. A. 75, and *Shoe Co. v. Roper*, 36 C. C. A. 459.

<sup>2</sup> State laws as rules of decision, see notes to *Griffin v. Wheel Co.*, 9 C. C. A. 548; *Wilson v. Perrin*, 11 C. C. A. 71; and *Hill v. Hite*, 29 C. C. A. 553.

assessed is that assigned and conveyed in the partition to Mrs. Harriet Cruger, a daughter of said George Douglas, she having intermarried with H. D. Cruger. This tract was charged on the land books as 6,134 acres. There were two other tracts conveyed under the decree of partition, and charged on the land books,—one to George Douglas, an heir of the elder Douglas, for 6,054 acres; the other to William Douglas, for 6,072 acres. These several tracts stood charged on the land books, until the year 1885, in the names of the parties to whom they had been conveyed by the deeds of partition in 1849, though in the meantime the grantees in the deeds had all died. In the year 1885, some question having arisen as to the quantity of land liable to taxation, inasmuch as large portions of the original survey were held by others by older and better titles, and by adverse possession, and the holders of which it was claimed were paying taxes on the same land. The bill alleges that the owners of the land made an arrangement with one Charles J. Shannon, the then acting assessor for the district in which the land lay, to reduce the quantity of land charged to the owners to the proper quantity. The bill states:

"It is believed that the assessor thought he could settle this question more easily by simply dropping one of the names from the book, leaving the parties thus charged with 12,126 acres,—fully as much, and more, really, than they were liable to be charged with on the three tracts of land. After that time the tax tickets, state and county, continued to be made off in the names of George Douglas and William Douglas for this quantity of land, and the parties interested continued to pay the tickets thus made out regularly and promptly."

The plaintiff became the owner by purchase of the said several tracts of land in the year 1893. After dropping from the land books in 1885 the land theretofore standing in the name of Mrs. Cruger, no change as to these lands was made on the commissioner's books until the year 1898, when the commissioner of the revenue for the district in which the Cruger land is situated entered the same on his land book as belonging to Mrs. Cruger's estate for taxation, claiming that the same had been improperly dropped from the land books in 1885. This action on the part of the commissioner he claimed was taken under section 479, Code Va. 1887, which provides:

"Sec. 479. Omitted lands, how re-entered and assessed.—When the commissioner ascertains that there is any patented land in his district which has not been entered on his book, or after being entered, has from any cause been omitted for one or more years, he shall make an entry thereof, and of the name of the owner; and if there be no re-assessment of the value thereof, he shall proceed to make such assessment to the best of his judgment by reference to the assessed value of contiguous lands similarly situated; and shall charge on the land which he so enters, taxes at the rate imposed by law, for each year in which the land was not before entered in such book, from the year eighteen hundred and thirty-two inclusive, if the patent emanated before that time, and if it did not, then from the date of the patent, together with the lawful interest on each year's tax. Any commissioner failing to make such entry and assessment shall forfeit twenty dollars."

In compliance with the requirements of section 479, the commissioner of the revenue assessed the said Cruger tract of land for the



years from 1885 to 1898, inclusive, making the sum of taxes and interest thereon \$1,609.25. The plaintiff claims that at the time this assessment was made none of the land belonged to the estate of Mrs. Cruger, but was owned by the plaintiff, and that it paid the taxes thereon from the year 1893 to 1898; that by provision of section 480 of the Code of Virginia of 1887, the plaintiff, being a bona fide purchaser of said land, is not liable for the arrears of taxes thereon, except from the date of its title thereto. The taxes assessed not being paid, the defendant, as treasurer of Smyth county, proceeding under an act of the legislature of Virginia (Acts Assem., Sess. 1897-98, p. 931, c. 884), levied for the same on the growing timber on the Cruger tract, and advertised the same for sale. The plaintiff obtained from this court a restraining order inhibiting the defendant from selling the timber advertised until the further order of the court. The defendant demurs to the bill. The grounds of demurrer assigned are: (1) That it does not appear from the bill that the amount in controversy is sufficient to give the court jurisdiction of the same; (2) that the plaintiff has a complete and adequate remedy at law; (3) that the controversy relates solely to matters within the sovereignty of the state; (4) that it is a suit against the commonwealth of Virginia, and is therefore forbidden by the constitution of the United States, and that this court cannot take jurisdiction thereof.

The court deems it unnecessary to consider the third and fourth grounds of demurrer, and will confine the discussion to the first and second grounds. The first raises the question of jurisdiction in this court on account of the amount involved in the controversy. This, as we have seen, does not amount to over \$2,000, exclusive of interest and costs, the sum necessary under act of congress of March 3, 1887, as amended, August 13, 1888, to confer jurisdiction on this court. It is contended in the argument of counsel for the plaintiff that it is not the amount of taxes the collection of which is sought to be enjoined that fixes the jurisdiction of the court, but the value of the land on which the taxes are assessed. This contention is based on the allegation that the object of the suit is to remove a cloud upon the title, and that in such a suit the value of the land fixes the jurisdiction. But the title to the land on which the tax is assessed is not involved. The question is as to the amount of taxes due, if any. The taxes are not illegal; they were levied under the tax laws of Virginia. The assessment may be irregular or erroneous, but it is not in violation of either the constitution of the state or of the federal constitution. It is doubtful if any case can be found where a federal court has restrained the collection of taxes by a state officer acting in pursuance of a state statute, except where it is charged that the tax is illegal. And where the tax is illegal there must be some equitable ground to justify the court in restraining its collection.

In *Railroad Co. v. Cheyenne*, 113 U. S. 516, 5 Sup. Ct. 601, 28 L. Ed. 1098, Mr. Justice Bradley says:

"It is well settled that there ought to be some equitable ground for relief besides the mere illegality of the tax, for it might be presumed that the law furnishes a remedy for illegal taxation."

In *Pittsburg, C., C. & St. L. R. Co. v. Board of Public Works*, 172 U. S. 32, 19 Sup. Ct. 90, 43 L. Ed. 354, Justice Gray, speaking for the court, says:

"The collection of taxes assessed under the authority of a state is not to be restrained by writ of injunction from a court of the United States, unless it clearly appears, not only that the tax is illegal, but that the owner of the property taxed has no adequate remedy by the ordinary processes of law, and that there are special circumstances bringing the case under some recognized head of equity jurisdiction."

The bill not alleging that the tax is illegal, nor that it is to be continuous, destructive, infictive of injury incapable of being measured in money, or that it is being committed by irresponsible persons, the court does not see that the levy of the tax on the timber casts a cloud upon the title to the land. The jurisdiction must be determined by the amount of the taxes claimed, and this is insufficient to confer jurisdiction. This conclusion is further supported by *Fishbach v. Telegraph Co.*, 161 U. S. 96, 16 Sup. Ct. 506, 40 L. Ed. 630; *Bank v. Cannon*, 164 U. S. 319, 17 Sup. Ct. 89, 41 L. Ed. 451; *Railroad Co. v. Pendergrass*, 16 C. C. A. 585, 70 Fed. 1.

For a more satisfactory settlement of the question of equity jurisdiction, the court will consider the second ground of demurrer,— "that the plaintiff has a complete and adequate remedy at law." It scarcely needs any citation of authorities to sustain the position that, if the plaintiff has an adequate remedy at law, it is not entitled to the aid of a federal court of equity to restrain the collection of a state tax. They are numerous and uniform. 1 *Fost. Fed. Prac.* 20, and notes; *Shelton v. Platt*, 139 U. S. 591, 11 Sup. Ct. 646, 35 L. Ed. 273; *State Railroad Tax Cases*, 92 U. S. 575, 23 L. Ed. 663. An adequate remedy is provided by the statute law of Virginia for the correction of an erroneous assessment of taxes. The importance of the question will justify the court in quoting in full the several sections of the Code of Virginia of 1887 giving the remedy at law:

"Sec. 567. Redress against erroneous assessment of taxes.—Any person assessed with taxes, aggrieved by an entry in either the land book or the personal property book, may, within two years after the delivery of such book to the treasurer, and any person assessed with a license tax, aggrieved thereby, may, within one year after such assessment, apply for relief to the court in which the commissioner gave bond and qualified, or to which or to whose clerk such bond and the certificate of his qualification were returned. The attorney for the commonwealth shall defend the application; and no order made in favor of the applicant shall have any validity unless it is stated therein that such attorney did so defend; that the commissioner making the assessment, or his successor, was examined as a witness touching the application; and the facts proved be certified.

"Sec. 568. When court may order assessment to be corrected and money refunded.—If the court be satisfied that the applicant is erroneously charged on said books, or either of them, with any taxes, and that the erroneous entry was not caused by the failure or refusal of the applicant to furnish a list of his property, real and personal, to the commissioner, on oath, as the law requires; or that the applicant is erroneously charged with a license tax, and that the erroneous assessment was not caused by the failure or refusal of the applicant to furnish the commissioner, on oath, with the necessary information, as required by law: in either case, the court may order that the assessment be corrected. If the assessment exceeds the proper amount, the court may order that the applicant be exonerated from the payment of so much as is erroneously charged, if not already paid, and if paid, that it be

refunded to him. If the assessment be less than the proper amount, the court shall order that the applicant pay the proper taxes. A copy of any order made under this section correcting an erroneous assessment shall be certified by the court to the auditor of public accounts and the treasurer of the state.

"Sec. 569. Treasurer restrained from collecting; how money refunded.—An order of exoneration made as aforesaid, when delivered to the treasurer, shall restrain him from collecting so much as is thus erroneously charged; or if the same has already been collected, shall compel him to refund the money, if such officer has not already paid it into the treasury; and either way, when properly endorsed by the applicant, it shall be a sufficient voucher to entitle the officer to a credit for so much in his settlement with the auditor of public accounts.

"Sec. 570. If paid into treasury how refunded.—If what was so erroneously charged has been paid into the treasury, the order of court shall entitle the claimant to a warrant on the treasury for the amount thereof, provided application for the same be made to the auditor of public accounts within one year after the date of such order."

The sections of the Code of Virginia just referred to as providing a remedy at law for the correction of erroneous assessment of taxes have been construed by the supreme court of appeals of Virginia. The same questions presented in this cause have been decided by that court in *Douglas Co. v. Com.*, 97 Va. 397, 34 S. E. 52. The plaintiff in this cause invoked the remedy at law provided by the statute law of Virginia, in the county court of Smyth county. On an adverse decision to the plaintiff by that court it appealed to the circuit court of Smyth county, which sustained the decision of the county court. The case was then carried to the supreme court of appeals of Virginia, where the decision of the court below was affirmed. That the federal courts will follow the decisions of the highest court of a state in construing the constitution and laws of that state is a doctrine so well established as not to require discussion to sustain it. Justice Miller, in the opinion of the supreme court in the *State Railway Tax Cases*, 92 U. S. 617, 23 L. Ed. 675, said:

"But, if for no other reason, we should reverse the decrees of the circuit court in these cases, because the same questions, involving the same considerations urged upon us here, have been decided by the supreme court of the state of Illinois in a manner which leads to the reversal of these."

For the reasons given, the bill will be dismissed.

#### NIAGARA FIRE INS. CO. et al. v. CORNELL, State Auditor, et al.

(Circuit Court, D. Nebraska. September 23, 1901.)

#### 1 FOREIGN CORPORATIONS—STATE REGULATION—STANDING TO CONTEST—VALIDITY OF STATUTE.

While foreign insurance companies can enter a state to do business only by permission of the state, and subject to such regulations and conditions as it may see fit to impose, yet, where they have complied with all such conditions, and under license from the state have expended money in establishing agencies and in advertising and building up a business, they have the right to challenge the validity of statutes subsequently enacted which affect their business and interests equally with those of domestic companies.

#### 2. INJUNCTION—SUIT TO RESTRAIN ENFORCEMENT OF STATUTE.

In a suit against officers of a state to enjoin them from enforcing legislative acts as required by their provisions on the ground of their invalid-

ity, a denial by the defendants of an intention to enforce such acts, coupled with a denial of their invalidity, constitutes no defense and raises no issue.

**3. STATUTES—CONSTITUTIONALITY—VESTING JUDICIAL POWERS IN EXECUTIVE OFFICER.**

A statute is not invalid, as in violation of a constitutional provision vesting all the judicial powers of the state in the courts, because it provides that charges of violation of its provisions shall be heard and determined in the first instance by an executive officer, where it gives a right of appeal to the courts.

**4. EQUITY JURISDICTION—ADEQUATE REMEDY AT LAW—FEDERAL COURTS.**

The fact that a complainant has a plain, speedy, and adequate remedy at law in the state courts does not exclude the jurisdiction of a federal court of equity, where the requisite facts exist to give such court jurisdiction of the parties and the subject-matter, and a proper case for equitable relief is shown.

**5. STATUTES—DETERMINING CONSTITUTIONALITY—QUESTIONS OF DOUBT.**

A trial court will not declare a state statute regulating the business of insurance invalid because of a provision subjecting insurance companies to the payment of attorney's fees for its violation where the company is unsuccessful, but denying them the recovery of fees if successful, as in violation of their constitutional right to the equal protection of the laws, where the question, under the decisions of the appellate federal courts, is doubtful.

**6. CONSTITUTIONAL LAW—EQUAL PROTECTION OF LAWS—NEBRASKA STATUTE REGULATING INSURANCE.**

Act Neb. 1897 (Laws 1897, c. 81), to prevent combinations between fire insurance companies, which, among other things, declares void all agreements by or between such companies relating to the amount of commissions to be allowed agents for procuring insurance, or the manner of transacting the business of fire insurance, is void as a regulation not within the police powers of the state, and as in violation of the constitution of the United States, in that it deprives insurance companies of the equal protection of the laws in the right to make and enforce contracts.

**7. SAME—NEBRASKA ANTI-TRUST ACT.**

Laws Neb. 1897, c. 79, defining trusts, and declaring them illegal, and all agreements in relation thereto void, and imposing penalties for its violation, makes any combination of capital, skill, or acts, by which persons seek to fix the price of any article, commodity, use, or merchandise, with intent to prevent others in a like business or occupation from conducting the business or occupation, a trust. It declares illegal and void any agreement to fix the price of any article or commodity, or to limit the production of any commodity, or to prevent competition in insurance, or in the making, transportation, or sale, or purchase of any article, and makes all persons entering into such agreements conspirators, and punishable as such. It provides that the charters of domestic corporations shall be forfeited, and foreign corporations excluded from the state, for a violation of its provisions, and makes it the duty of the law officers of the state to institute actions for its violation, in which, if the action is successful, the defendant is taxed with an attorney's fee, but is not allowed an attorney's fee if the action is unsuccessful, and the same provision is made in regard to suits by private persons to recover damages for injury to their business, property, or employment by reason of its violation. It expressly excepts from its provisions all assemblies and associations of working men, and provides that "there is hereby reserved to them all the rights and privileges now accorded them by law." *Held*, that such act, in its general scope, exceeds the powers of the state, and is unconstitutional and void, as depriving persons of their liberty in violation of the federal constitution, which includes not merely liberty of the person, but liberty to make and enforce contracts, that being an institutional and fundamental right

of the citizen in the United States; that it also, by excepting labor organizations from its provisions, denies the equal protection of the laws to all persons not members of such organizations.

In Equity. Suit to enjoin the enforcement of state statutes alleged to be in violation of the constitution of the United States.

J. M. Woolworth and W. D. McHugh, for complainants.

F. N. Prout, Atty. Gen., and Norris Brown, Asst. Atty. Gen., for respondents.

McPHERSON, District Judge. A number of fire insurance companies, corporations organized and existing under the laws of states of the United States other than the state of Nebraska, are complainants herein. John F. Corneil, auditor of Nebraska, C. J. Smythe, attorney general, and Howard H. Baldridge, county attorney of Douglas county, are respondents. So far as I deem important, waiving allegations conferring jurisdiction and allegations more or less technical, the recitals of complainants' bill in equity in substance are as follows: Nearly 20 years ago each of complainants made application to the state auditor of Nebraska for license to transact the business of fire insurance in the state, making the showing as to solvency, its character and methods of doing business, and in all respects complying with the requirements of the Nebraska laws relating to foreign insurance companies, including the payment of large sums of moneys to the state; all of which has been done each and every year, and each and all of said exactions and burdens it is now and ever will be ready and willing to comply with and bear. During all of these years it has, by reason of such license, and the many renewals thereof, gone to very large expense in advertising, establishing offices and agencies to properly and successfully carry on its business in the state. The bill then recites at much length historical facts, as claimed, pertaining to the insurance business, by which it appears that until some years ago the business of fire insurance was mere guesswork, and akin to gambling, for the reason that neither the insured nor insurer, nor any one else, knew the cost or value of a certain risk. Then it was that men of great skill and learning and experience were employed to fix the price or cost of insurance of the innumerable kinds of risks. And it is alleged that several years ago the complainants, and a large number of other insurance companies doing business in Nebraska, employed one Hartman, an expert of high standing, to fix the fair and reasonable rates for the various risks, physical and moral, and that the companies would be bound, by agreement, to do business only in accordance with the rates thus fixed by Hartman. Business was so done by agreement in Nebraska, with Hartman's help, until the legislation of which complaint is now made. It is also alleged that the Nebraska legislature, in 1897, passed two statutes, one known as "Senate File No. 330" and the other as "Senate File No. 2," both approved April 15, 1897. No 330 is with reference to "Trusts," defining the same, providing means for their suppression, and provides for punishment for a violation of the statute. It specifically refers to fire insurance companies, and in the definition of a trust it recites that a combination

of capital, skill, or acts by persons with the intent to prevent competition in fire insurance, or by which they shall in any manner establish or settle the price of fire insurance, with the intent to prevent free competition, is in violation of the statute. The other statute is likewise to prevent combinations in matters of fire insurance, and provides penalties for its violations. It is the duty of the auditor, the attorney general, and the several county attorneys to enforce these statutes. Since the passage of these statutes, the companies, including complainants, still get information from the said Hartman as to risks, their classification, their cost or worth, and so on. But it is alleged that Hartman's conclusions, while generally observed, are not always followed, each company acting as it deems wise, and often ignoring his recommendations. It is also alleged that, unless restrained, defendants will seek to enforce these statutes, to the great annoyance, detriment, and damage of the companies. And complainants insist that the statutes for various reasons are in conflict with both the state and federal constitutions. An injunction is prayed for, restraining the defendants, their successors in office, and the various county attorneys from enforcing, as against any of complainants, either of the statutes, or any of their void provisions. Supplemental bills have been filed, showing that annually since the bill was filed each of complainants has made a proper showing to the auditor, paid the money necessary to enable it to do business in Nebraska, and has received a license therefor. Other important allegations are made, which will be noticed later in this opinion. A restraining order was issued by Judge Munger. The answers to the bill and supplemental bills were filed by Mr. Smythe, the then attorney general. He tendered but three issues: (a) A denial of the unconstitutionality of either of said statutes; (b) denies that either he or the auditor, or any county attorney, intends to attack either of the complainants because of a violation of either of the statutes in question; (c) allegations that complainants are doing business in Nebraska by mere sufferance. On the issues thus raised the case has been tried.

1. Neither the first nor third defense raises any question of fact; and in my judgment the second defense neither raises a question of fact that need be decided, nor has it any merit. The showing both by the allegations of the bill not put in issue and the proofs is to the effect that by legislation for a great many years in force, and still in force, in Nebraska, foreign insurance companies were invited to go into Nebraska and do a fire insurance business. This was done, no doubt, partly by reason of comity to other states, but no doubt largely to enable the citizens of the state to have competition generally, and particularly as to large risks in the cities. The companies went into the state, and for many years paid large sums to the state, and additional large sums in advertisements, establishing offices, agencies, and other necessary expenses. The present attorney general, in his argument, strongly and with much ability and force urges for my consideration the case in the United States supreme court of *Paul v. Virginia*, 8 Wall. 168, 19 L. Ed. 357. I agree with him that that case and many other like cases hold—to all of

which I agree—that foreign insurance companies cannot do business in Nebraska excepting by and with the consent of the state of Nebraska. To that effect the law is well settled. If the state of Nebraska by legislation makes it more onerous for foreign insurance companies, there can be no doubt about the validity of such legislation. Their license fees can be increased. Their local agents can be required to pay fees. The laws can be made more rigorous as to suits brought against them. They can be required to name in the state or in every county a resident attorney upon whom process can be served. Many other exactions can be required. And the fact that the foreign company has heretofore been licensed is no answer to such new legislation, and all foreign companies can be excluded from the state. But that is not the question before me for decision. If it were, I would sustain the contention of the attorney general. These companies have been, by legislation, invited to come into the state. They are here, and here lawfully. They are complying with all requirements of the state, unless it be the requirements of the statutes in question. They being here by invitation, and complying with all legal requirements, as they say, it cannot be exacted of them that they comply with illegal requirements, because an illegal requirement is none at all. An unconstitutional statute is no law. It seems clear to me that the complainants have the right to challenge these statutes. And it will not do for the respondents Mr. Cornell and Mr. Smythe, nor their successors, to say, as is said by their answer filed, that the laws are constitutional, but that they will not enforce them, and therefore there need be no injunction. If the laws are valid, they must be enforced, and a presumption well-nigh conclusive that they will enforce them. So the question for judicial determination is as to the validity of these statutes.

2. The statutes provide that for alleged infractions the companies may be cited to appear before the state auditor. From his decision an appeal can be taken to the state court. But because the auditor passes thereon it is insisted he is exercising judicial functions, and therefore the statutes are in conflict with the Nebraska constitution, which lodges all judicial power with the courts. I cannot sustain this contention of the companies; and upon this question, as well as others, I do not care to enter upon a discussion, which would be, and only could be, academic. If the companies, by appeal or other proceeding, can get a hearing before the courts, and there be given a trial by jury, or a trial according to the recognized chancery practice, as the nature of the case may require, then it has been tried according to due process of law and the law of the land, and has no just cause of complaint. Such are the holdings of the courts. I suppose all the states have special proceedings for the hearing of grievances, and such proceedings are sustained if along the line somewhere, and by some reasonable method, the party can have a hearing in the courts. And it is equally clear that such remedy is not to the exclusion of the power of a federal court to act. There may be a plain, speedy, and adequate remedy at law in the state courts, but with the proper parties, with the requisite citizenship, and the necessary amount involved, a federal court sitting in chancery may take hold

of the case, and order the proper decree. And the more so is this true when federal questions are presented, as in this case. And these conclusions, but briefly stated, obviate the discussion of many questions argued by counsel.

3. And it is insisted that the statutes are void because that in the litigation the companies are mulcted with an attorney's fee for the opposite party, but, when successful themselves, they cannot recover their attorney's fee. In Texas a statute was enacted which allowed the recovery by plaintiff of his attorney's fee, if successful, in a suit to recover for services performed for, or for the killing of live stock by, a railway company. In such litigation, if the railway company were successful, it could not recover its attorney's fee. The supreme court held the statute unconstitutional. *Railway Co. v. Ellis*, 165 U. S. 150, 17 Sup. Ct. 255, 41 L. Ed. 666. In Kansas there is a statute allowing the plaintiff to recover, in addition to his damages, an attorney's fee, in a suit for damages by fire set out by a railway company. The company, if successful, cannot recover its attorney's fee. This statute was held constitutional by the supreme court. *Railroad Co. v. Matthews*, 174 U. S. 96, 19 Sup. Ct. 609, 43 L. Ed. 909. In the first of these cases three justices dissented, and in the latter case four justices dissented. While the decisions can be reconciled, it is apparent that in the case at bar there is so much doubt about the question,—so much doubt what the supreme court or the court of appeals will hold,—that I deem it my duty to not hold the Nebraska statute unconstitutional on this ground; and, if I were to hold this provision invalid, such holding would not control the balance of the statute. And see *Association v. Yoakum*, 39 C. C. A. 56, 98 Fed. 251.

4. But that both of these statutes, in their general scope, are unconstitutional, I have no doubt; and, sitting as a trial court, and being free from all doubt, I must so declare; and, so holding, I shall as briefly as possible give my reasons. But I can serve no useful purpose by reviewing all the authorities cited by counsel. The cases arising under the "commerce clause" of the constitution are not in point, because insurance is not commerce. The one statute (senate file No. 2) is directed against fire insurance companies only. It declares as void all agreements by fire insurance companies as to any of the following things: (a) Relating to the rates to be charged for insurance; (b) the amounts of commissions to be charged by agents to their companies; (c) the manner of transacting the business of fire insurance. It is possible that the legislature can prohibit an agreement fixing the premiums to be charged; and yet it is difficult to believe that if, by such agreement, the rates were less than otherwise would be charged, such agreement would be unlawful, and yet an agreement to lower the rates becomes unlawful if that statute is valid. But, whether less or more, we all know that agreements are made as to other commodities in every community every day of the year. Employers of labor agree what they will pay, and laboring men agree for what sum only they will work, and the hours per day and per week they will work. Buyers, shippers, and venders of live stock, grain, gro-



ceries, clothing, anything and everything, are the subject of agreement, both by those who buy and those who sell. And yet the courts have gone further in limiting the right of contract as to rates to be charged for insurance than upon any other subject of legitimate business. Possibly that phase of the law is valid. But it is beyond my comprehension how the legislature can inhibit the making of contracts as to the amounts to be paid agents for securing insurance. The amount paid agents does not increase the cost to the insured. The cost to the insured is controlled by too many other factors, such as profits to the company, the economy of management, the moral as well as the physical hazard relating to the property insured, the rates of interest received on the surplus and capital, and interest paid on money borrowed, and no doubt many other things. How is such a provision the exercise of the police power? Still more obnoxious is the other provision, which declares all agreements void that relate to "the manner of transacting business." Is it possible that two or more companies cannot agree as to any of the following things: How many officers they shall have, or their duties; what are regarded as moral hazards; what are regarded as physical hazards; whether they will insure saloons, or bawdy houses, or dens of vice; whether they will take written applications, and whether they shall be annexed to the policies, or whether statements of the insured shall be warranties or representations; or whether they will do business by correspondence or by agents? If this statute prevails, then the manner of doing business, if by agreement, whether harmful or beneficial to good order and the welfare of the people of Nebraska, must be held as unlawful. And, if such legislation is valid, is not the boasted right of liberty of contract entirely subject to legislative control? And there is no more sacred right, under our government, than the right of contract. Without it, business cannot be transacted for a day by any person. Contracts, express or implied, enter into every transaction, with every person, every day of the year. Liberty does not mean alone out of jail, or from the clutches of the officer. Of course, for reasons of public policy, matters of immorality and crime cannot be the subject of contract. But it is not for the legislature alone to declare public policy. If this were so, then any contract can be denounced as against public policy, and the evils our fathers sought to be rid of are with us again. It has been but a few years since the belief was quite as general that commerce could be controlled by state legislation, until the remedy was many times worse than the evil. Judge John F. Dillon, once the honored judge of this court, last February (Marshall day), at Albany, said in a public address on the great chief justice:

"Mr. Justice Miller, speaking on this subject (Miller, Const. p. 81), truly declared: 'Notwithstanding for nearly one hundred years we have had in the federal constitution the declaration that congress shall have power to regulate commerce among the several states, there are at this hour, upon the statute books of almost every state, laws violating that provision, and there is no doubt that, if this clause were removed to-morrow, this Union would fall to pieces, simply by reason of the struggles of each state to make the property owned in the other states pay its expenses.'"

If Justice Miller had been speaking of the right of contract, he would have been equally severe on the attempt by many legislatures to break down such right. "Nor shall any state deprive any person of life, liberty or property without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws," is the law of the land. If the pretense urged by some that legislatures and municipal councils can declare public policy, and then, by the exercise of the police power, make all business otherwise legitimate unlawful, then we have a written constitution to no purpose. The cases on this great subject are numerous, and they cannot all be reconciled. I do not care to review them, nor to allude to but few. It is sufficient for me to say that the police power of the state does not go to the extent of riding down plain provisions of the federal constitution, from which I have quoted. Some of the other objections to this statute I will not consider.

3. The other statute attempts to define a trust, declares all agreements with reference thereto as void, and for a violation of the statute imposes penalties. The statute is too lengthy to set it out in full herein, but it declares that any combination of capital, or skill, or acts by which persons seek to fix the price of any article, commodity, use, or merchandise with the intent to prevent others in a like business or occupation from conducting the business or occupation, is a trust, and especially so as to any of the following things: Restrictions in trade; to limit the production or increase or reduce the price of any commodity; to prevent competition in insurance, or in the making, transportation, sale, or purchase of any article; to fix any standard whereby its price to the public shall in any manner be established; to enter into any contract by which a party is not to deal in any article below a certain price, or by which the parties agree to keep the price at any sum. The statute declares any persons violating the statute shall be conspirators, and punished accordingly. Any corporation of the state violating the statute shall have its corporate existence declared forfeited by suit, and, if the complaining party is successful, an attorney's fee shall be taxed; but, if the corporation is successful, it must pay its own attorney's fees. Any foreign corporation violating the statute is to be driven from the state, and a like provision is recited as to attorney's fees. There are provisions entirely changing the rules of pleading and evidence in suits under the statute. Any person may bring the suit, and it is the imperative duty of the county attorneys to bring suits for the violation of the statute; and upon conviction an attorney's fee is taxed as costs, but, if successful, the company recovers no such fee. All contracts in violation of the statute are absolutely void. Any purchaser of a commodity in violation of the statute can plead the violation as a complete defense in an action to recover the purchase price. Any person injured in his business, property, or employment by any violation of the statute can recover damages and an attorney's fee, but the defendant, if successful, cannot recover such fee. Any person or corporation accused of violating the statute in any manner can be compelled to furnish all books and papers bearing on the question, but exempts such person from a conviction on such evidence. Finally, the statute exempts

any assembly or association of laboring men from the provisions of the statute. Such is a general statement of the statute. Many, and perhaps most, people believe a trust to be an evil, and many believe they can be exterminated by state legislation. Probably some of them can. But, if legislation like this can be sustained, then matters which have been the subject of contract from time immemorial cannot longer be covered by agreements. It cannot be said of this statute that any one material provision may be held void, and allow the balance of the statute to stand, and be enforced. Of some statutes that rule can be invoked. But in this statute practically every recital refers almost directly to every other provision. Every poisonous phase permeates the entire scheme, and it only remains to show what some of them are. If this statute is valid, two men in the same line of business in the same town or village cannot form a partnership if it tends to maintain prices. They must continue, each for himself, until one or the other or both are destroyed. Neither can a stock company nor a corporation be formed by two or more if, by so doing, the price is maintained. This statute is not a step, but it is a long stride,—hundreds of years,—backward, when monarchs, cabinet officers, and even parliament decreed the price to be paid for a day's labor, and the cost of all the necessities of life, even to the loaf of bread. Any one with but the slightest knowledge of history will recall what tyranny and brutality existed in England by reason of such laws, and in France down to the Revolution. If this statute is valid, the next step may be, and can be, and probably will be, the granting of exclusive rights to certain persons, only, to pursue an occupation. It would be probable, because those let in would be the more thrifty. Drive out three-fourths of the barbers, or waiters, or carpenters, or blacksmiths, and those remaining would be thrifty, even at the old price. Competition and contracts would be at an end. If we cannot acquire property, then we have a government of socialism. And how can we acquire property, or enjoy the property we do have, without the right of contract? If this law is valid, two or more farmers cannot agree that they will not sell their wheat to a neighboring mill for less than so much per bushel. Two or more farmers cannot agree that the live-stock feeder shall not have their corn, only at a certain price. Blacksmiths cannot agree that they will charge so much for shoeing horses. Nothing can be agreed to by the manufacturer, the farmer, gardener, the contractor, consumer, or laborer to prevent the reduction of price. Can it be possible that such legislation is valid? If it is valid, then what becomes of the provision, "No man shall be deprived of equal protection of the law," or of that other provision, "No man shall be deprived of life, liberty, or property without due process of law?" Justice Field once said: "The right to pursue them without let or hindrance is a distinguishing privilege of the citizens of the United States, and an essential element of that freedom which is their birthright." Another justice of the United States supreme court said: "Yet the power does not and cannot extend to prohibiting a citizen from making contracts, and this is institutional law in England as well as America." Another great judge has said: "Liberty includes the right to acquire prop-

erty, and that means and includes the right to make and enforce contracts." And I dare say that there is not an appellate court in this Union but has given a like definition of liberty,—“the right to make and enforce contracts.” Without it, in the language of Justice Miller, emphasized by Judge Dillon, already quoted, “And there is no doubt that, if this clause were removed to-morrow, this Union would fall to pieces.” We could not exist as a free people, but would be the slaves to every legislature that could be carried off its feet by first one public clamor and then another. Parties cannot only make contracts, but they may violate them, subject to being held responsible in damages. It will be recalled that a few years ago one of the United States judges issued an injunction in effect prohibiting employes of a railroad from agreeing in a body to quit work. The court of appeals of the Seventh circuit, presided over by Justice Harlan, of the supreme court, reversed the decision, in effect holding that it was lawful for the employes by agreement to quit in a body because their wages had been cut down. Citations could be made at great length from jurists and statesmen, practically without conflict, as to the right of contract being the greatest of all blessings enjoyed by a free people, and guaranteed us by the constitution so long as that instrument may last. And when the work of a lawmaking power conflicts with the constitution, there can be but one choice as to which ought to prevail. “No man shall be deprived of the equal protection of the laws” says the constitution.

The statute expressly excepts from its provisions assemblies or associations of laboring men. By saying that associations of laboring men are exempt from the provisions of the statute, it is thereby stated, in meaning, that unorganized labor must pay the penalties of a criminal statute for an act done by a member of an organization, and by him done with impunity. On one side, by this legislation, we have organized labor. Those men are not amenable to the statute. On the other side we have men who do not belong to organized labor,—farmers, merchants, professional men, laborers, as well as all others. They are amenable, and by this statute that is called “equal protection.” I do not believe it. Such legislation has been denounced by the supreme court of Nebraska. *Low v. Printing Co.*, 41 Neb. 127, 59 N. W. 362. Dozens of statutes have been held invalid by appellate courts which sought to make it invalid for one class of men to do one thing and lawful for other men, practically under the same circumstances, to do another, but like, thing.

5. The Railroad Traffic Association Case, 166 U. S. 290, 17 Sup. Ct. 540, 41 L. Ed. 1007, by the United States supreme court has been strongly urged by the attorney general as upholding the doctrine of this statute. But it does not, for the reason that the statute under consideration in that case was upheld by reason of the commerce clause of the constitution; and to that extent the commerce clause controlled the other clauses of the constitution; and I repeat that the statute with which I am dealing is a state statute.

6. Finally, it is claimed that as against foreign corporations the case of *Waters v. Texas*, 177 U. S. 28, 20 Sup. Ct. 518, 44 L. Ed. 657, forecloses the question, and in this I think the attorney general

and his deputy are mistaken. There the Waters Company, a foreign corporation, was licensed and went into the state at a time when there was in force a valid statute prohibiting foreign corporations from doing certain things, which it failed to observe. At all events, the validity of the statute in force when it went into the state was not challenged. The attorney general of Texas brought proceedings to oust it from the state. The opinion of the supreme court of the United States fortifies the proposition that a foreign corporation can only come into and remain in a state by the grace of the state. Subsequently Texas passed a statute, the validity of which was challenged by the foreign corporation. But the supreme court said, in substance, that it was wholly immaterial whether the later statute was valid or invalid. If valid, the judgment of ouster would be sustained; and, if invalid, the old law under which it came into the state was in force, and under the old law the judgment of ouster would be sustained. More than this cannot be claimed for that case. But that is not the question in the case at bar. These complainants were rightfully in Nebraska when these illegal or unconstitutional statutes were passed, and the question is this: Does the passage of an unconstitutional statute amount to the withdrawal of consent for a foreign corporation to remain in the state? I had supposed, and still believe, that an unconstitutional law was as though never passed. How can an unconstitutional statute be regarded as a withdrawal of consent to a foreign insurance company to remain and do business in the state? That the legislature of Nebraska can withdraw such consent, there can be no doubt. That the legislature can place onerous burdens on the foreign insurance companies, I have no doubt. That the legislature can discriminate in favor of Nebraska insurance companies, and against foreign insurance companies, is to me equally clear. A strong presentation of these matters is made by Judge Shiras in the case of *Insurance Co. v. Herriott* (C. C.) 91 Fed. 711. But the statutes with which I am dealing apply to all insurance companies, resident and foreign, and the statutes are equally void, in my judgment, as to all; and I can reach no other conclusion but that complainants should have a decree, and it is so ordered.

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BARSTOW et al. v. BECKET et al.

(Circuit Court, E. D. Georgia, S. D. October 6, 1899.)

**INJUNCTION—TEMPORARY RESTRAINING ORDER—GROUNDS FOR GRANTING.**

Under Rev. St. § 718, which authorizes a federal court or judge to grant a temporary restraining order pending the hearing of a motion for injunction, "if there appears to be danger of irreparable injury from delay," such an order should not ordinarily be granted to prevent defendants from conveying lands described in the bill, the purpose of which is to vacate alleged fraudulent deeds to such lands, and as to which the filing of the bill operates as a *lis pendens*.

In Equity. On motion for a temporary restraining order.

Hugh V. Washington, for the motion.

SHELBY, Circuit Judge. The bill shows that the several complainants are heirs at law of Elias B. Barstow, deceased, who died intestate in 1898. While in life he was seised and possessed of several tracts of land, which are the subject of the suit. The bill shows that his estate is entirely solvent. It is alleged that during his lifetime several of the defendants conspired to obtain this land by fraudulent means. E. B. Barstow was very old and infirm, and it is alleged that he was non compos mentis. The bill alleges at length a combination and conspiracy to obtain the property at its sale under execution at a grossly inadequate price. It is alleged that some of the defendants who did not participate in the fraud have become purchasers of portions of the land with knowledge of the facts. The bill contains an offer to do equity by paying anything that may be justly due on the judgments under which the lands were sold, and prays for an account of rents and profits, and for cancellation of the several conveyances. It will be seen by these averments that the complainants are claiming the real estate as heirs at law of E. B. Barstow, and seeking to remove a cloud upon their title. There is also a prayer that the defendants be restrained from alienating or incumbering the lands pending this suit, and a prayer for a permanent injunction restraining them from setting up a claim or bringing any action of law or suit in equity, under the said conveyances, to recover the said lands. The substance and purpose of the bill is to vacate and avoid the fraudulent deeds. The case is now submitted only on a motion for a restraining order as prayed for in the bill. The sworn bill containing these averments is submitted to the court to sustain the motion.

Section 718 of the Revised Statutes is as follows:

"Whenever notice is given of a motion for an injunction out of a circuit or district court, the court or judge thereof may, if there appears to be danger of irreparable injury from delay, grant an order restraining the act sought to be enjoined until the decision upon the motion; and such order may be granted with or without security, in the discretion of the court or judge."

It will be observed from the language of this section that the court is authorized to grant the restraining order prayed for only in cases where there appears to be danger of irreparable injury from delay. In such cases it is proper that the court should grant an order restraining the acts sought to be enjoined until the decision upon the motion for the injunction. The complainants in this case pray that the defendants be restrained from conveying or incumbering the real estate, which is fully described in the bill. The filing of the bill in this case will create a *lis pendens* as to the property described in it. If any one purchases the real estate, or any part of it, involved in the suit, while it is pending, the purchase will be subject to the result of the suit. If the complainants succeed in obtaining the decree prayed for on final hearing, the decree will be conclusive against such purchaser. Relief by restraining order, as here prayed for, against the transfer of real estate by the defendants, should, we think, ordinarily be refused when the effect of filing the bill operates as *lis pendens* so as to afford sufficient protection

against the transfer of the property pendente lite. *High, Inj.* (2d Ed.) § 333; *Smith v. Malcolm*, 48 Ga. 343; *Powell v. Quinn*, 49 Ga. 523. For these reasons the motion to grant the restraining order is overruled, and decree will be entered accordingly.

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**BELL v. COMMONWEALTH TITLE INS. & TRUST CO.**

(Circuit Court of Appeals, Third Circuit. September 27, 1901.)

**No. 31.**

**RECORDS OF FEDERAL COURTS—JUDGMENT INDICES—RIGHT OF INSPECTION.**

Under Act Aug. 1, 1888 (25 Stat. 357), which makes judgments and decrees rendered in the circuit and district courts of the United States liens on property the same as like judgments and decrees of the courts of the state in which they are rendered, and requires the clerks of such courts to prepare and keep in their offices indices and cross indices of the judgment records, which "indices and records shall at all times be open to the inspection and examination of the public," a corporation engaged in insuring titles is entitled to inspect the indices so kept in relation to transactions which are at the time depending, under proper regulations and restrictions.

Appeal from the Circuit Court of the United States for the Eastern District of Pennsylvania.

W. M. Stewart, Jr., and James B. Holland, for appellant.

John G. Johnson, for appellee.

Before **ACHESON** and **GRAY**, Circuit Judges, and **BUFFINGTON**, District Judge.

**ACHESON**, Circuit Judge. This is an appeal by Samuel Bell, clerk of the circuit court of the United States for the Eastern district of Pennsylvania, the respondent below, from a decree of that court (105 Fed. 548), of which the following is a copy:

"And now, this 16th day of January, 1901, this case having come on to be heard upon pleadings and proofs, and having been argued by counsel, it is ordered, decreed, and adjudged that the respondent shall permit the properly authorized representatives of the complainant to inspect and examine the judgment indices and cross indices kept by the respondent, as clerk of the circuit court of the United States for the Eastern district of Pennsylvania, in such way and manner as will enable the complainant to prosecute its business as insurer of titles; but subject to the following restrictions: (1) The inspection and examination must in each instance relate and be confined to a transaction or transactions which at the time being shall be current or depending; and (2) such inspection and examination shall be made only at such times and under such circumstances as will not interfere with the respondent or his assistants in the discharge of their duties, or with the exercise of the right of other persons to have access to said indices and cross indices."

The Commonwealth Title Insurance & Trust Company, the complainant below (here the appellee), is lawfully engaged in the business of insuring titles to real estate, in making searches for liens and incumbrances against the same, in giving certificates as to the condition of such real estate as regards the existence of liens against the same, and in doing, on behalf of persons contemplating purchases

of real estate, all that is necessary in the way of examination of the titles thereof and for liens and incumbrances against the same. Section 828 of the United States Revised Statutes provides:

"All books in the office of the clerks of the circuit and district courts, containing the docket or minute of the judgments, or decrees thereof, shall, during office hours, be open to the inspection of any person desiring to examine the same, without any fees or charge therefor."

The act of congress of August 1, 1888 (25 Stat. 357; 1 Supp. Rev. St. [2d Ed.] p. 602), after enacting that judgments and decrees rendered in a circuit or district court of the United States within any state shall be liens on property throughout such state in the same manner and to the same extent and under the same conditions as if they had been rendered by a court of general jurisdiction of such state, provides thus:

"Sec. 2. That the clerks of the several courts of the United States shall prepare and keep in their respective offices complete and convenient indices and cross-indices of the judgment records of said courts, and such indices and records shall at all times be open to the inspection and examination of the public."

This legislation, we think, was a complete warrant for the measure of relief accorded to the complainant below. We do not regard it as at all material that the words "without any fees or charges therefor" are not repeated in the act of 1888. The two cited enactments relate to the same general subject-matter, and are to be read together. Besides, the language "such indices and records shall at all times be open to the inspection and examination of the public" clearly implies free access for the purpose stated. The reason is obvious, for by the first section of the act of 1888 judgments and decrees rendered by a circuit or district court of the United States within any state are made liens on property throughout the state in the same manner, and to the same extent, and under the same conditions as if rendered by a court of general jurisdiction of the state. Under this act, and within its limitations, every judgment or money decree rendered in a circuit or district court of the United States within the state of Pennsylvania is a lien upon the real estate of the defendant in such judgment or decree, and every one purchasing real estate which might be affected by the act of congress for his protection must examine or cause to be examined the indices and cross indices required by the act to be kept by the clerk of the court. Undoubtedly the right of inspection and examination of these indices is given to such purchasers by the statute. The purchaser or intending purchaser of real estate, however, is not bound to exercise this right personally, but may do so by an agent, or through a skilled person, or an experienced company, such as an attorney at law or a title insurance company. In the present case the decree secures the right of inspection and examination to a title insurance company in the prosecution of a legitimate business, and when acting in the interest of its customers. We cannot doubt that under the act of congress these indices and cross indices are open for inspection and examination to this title insurance company as part of the public.

The decree of the court below, it will be perceived, is very guarded



in its terms. Under it the title insurance company, the appellee, has no general access to the judgment indices and cross indices, but simply the right of inspection and examination in a particular transaction or transactions at the time current or depending; and this restricted right is to be so exercised as not to interfere with the clerk or his assistants in the discharge of their duties, or with the right of other persons to have access to the indices. The right of inspection and examination of the judgment indices expressly conferred by the act of congress is not to be denied because its exercise may diminish the income of the clerk's office. No one who is entitled by law to inspect and examine these indices is to be compelled to order, and pay office fees for, certificates of search. If the revenue of the office is insufficient, the remedy is with congress. No good reason for disturbing the decree of the circuit court has been shown to us.

The decree is affirmed.

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**CURTICE v. CRAWFORD COUNTY BANK et al.**

(Circuit Court, W. D. Arkansas. September 20, 1901.)

1. **BANKS—STATUTORY LIEN ON STOCK—PRIORITY BETWEEN BANK AND PLEDGEE.**  
A stockholder in a bank may pledge his stock as collateral security to a third person by a written assignment and delivery notwithstanding a statute requiring transfers to be made on the books of the bank, and the lien of such pledgee, acquired before the stockholder becomes indebted to the bank, will prevail over a statutory lien given the bank to secure its debt, where the bank before or at the time its debt was contracted had notice of the pledge; but, in the absence of such notice, the lien of the bank is superior, and the burden of proving notice rests upon the pledgee.
2. **SAME—NOTICE OF LIEN.**  
A pledgee of bank stock is chargeable with notice of a statutory lien on such stock in favor of the bank for an indebtedness from the stockholder to the bank existing when the pledge is made.
3. **EVIDENCE—TESTIMONY OF PARTY—CONSIDERATIONS AFFECTING WEIGHT.**  
Although a party to a suit is permitted by statute to testify in his own behalf, the considerations which excluded his testimony at common law still exist, and may properly be considered as affecting the weight to which it is entitled, especially where his right to recover as a plaintiff depends solely on his own testimony in regard to transactions with persons since deceased, through whom, as officers and agents of a defendant corporation, he seeks to charge such defendant with notice.
4. **BANKS—REPRESENTATION BY OFFICER—KNOWLEDGE OF CASHIER AS NOTICE TO BANK.**  
The cashier of a bank, in pledging stock of the bank, owned by him, as security for a personal debt, acts in his individual capacity, and not as an officer of the bank; and his knowledge of the transaction is not attributable to the bank to affect the validity of its statutory lien on the stock as security for a loan subsequently made him.
5. **SAME—NOTICE TO PRESIDENT.**  
Notice that a stockholder in a bank has pledged his stock to a third person, acquired by the president, who has no part in the active management of the bank's business, and who is not at the time acting in its behalf, is not notice to the bank which will affect its statutory lien on such stock for a loan subsequently made to the stockholder without the president's knowledge.

In Equity. Suit to enforce lien on bank stock pledged as collateral security.

Miles & Miles and Scarrit, Griffith & Jones, for complainant.

Reid & McDonough and Jesse Turner, Jr., for respondent Crawford County Bank.

E. B. Pierce, in pro. per.

ROGERS, District Judge. The controlling inquiry in this case is whether the plaintiff, J. M. Curtice, has a first lien on the stock of Robert S. Hynes in the Crawford County Bank, it being evidenced by stock certificates numbered 108 and 133. Both certificates were issued to defendant Hynes. He was cashier of the bank when certificate 108 was issued, but had ceased to be cashier when certificate 133 was issued. Certificate 108 was issued June 16, 1891, and was for 200 shares of \$25 each,—\$5,000; certificate 133 was issued March 15, 1894, for 40 shares of \$25 each, or \$1,000. Plaintiff claims a lien on said stock by way of pledge as collateral for a loan to defendant Hynes, evidenced by note bearing date March 15, 1894, for \$8,400, and on which is now due something over \$6,000. This note, it is alleged, was a renewal note for money, a part (\$2,000) loaned Hynes in the spring of 1888, and a part (\$3,000) in the spring of 1889, and subsequently renewed annually until principal and interest amounted to \$8,400; and that the stock certificates represented other certificates anterior in date, which had been taken up and canceled, and these issued in their stead. The bank, on the other hand, claims a statutory lien (Sand. & H. Dig. Ark. § 1342) on the same stock to secure advances made to Hynes after he ceased to be cashier, in the fall and winter of 1893 and 1894, as well as for some small loans made to him anterior thereto. The question is, which has the prior lien?

Section 1342 of Sand. & H. Dig. Ark. reads:

"The stock of every such corporation shall be deemed personal property, and be transferred only on the books of such corporation in such form as the directors shall prescribe; and such corporation shall at all times have a lien upon all the stock or property of its members invested therein for all debts due from them to such corporation."

This statute has been construed by the supreme court of Arkansas in two cases (Springfield Wagon Co. v. Bank of Batesville, 57 S. W. 257; Oliphint v. Bank, 60 Ark. 198, 29 S. W. 460), but the precise question here presented was not determined in these cases. The consensus of judicial opinion on the construction of statutes substantially the same as this establishes the following principles of law: (1) The bank has a statutory lien on the stock of a stockholder the moment he becomes indebted to the bank. (2) As between a stockholder in a bank and a third person, the former may, by assignment in writing and delivery, pledge his stock to such third person as collateral security without regard to the provisions of the statute regulating the transfers of stock. (3) The lien of such a pledgee, acquired before the stockholder becomes indebted to the bank, will prevail over the lien of the bank, provided the bank had notice of the pledgee's lien before or when its debt was

contracted; contra, if the bank had no notice. (4) A third party accepting the stock of a stockholder in pledge for his indebtedness must be held to have notice of the lien of the bank on the stock for all then existing indebtedness of the stockholder to the bank. (5) In a contest by a pledgee asserting a lien on the stock of the bank against the bank claiming a lien on the stock for the stockholder's indebtedness to the bank, the burden is on the pledgee to show notice to the bank of the existence of his lien before or at the time the indebtedness to the bank was created. In support of these principles, I cite: *Masury v. Bank*, 35 C. C. A. 476, 93 Fed. 603; *Lowell, Stocks*, § 175; *Cohant v. Reed*, 1 Ohio St. 298; *Birmingham Trust & Sav. Co. v. Louisiana Nat. Bank* (Ala.) 13 South. 112, 20 L. R. A. 600; *Bank v. Laird*, 2 Wheat. 390, 4 L. Ed. 269; *Hammond v. Hastings*, 134 U. S. 401, 10 Sup. Ct. 727, 33 L. Ed. 960; 1 *Cook, Stock & S.* § 533; *Gemmell v. Davis* (Md.) 23 Atl. 1034. Many other authorities might be cited bearing upon and illustrating the principles of law above stated. It is believed, however, these principles are established by the great weight of judicial opinion, and I do not understand either or any of them are controverted by the learned counsel on either side of this case. Moreover, there seems to be no controversy as to the validity of the indebtedness of the defendant Hynes to both Curtice and the bank. It follows, therefore, from an examination of this record, that, if the bank had no notice at the time its indebtedness was created that Hynes had previously pledged the stock in controversy to Curtice (assuming such to be the case), its statutory lien must prevail over that created by the pledge to Curtice. As to whether the bank had such notice on this record is perhaps a mixed question of law and fact. So far as the plaintiff's case on the facts, as it relates to notice, is concerned, it depends solely on his own evidence as to alleged interviews between himself and defendant Hynes and Judge Jesse Turner, Sr., both of whom died before this suit was begun. In weighing the testimony of a party to a suit, there are some elementary principles which should not be passed over lightly. They rest upon long experience, and until a comparatively recent date received the sanction of the best and wisest minds. In 1 Greenl. Ev. § 326, the author says:

"It [the common law] rejects the testimony (1) of parties; (2) of persons deficient in understanding; (3) of persons insensible to the obligations of an oath; and (4) of persons whose pecuniary interest is directly involved in the matter in issue,—not because they may not sometimes speak the truth, but because it would ordinarily be unsafe to rely on their testimony."

Such was the law in this country in all the courts, state and federal, until within the memory of some of us. In 1864 congress passed this statute (section 858):

"In the courts of the United States no witness shall be excluded in any action on account of color, or in any civil action because he is a party interested in the issue tried: provided, that in actions by or against executors, administrators, or guardians, in which judgment may be rendered for or against them, neither party shall be allowed to testify against the other, as to any transactions with, or statement by, the testator, intestate or ward, unless called to testify thereto by the opposite party, or required to testify

thereto by the court. In all other respects the laws of the state in which the court is held shall be the rules of decision as to the competency of witnesses in the courts of the United States in trials at common law, and in equity and admiralty."

Schedule, section 2, Const. Ark. 1874, provides:

"In civil actions no witness shall be excluded because he is a party to the suit or interested in the issue to be tried. Provided, that in actions by or against executors, administrators or guardians, in which judgment may be rendered for or against them, neither party shall be allowed to testify against the other as to any transactions with or statements of the testator, intestate or ward, unless called to testify thereto by the opposite party. Provided, further, that this section may be amended or repealed by the General Assembly."

The right of parties to a suit to testify had been previously conferred by the Arkansas Code of 1869, now incorporated in Sand. & H. Dig. §§ 2915, 2916. By section 2917, Sand. & H. Dig., it is provided:

"All other objections to witnesses [referring to persons made incompetent by the previous sections, but not including parties] shall go to their credit alone, and be weighed by the jury or tribunal to which their evidence is offered."

I call attention to these statutes merely that we may know the inroads on the common law, and get at the present status of the law in this state. But if it was not "ordinarily safe" to rely on the testimony of a party to a suit simply because he was a party, and that only, how much more unsafe is it when his right to recover depends solely upon his narration of what took place between himself and other persons who are no longer alive? In that event all restraint, except that of conscience, is removed, because there are none to question; and the temptation to deceive, to suppress, to prevaricate, is not held in check by the fear of contradiction or exposure, and immunity from the penalty of false swearing is made practically sure. Nor must it be forgotten that the removal of the barrier which disqualified a party to a suit to testify at all does not add anything to his credibility, or remove any temptation previously existing to deviate from the truth. It is just as unsafe after the disqualification is removed to rely upon the testimony as it was before, the only difference being that the court or jury trying the case is required to pass upon the credibility of the party. No doubt, in many cases the ends of justice have been subserved by permitting parties to a suit to testify. The statutes removing the bar as to parties to a suit becoming witnesses was a recognition of the harshness of the common-law rule; but those who are called upon to witness the administration of justice in the courts can scarcely have escaped the suspicion that the fountains of justice have not been purified thereby. The legislatures have recognized this danger by forbidding a party to a suit in cases where the opposite party is an executor, administrator, or guardian, and wherein judgments may be rendered for or against them, to testify as to transactions with or statements of the testator, intestate, or ward, unless called to testify by the opposite party. The reason which underlies statutes of that character is equally applicable to the case at bar. The only difference is, neither the congress nor the

legislature of this state has extended the principle to a deceased agent, although it has been done in many other states, as will be seen by an examination of the text and cases cited thereunder in 29 Am. & Eng. Enc. Law (1st Ed.) tit. "Witnesses," p. 715 et seq. Under the statutes quoted above, the evidence of the plaintiff as to personal transactions between himself and Hynes cannot be considered, because as to such transactions he is not a competent witness against the administrator of Hynes; nor would such evidence be binding on the bank. The reason is that, when an agent comes in possession of information while engaged in a transaction of his own, with which his principal has nothing to do, and in which his principal has no interest, such knowledge is not binding upon his principal; and especially is this true if the transaction in which the agent is engaged is of a nature hostile to the interests of his principal. If it be true that plaintiff is not a competent witness, in a suit against the administrator of Hynes, as to transactions between himself and Hynes in the lifetime of the latter, which transactions were personal to themselves, then the inquiry is, when did plaintiff come into the possession of either of the certificates in controversy as collateral for the loan made to Hynes? No lien could attach to the stock in the absence of the possession of the certificate, unless it may be, as some authorities say, by some instrument of writing creating a lien. There was no such writing in this case. The lien, therefore, could only attach by possession of the certificate. The stock itself, while declared by the statute to be personal property, is incapable of delivery, because intangible, existing only in contemplation of law; and the certificates are not stock, but, like deeds to land, are the evidence only of title. The only evidence except that of plaintiff relating to the transfer of this stock is found in the face of Hynes' note to Curtice. That note bears date March 15, 1894, and recites on its face, "I hereby deposit with said Curtice, as collateral security for the payment thereof, 340 shares of the capital stock of the Crawford Co. Bank of Van Buren, Ark., being certificates 106, 108, and 133," and then gives said Curtice the power to sell, etc. In the absence of other proof, the deposit of the stock must be held to have occurred on that date to secure that note. Now, let us see if the testimony of plaintiff can be allowed to vary that conclusion. Curtice testifies in substance as follows: That in the spring of 1888 he made two loans at the same time,—one for \$2,000 to Hynes personally, one for \$3,000 to the defendant bank,—and took as collateral security for both loans certificates for about \$5,000 of Hynes' stock in the defendant bank; that he took a note of Hynes for the \$2,000 loaned him, and the loan to the bank was evidenced by a time certificate of deposit drawing 8 per cent. interest, and running for one year; that Hynes, who was cashier of the defendant bank, and himself were in the new bank building of the defendant bank, behind the cashier's desk, discussing the loan; that an agreement was reached as to the terms of the \$2,000 loaned to Hynes personally, but the terms as to the bank's loan were left open, and Hynes said he would step out and see Judge Turner about whether the bank wanted the \$3,000; that he (Curtice) followed Hynes to the room

in the rear end of the building, called the "directors' room," and there found Judge Turner alone, sitting at his desk; that the purpose of Mr. Hynes going there was to see if Judge Turner advocated the bank taking the loan, but he gives no reason why he followed Hynes, although the question was put to him. He says Hynes' conversation with Judge Turner about the loan "was a little to the side," and he did not hear it. On being called upon to give a "photographic" account of what occurred in that interview, he answered:

"I simply remember that Mr. Turner, Sr., asked the question—I don't know how it came up—why I wanted to take bank stock as collateral, and he said bank stock would not be good unless the certificate of deposit was good; that they were both on the same firm; and it struck me that it was a point well taken, and I remember it, for it looked unbusinesslike for me to take bank stock for the debt of the bank; and Mr. Hynes spoke up, and said, 'Curtice will not loan anything without collateral.' I only remember that from its being out of the usual order. Mr. Jesse Turner's criticism was so appropriate that it has lived in my memory."

Curtice says about a year after this transaction the bank paid its \$3,000 indebtedness, but Hynes at the same time borrowed a like sum from him, and, taking up his \$2,000 note, executed his own note for about \$5,000, and left the bank stock with him as collateral; that he does not know the numbers or amounts of these certificates of stock, but they were indorsed "Robert S. Hynes" in blank, and Hynes said they were the first certificates of stock he ever owned. It is beyond dispute that the new bank building in which Curtice says this transaction occurred was not then in existence, and was not for nearly two years thereafter. This conversation and transaction could not, therefore, have taken place in that building in the spring of 1888. Did it take place in that building at all? The admitted—or at least established—facts preclude the possibility of it. Curtice, according to his own statement, never made any other loan to the bank but that one, and it was paid off, as shown by him, about a year later. This payment was made before the new bank building had been constructed. But, if such were not true, the predicate for any such conversation passed away when the first loan was made. The purpose, says Curtice, of interviewing Judge Turner was to see if he advocated the bank taking the loan; and if the loan was made in the spring of 1888 and no other loan was ever made to the bank, there was no occasion afterwards for any such interview, either in that building or in any other building. Curtice assigned no other purpose for the interview than to ascertain whether or not Judge Turner advocated the bank accepting the loan. Moreover, the purpose for which this interview was had was a matter purely of bank policy, and entirely within the province of Hynes, and entirely beyond the established course of action of Judge Turner. It is shown that Hynes, without consultation with any of the officers of the bank, was accustomed to exercise at all times the power of receiving deposits, whether they bore interest or not; and that it was agreed, when Judge Turner became interested in the bank and accepted its presidency, that he should not be annoyed with the details of the bank, and that in point of fact he never was; that his real connection with the bank

was to preside over its directors' and stockholders' meetings, and to sign such documents as the president of the bank, by the nature of his office, was required to execute; and this is shown to have been done wholly, if not always, at the instance of his son and law partner, Jesse Turner, Jr., who was an active director and a member of its board of discount or executive committee. It is shown, too, that there never was a desk in the directors' room at any time, and that Judge Turner was never known by the present cashier, Mr. Pernot, who has been a trusted employé in the bank since it was founded, or by his son, or by Mr. Moore, also a director and a member of the executive committee of the bank, to be in that room at any time except at stockholders' or directors' meetings. He is not shown to have ever transacted any other bank business there, or to have had anything to do with the details or daily transactions of the business of the bank. His name and character was what the bank wanted and got, and not his active services. His age forbade the latter. The statement of Curtice, in the absence of a knowledge of the powers and duties of Hynes and of Judge Turner, and of the habits and life of the latter, and his real relations with the bank, is plausible in some respects, while not so in others. An inexperienced cashier, exercising limited powers and discretion, might very well be supposed to consult the president of the bank, if convenient, but more properly the executive committee or board of directors, before taking deposits bearing interest at 8 per cent. Such a statement might well be considered consistent with business experience. But Hynes was not an inexperienced cashier. He founded the bank. He had the active management of it from its organization. He was, in fact, the manager of the bank, himself a large stockholder, consulting no one as to the general run of its business, but no doubt referring important loans and other matters to the executive committee or board of directors. He was never known to refer such a matter to Judge Turner. He knew Judge Turner had nothing to do with that part of the bank's business. Nor is it shown, either by practice or express authority, that Judge Turner was ever empowered to perform any such duty or exercise any such power, while it was the constant practice of Hynes; and it must be inferred that it was with the knowledge of the bank to do without consulting any one the very thing about which Curtice says he went to consult Judge Turner. Again, just why Curtice should have followed Hynes into a private room where Hynes had gone, with his knowledge, to consult Judge Turner upon a question of bank policy, viz. as to whether the bank should take the loan, and where the consultation, when had, as Curtice says, was a "little aside," where he did not hear it, is not clear, nor entirely consistent with common propriety or business experience. Just why Hynes himself, a borrower at that time, should of his own accord pledge his own bank stock to secure a loan for the bank, is out of the usual experience of business men, and no reason is given by Curtice why he did not call upon the bank for security, instead of Hynes personally. But, if Hynes chose to do that, it was a matter about which there was no occasion for consultation with Judge

Turner, as the bank could not have been injured by Hynes pledging his own bank stock to secure the loan to the bank. Nor does Curtice say that the interview was had in order to consult Judge Turner about the collateral, or about the question of the loan of Hynes. Turner had no concern in that. Nor does it appear that Judge Turner was advised at the time that Curtice had made a personal loan to Hynes. So that, on the whole, there is much more reason to say that, if the statement of Curtice is not incredible and unreasonable, it is at least out of the ordinary course of conduct and inconsistent with business experience. To this it may be added that the stock book shows that in the spring of 1888, when Curtice says this loan was made, Hynes had only one certificate for \$10,000, and two smaller certificates, in the aggregate amounting to \$2,750. Indeed, the stock book shows that the first time Hynes owned stock certificates which, either singly or any two or more of which in the aggregate, approximated \$5,000, was in February, 1890, when he had issued to him certificate numbered 65, for 400 shares (\$10,000), No. 66, for 160 shares (\$4,000), and No. 67, for 40 shares (\$1,000), the last two certificates aggregating \$5,000, which is the sum Curtice claimed was pledged to him as collateral in the spring of 1888. Those certificates were issued to Hynes about a year after the bank had paid Curtice the \$3,000 loan made in the spring of 1888, and also about a year after Hynes had renewed his loan, and increased it to \$5,000. Curtice also stated that the certificates of shares which he held as collateral were indorsed to him in blank, but the stock book and the agreed statement of facts both show that no stock certificates ever issued to Hynes were signed in blank by him except No. 124, for 160 shares, issued on the 20th of September, 1892, and the stock certificates numbered 106, 108, and 133, neither of which had been issued in February, 1890. So that it is quite clear that neither of certificates 65, 66, nor 67 was ever pledged to Curtice. It may be noted here that it was in February, 1890, that the bank stock was increased from \$50,000 to \$90,000. It is also absolutely certain, from the facts stated, that Curtice did not hold \$5,000 of Hynes' stock either in 1888 or 1889, for the reasons that Hynes had no certificates approximating \$5,000 in amount during these years, and those he did hold were never assigned, in blank or otherwise. It is useless to consider this branch of the subject further. In the opinion of the court the interview testified to by Curtice as having taken place in the spring of 1888 in the directors' room of the new bank building did not occur at that time, or at any other time; and, if the transaction itself occurred between himself and Hynes, the evidence wholly fails to show that any one except Curtice and Hynes knew of it before or up to the death of Hynes. If they knew of it, the testimony of Curtice to that effect would not be competent to bind the administrator of Hynes, nor was Hynes' knowledge binding on the bank. I also conclude that if Curtice's testimony is true in this that the stock he held was assigned to him by Hynes in blank (and for the purposes of this case his testimony in that regard must be taken as true), that he never held any stock up to July 15, 1891, for no stock of Hynes issued



prior to that date was ever assigned in blank at any time, and the stock canceled itself so shows, and it is so agreed in the stipulation filed.

But the plaintiff claims that in 1890 or 1891 he had another interview with Judge Turner, in which he imparted notice to Judge Turner of Hynes' indebtedness to him, and that he held the bank stock of Hynes as collateral. He says it occurred in this way: The bank, he says, had increased its capital stock, and Hynes had written to him to send in the old certificates he held, and get new ones for them; and later, when he was in Van Buren, Hynes requested him to return the old certificates, and get new ones. On being asked, "Was that the time at which this certificate 108 was issued?" he answered: "I think the capital stock was increased the year before the date of issue of certificate number 108. My impression is the change was made in 1890, and this certificate was probably issued and delivered to him a year later, when the note became due again, as I usually took the notes from year to year; sometimes 14 months." He then says, in substance, that he does not remember the circumstances under which certificate No. 108 was issued to him, or who was present when it was done, but "I do remember an instance when all the certificates I held were taken up on account of change in the bank's capital, and new certificates being issued by the corporation. When I was in Van Buren, Mr. Hynes told me, as he had written me, that he would like to take up the certificates, and issue new ones, and requested me to come to the bank, and he would issue new certificates. What deeply impressed this transaction on my mind was that when he opened the stock book of the bank I saw that Jesse Turner, Sr., had signed the certificates, as president, in blank, and I thought it an unusual proceeding. From the blanks so signed, he filled out a certificate for me. Question. Who did? Answer. Capt. R. S. Hynes, and signed it himself as cashier." "Later," he says, "I was at Jesse Turner's office—Jesse Turner, Sr. I went to him as president of the bank, desiring him to see the stock issued to me, from the fact that it was just a little suspicious about the stock of the bank being filled out over his signature in blank; and I asked Jesse Turner, Sr., what he thought the stock was worth, and told him that they had been issued by Capt. Robert S. Hynes as collateral for his indebtedness to me; and he said he thought they were worth par. My real object was in getting him to see stock filled out over his signature." Curtice says the blanks had been filled out at that time, and stock delivered to him as security; that he does not know that the certificate referred to was No. 108, but that he had about \$7,500 of stock at that time, and that Judge Turner was then president of the bank. He then says certificate 133 was not issued to him until March 15, 1894, which is the date the note now in controversy was executed, and that stock certificate 133 was intended to cover accrued interest then due on a former note, of which the present note is a renewal; and then details the circumstances under which certificate 133 was given to him. On cross-examination, plaintiff, when asked to state when it was he took the certificates above referred to up to Judge Turner,

and had the conversation about their value, and was asked how many certificates he then had, answered that he did not remember how many certificates he had; that the interview occurred either in the fall or summer of 1890, or, if in 1891, "in the early part of the summer, or before the month of July"; that no one was present when he went to Judge Turner's office, and he found him sitting near his desk; that he then held more than one certificate, but does not know whether he held over two. He also says that he surrendered certificate 106, for \$2,500, on July 17, 1895. This was before Hynes' death. Certificate No. 133, not having been issued until after the bank's debt was created, is eliminated from further consideration. This leaves certificate No. 108, for 200 shares,—\$5,000,—in issue. That certificate was not issued until July 16, 1891. It could not have been the certificate he presented to Judge Turner, because Curtice says his interview with Judge Turner took place in the fall or summer of 1890, or before July, 1891, and certificate 108 had no existence at either of these dates. On February 15, 1890, the capital stock of the bank was increased to \$90,000. On September 9, 1890, all the old stock which Hynes held was called in, and the new certificates issued to him in lieu thereof were as follows: Certificate No. 65, 400 shares, \$10,000; certificate No. 66, 160 shares, \$4,000; certificate No. 67, 40 shares, \$1,000; and it could not have been this stock that Curtice showed to Judge Turner, for three reasons, either of which is conclusive: (1) The stock which Curtice says he held was all assigned to him in blank, but none of these certificates were ever assigned at any time by Hynes. (2) Curtice says he held at the time of the interview with Turner two certificates aggregating about \$7,500. Certificate No. 67, for 40 shares, was assigned by Hynes to W. T. Morgan, as shown by the bank books, on January 10, 1891. There were only two certificates remaining, Nos. 65 and 66, and they aggregated \$15,000, whereas Curtice said he held at that time two certificates aggregating only about \$7,500, or perhaps they may have been \$200 or \$300, more or less. (3) These certificates were issued September 9, 1890, and in lieu of all other stock held by Hynes. Curtice says his interview with Turner was a short time after the stock was issued,—perhaps a week; that he took it up to Turner, and asked him what it was worth, his real object being, not to ascertain its value, but to let Turner see the stock, which he says had been filled out by Hynes upon blanks purporting to have been previously signed by Turner, which transaction he thought was irregular; and that this interview took place in Turner's office over the bank. But Turner did not occupy the office over the bank until six weeks after that, or between the 25th of October or the 1st of November, 1890. It is certain, therefore, that certificates of stock 65, 66, and 67 were not shown by Curtice to Turner. But, if there were no certificates of Hynes then in existence, answering to the description of those he said he showed Judge Turner, and the irregularity of the certificates was the sole reason he had for going to see Judge Turner, it follows he did not have the interview at that time.

There are many other facts in this record, established by testimony which is not controverted, tending to show the falsity of the testimony of Curtice, and to which I have not adverted. No one can read his testimony, and compare it with the facts which appear on the face of the stock book, including the canceled stock attached thereto, and then compare it with the stipulation on file, and the testimony of Jesse Turner, Jr., and Mr. Pernot, without being impressed with the belief that many things testified to by him can have no foundation in fact. It may be observed, if the alleged interview with Judge Turner was in 1890, when Curtice says he saw the stock signed in blank by Judge Turner, then he certainly got all the stock of one date, for all the stock of Hynes was reissued September 9, 1890; and this stock, except 40 shares, assigned to Morgan in January, 1891, remained outstanding and unchanged in amount until called in in July, 1891, and during that period Hynes held no other stock. The certificates issued to Hynes after the stock of the bank was increased from \$90,000 to \$100,000, which increase occurred on the 15th of February, 1891, were as follows: Certificate No. 106, issued July 15, 1891, 100 shares, \$2,500; certificate No. 107, issued July 15, 1891, 100 shares, \$2,500; certificate No. 108, issued July 16, 1891, 200 shares, \$5,000; certificate No. 124, issued September 20, 1891, 160 shares, \$4,000. Curtice received as collateral of this issue certificates 106 and 108, as shown by Hynes' note now in controversy. I am satisfied, not only from Curtice's own evidence, but from facts appearing on the stock book, that he neither got these certificates at the time they were issued nor did he ever show them to Judge Turner. He was not in Van Buren in July, 1891, when they were issued. He says himself that the interview was before July, 1891; and, moreover, this stock was issued on different dates, while this transaction with Hynes about this stock, as he states, all occurred on the same day, and his interview with Judge Turner only a few days later. His debt, too, was for a larger amount than either of these certificates of stock. It was \$2,500 more than the largest certificate of stock, and no reason is assigned why, if the stock had been signed by Turner in blank, and was being filled out in the place of old stock formerly held by him, he did not have one piece filled out to cover the entire debt, instead of having two pieces filled out, on different dates, for amounts neither of which approximated the debt. I think it clear, therefore, that the second interview to which Curtice testifies as having been had with Judge Turner is not shown to have occurred either in 1890 or 1891, and there is an absence of any evidence that the second interview was at a later period than July 1, 1891. I conclude, therefore, from the facts, that this stock was never pledged until the 14th day of September, 1894, the day on which Hynes executed the note for \$8,400.

It is very difficult to see how the plaintiff could be mistaken, simply, in many of his statements which are overcome by the practically uncontroverted facts; and no more striking case can perhaps be found than this, indicating the care that should be given in considering the statements of a party with reference to interviews and transactions which he claims to have had with persons who are

dead. "Courts lend a very unwilling ear to the statements of what dead men had said." *Lea v. Copper Co.*, 21 How. 504, 16 L. Ed. 207. But, suppose it were true that Turner had the interviews with plaintiff, as testified to by the latter. How would that affect the bank? As to Hynes, it is true that in the spring of 1888, when the original loans were made, if he pledged any stock, he knew it. But, so far as his personal loan and the pledge of his stock was concerned, it was not a bank transaction, nor was it within the province of his agency for the bank to pledge his own stock for a bank loan. He might have done that of his own accord, and, if he did, it was a very unusual transaction. And, if he did pledge his stock for a loan to himself as well as a loan to the bank, he was not acting for the bank in pledging his stock, for the bank had no authority or power to pledge his stock. The bank did not control or hold his stock. It had no lien upon it at that time, and, if it had, it could not have pledged it. If, therefore, he pledged his stock, it was his own act, and not that of the bank, and he was under no obligation to the bank to pledge it. He agreed to pledge it for his own loan before he ever saw Judge Turner, and when he did see him it was not about his personal loan or the stock, but to ascertain whether he favored the bank taking the \$3,000 loan from Curtice. Nor was this a matter about which the president of the bank had anything to do. He had taken the presidency of the bank under an agreement that he should have nothing to do with its active management, and no one except Curtice ever knew him, so far as the proof shows, to have done a single act pertaining to the management or control of the details of the bank's business, except this one act, to which Curtice alone testifies. He was not a member of the executive committee, had nothing to do with taking deposits bearing interest, or making loans, or discounting paper, and it is not shown that he ever knew that Hynes ever owed the bank a dollar up to the day of his death. So far as Hynes' loan was concerned, it cannot be said to have been of any concern pro or con to the bank; but, if it was, it was an act unfriendly to it, for it might be the bank would prefer that a man exercising as much control as Hynes did over the bank's business should be as much identified pecuniarily with its welfare as possible. Hynes' loan and his pledge of stock therefore must be held to have been his personal transaction, and the information his own information, in no sense binding on the bank. I can but think that if he did pledge the stock as Curtice said it was purposely concealed from the bank, for it is almost incredible that the present cashier, Mr. Pernot, would not have known of it. He did not know it, and even after Hynes had pledged the stock by the note of September 14, 1894, he kept it from Pernot, and did not disclose the whereabouts of his stock when Pernot demanded it, and never did up to the day of his death. But even, if as stated, Turner and Hynes both knew that Hynes pledged the stock in 1888 to secure the bank loan of \$3,000, that loan was paid in 1889, and presumably the stock released, for there is no evidence that Turner knew Hynes made a personal loan of \$2,000 at the same time that the bank made its \$3,000 loan. Assuming, therefore, that all Curtice says about the interview of 1888

to be true, I am of opinion it constituted no notice to the bank. The principle of law is that notice to an agent, to be binding on a corporation, must come to the agent while acting in the line of his duty, or within the scope of his agency, and relating to transactions in which the agent is engaged at the time for the corporation. The same principle applies to the second interview when Curtice says he showed Turner the stock, and inquired its value, and stated he held it as collateral for the debt of Hynes, not with the view of ascertaining its value, but, as he says, to let Turner see the stock in order that his own suspicion of its irregularity might be allayed. Turner was not then engaged in any duty of the bank. It was no part of his official business to tell Curtice the value of the bank stock, nor was he then or at any time a member of the executive committee or discount board, nor did he previously or subsequently take any part in extending credit to Hynes, or have any knowledge, so far as the proof shows, that the bank had extended credit to Hynes. Notice to him, therefore, that Hynes had pledged his stock, did not bind the bank.

Now, let us examine some of the authorities along these lines.

In *Whitehead v. Wells*, 29 Ark. 108, the court said:

"Whether *Whitehead* had actual notice or not,—which, from the evidence, the jury might well infer,—yet he is affected with notice of all his agent knew in the line of his duty or the scope of his powers."

In *Manufacturing Co. v. Rogers*, 65 Am. Dec. 604, the supreme court of Georgia, by Lumpkin, J., said:

"It should have been submitted to the jury to find, in the first place, whether or not the proof showed that *Crockett* acted as the agent of the company in making the contract. If so, then all he did and said in the execution of his agency was admissible evidence, and bound his principal; otherwise it should have been excluded from their consideration in making up their verdict."

In *Bank v. Savery*, 82 N. Y. 307, *Leonard* was a director of the plaintiff bank. As a member of his firm, he had received notice that the note in controversy was affected by fraud. When the note became the property of the bank, it was insisted that notice to *Leonard* was notice to the bank. The court said:

"If the knowledge of the director was acquired in his official capacity, the bank also is presumed to have it; but, if it was acquired as any private person might have acquired it, the bank is not chargeable. *Leonard* comes within the latter condition. The information which he had was not communicated to him as a director, nor did he acquire it while engaged in its business. It did not belong to the plaintiff, and there can be no presumption that it was communicated to it. In behalf of the bank he did no act concerning the note or its purchase. The title to the note was perfect in the bank when its president perfected the bargain. Relying on that, the money of the bank was paid. His knowledge, therefore, cannot operate to its prejudice."

In *Bank v. Clark* (N. Y. App.) 34 N. E. 909, the court said:

"An officer's knowledge, derived as an individual, and not while acting officially for the bank, cannot operate to the prejudice of the latter. *Bank v. Davis*, 2 Hill, 451. \* \* \* The rule may be stated generally to be that, where a director or an officer has knowledge of material facts respecting a proposed transaction, which his relations to it, as representing the bank, have given him, then, as it becomes his official duty to communicate that knowl-

edge to the bank, he will be presumed to have done so, and his knowledge then will be imputed to the bank."

In *Cragie v. Hadley*, 99 N. Y. 131, 1 N. E. 537, 52 Am. Rep. 9, the court said:

"The general rule is well established that notice to an agent of a bank or other corporation, intrusted with the management of its business, or of a particular branch of its business, is notice to the corporation in transactions conducted by said agent, acting for the corporation, within the scope of his authority, whether the knowledge of such agent was acquired in the course of the particular dealing or on some prior occasion."

In *Bank v. Cushman*, 121 Mass. 490, the court said:

"If the note is discounted by a bank, the mere fact that one of the directors knew the fraud or illegality would not prevent the bank from recovering; but if the director who has such knowledge acts for the bank in discounting the note, his act is the act of the bank, and the bank is affected with his knowledge. A bank or other corporation can act only through its officers or other agents. As in other cases of agencies, notice to the agent, in the course of the transaction in which he is acting for his principal, of facts affecting the nature and character of the transaction, is constructive notice to the principal."

See *Hatch v. Ferguson*, 66 Fed. 676.

In *Victor Gold & Silver Min. Co. v. National Bank of Republic*, 49 Pac. 828, the supreme court of Utah held:

"The agent cannot act for himself and his principal as to anything with respect to which their interests may vary. The reason is that self-interest may prevent him from the performance of the duties he owes his principal. 4 *Thomp. Corp.* §§ 4630, 4657, 4658; *Clafin v. Bank*, 25 N. Y. 293; *Bank v. Gifford*, 47 Iowa, 575. When the officer is acting partly for himself and partly for the corporation, a notice to him does not affect the corporation. In section 4657, *Thomp. Corp.*, the rule is stated: 'But it should be borne constantly in mind that the cases where a notice to the president or any officer of a corporation will affect the corporation are cases where such president or officer is acting exclusively for the corporation. In cases where they are acting partly for the corporation and partly for themselves, a notice to them does not affect the corporation, because the fact that their personal interest is opposed to that of the corporation may induce them to withhold the information thus communicated from the directors, or from the appropriate corporate officer. In receiving a communication under such circumstances the president or other officer is held not to represent the corporation, but to represent himself only.'"

In *Exchange Nat. Bank of Spokane v. Bank of Little Rock*, 7 C. C. A. 111, 58 Fed. 140, 22 L. R. A. 686, the Bank of Little Rock provided a clerk, whose duty it was to prepare exchange for the cashier's signature. This clerk drew a draft for \$25 to his own order, and procured the cashier's signature thereto, pretending that he wished to make a remittance of that amount. He raised the order to \$2,500, and discounted it. It was held by the court that the Bank of Little Rock was not liable on the draft, assigning as a reason that when the forgery occurred the clerk was not acting for the bank, but acting for himself, and because the purchase of the draft was complete, he being the owner of it when the forgery was committed. This case illustrates in the strongest light the principle that, in order to bind the bank, the agent must, at the time the notice comes to him, be acting for the bank.

In *Bank v. Sneed* (Tenn. Sup.) 36 S. W. 716, the supreme court of Tennessee held that:

"A bank will not be charged with notice of the insanity of an accommodation indorser on a renewal note accepted by it because at that time the president of the bank, who was a member of the discount committee which passed on the note, knew of such insanity, he not having been present with the committee when the new note was taken and the old note extinguished, and not having had knowledge of the transaction till the day after it was consummated."

"Notice to the president of a bank by the maker of a note that it was procured by fraud, and without consideration, and will not be paid, is not notice to the bank, and will not make it liable for subsequently discounting the note, when such notice was not given to the president in his official capacity, nor at the bank, nor with any reference to the bank's business." *Bank v. Pierce* (Wash.) 33 Pac. 972, 38 Am. St. Rep. 174.

In *Gemmell v. Davis* (Md.) 23 Atl. 1032, a contest arose between the North Branch Company, of which Brydon was president, and Davis & Co., as first pledgee, and Mrs. Brydon, as second pledgee, over dividends on Brydon's stock, which had been pledged to the parties above stated; and it was insisted in that case that Brydon, being the president of the North Branch Company, and having assigned his stock, the company had knowledge thereof. The court of appeals of Maryland said:

"Though Brydon, who was the president of the North Branch Company, knew of the transfer to Davis & Co. and to Mrs. Brydon, because he made them, his knowledge thus acquired was not binding on the company, he not then being engaged in the business of the company, and not acting in his capacity of president."

It appeared in *Mathis v. Pridham* (Tex. Civ. App.) 20 S. W. 1015, 1016, 1024, that:

"The president of a bank which was a creditor of the corporation had been informed by the promoters of the corporation, who were trying to sell him stock individually, that the stock was being taken at less than par. This was a month or two prior to the time the bank extended its credit to the corporation, and it was not shown that such credit was extended through the agency of the president. *Held*, that the evidence was not sufficient to charge the bank with notice of the manner of issuing the stock." *Held*, further: "Though parties have been informed of the issuance of stock below par by a corporation, such information has not the characteristics of notice in law, unless the transaction to be affected thereby took place under such circumstances as would lead to the reasonable conclusion that the fact reported was still remembered."

In *Bank v. Christopher*, 40 N. J. Law, 435, it is held:

"A bank discounting a note before its maturity is not chargeable with the knowledge of illegality or want of consideration acquired by one of its directors in other than his official capacity, such director not having acted with the board in making the discount. (2) A director offering a note, of which he is owner, to the bank, of which he is a director, for discount, is regarded in the transaction as a stranger, and the bank is not chargeable with the knowledge of such director of an infirmity or defect in the consideration of the note."

The diligence of counsel has been rewarded by the discovery of many other cases cited for the aid of the court, some of which are not accessible, and others throw more or less light upon the questions involved. Those to which I have referred are ample to estab-

lish the doctrine announced, and are in harmony with the great weight of authority. Nor do I think they are irreconcilably in conflict with the cases cited by the counsel for the complainant, which the court is of the opinion are not applicable to the facts in the case at bar. I conclude, therefore, that the lien created by the pledge to the plaintiff cannot prevail over that of the bank.

It was urged at the hearing that the bank had waived its lien. In the examination of the case the court has not overlooked that contention, but the court is of the opinion that no facts found in this case raise the question of estoppel or a waiver. The plaintiff has not been misled by any action of the bank, and the bank did not waive the lien given to it by statute by endeavoring to make its debts more secure by getting the certificates of stock issued to Hynes into its own possession.

**MANSHIP et al. v. NEW SOUTH BUILDING & LOAN ASS'N et al.**

(Circuit Court, S. D. Mississippi. July 27, 1901.)

**1. BUILDING AND LOAN ASSOCIATIONS—ORGANIZATION—LOUISIANA STATUTES.**

A building and loan association may be organized under the general incorporation statute of Louisiana, which authorizes the formation of corporations for the purposes enumerated (Rev. St. § 683), "and generally for all works of public utility and advantage," and may assume and exercise the powers usually incident to such associations, and its contracts with its members are governed by the law applicable generally to such contracts.

**2. SAME—POWERS—BORROWING MONEY.**

The fact that a building and loan association assumes by its charter, and exercises, the power to borrow money and execute notes therefor, or to issue different classes of stock, does not affect its character as a building and loan association; such powers being within those it may properly exercise, in the absence of any statutory restriction.

**3. SAME—BORROWING MEMBERS—ESTOPPEL TO DENY CHARACTER OF ASSOCIATION.**

One who deals with a corporation as a building and loan association, becoming a stockholder and a borrower from it, is estopped to deny its character as such an association to avoid liability on his contract.

**4. SAME—CONSTRUCTION OF CONTRACT—USURY.**

A borrowing member of a building and loan association sustains a dual relation to the association, as an investor in and borrower from the same, and where he is of full age and compos mentis a court is not justified in arbitrarily applying premiums and stock payments to the liquidation of his debt, contrary to the terms of his contract, nor in arbitrarily combining premiums and interest charges in order to constitute usury, ignoring the plan upon which such associations are conducted and the relations between the parties with reference thereto, and treating such relations as those simply of borrower and lender.

**5. SAME—CHARGING FIXED PREMIUMS—LEGALITY.**

The fact that the premium charged by a building and loan association from borrowing members is fixed by its by-laws, and is uniform in all cases, instead of by competitive bidding in each case, does not authorize such premium to be treated as interest, for the purpose of rendering the contract usurious, in the absence of any governing statute. Uniform premiums are in fact more equitable, as between the borrowing members, than those determined in each case by the necessities of the borrower.



**6. SAME—LAW GOVERNING CONTRACTS—DESIGNATED PLACE OF PERFORMANCE.**

Where the by-laws of a building and loan association provide that all money due from members of the association, or from it to the members, shall be payable at its home office, in the state where it is organized, and all its contracts contain similar provisions, such contracts are solvable in the state of the home office, and governed by its laws, although notes and mortgages given by borrowing members may be executed in other states, and such members are permitted for their own convenience to make payments to local agents appointed by the association, who are, for the purpose of receiving and forwarding such payments, made by the by-laws the agents of the members.

**7. FEDERAL COURTS—FOLLOWING STATE DECISIONS—QUESTIONS OF GENERAL LAW.**

What law governs a contract between a building and loan association and a borrowing member, where the member resides in another state and the mortgaged property is there situated, and whether such contract is usurious, when that depends upon whether it is solvable under the laws of that state or those of the state in which the association is domiciled, are questions of general commercial law, upon which a federal court is not bound to follow the decisions of the courts of the state, but is governed by those of the superior federal courts.<sup>1</sup>

**8. CORPORATIONS—INSOLVENCY—SETTLEMENT WITH STOCKHOLDERS.**

Where the affairs of an insolvent building and loan association are to be wound up in a federal court in the state of its domicile, the rule adopted by that court for accounting and settlement between the receiver of the corporation and its borrowing stockholders will be followed by a federal court of another district, which has appointed an ancillary receiver.

In Equity. Suit against an insolvent building and loan association by a borrowing stockholder, and cross bill by receiver for foreclosure of mortgage.

Sterling & Harris and Frank Johnston, for complainants.

Denegre, Blair & Denegre and J. S. Sexton, for defendants.

**NILES**, District Judge. Complainants herein filed a bill against the New South Building & Loan Association, Johnston Armstrong, receiver therefor, and Jules A. Blanc, trustee in a certain deed of trust hereinafter referred to, and alleged, among other things, that Luther Manship and his wife, Belmont P. Manship, borrowed from said association the sum of \$1,000 on the 7th day of December, 1894, and that in order to secure the same they executed a deed of trust of that date to said Jules A. Blanc as trustee to secure said association in the sum of money so borrowed upon real estate situated in the city of Jackson, Miss. They further alleged that said loan was "evidenced by the joint promissory note of Luther Manship and Belmont P. Manship, payable on the ——— day of October, 1906, to the order of said association, at its office in the city of New Orleans, La."; that said association is a nonresident of this state, and that on the ——— day of ———, 1899, it was placed in the hands of Johnston Armstrong as receiver of the United States circuit court for the Eastern district of Louisiana, and that later said receiver was appointed in ancillary proceedings had in the United States circuit court for the Southern district of Mississippi; that

<sup>1</sup> State laws as rules of decision, see notes to *Griffin v. Wheel Co.*, 9 C. C. A. 548; *Wilson v. Perrin*, 11 C. C. A. 71, and *Hill v. Hite*, 29 C. C. A. 553.

said Armstrong was about to make an attempt to collect the sum of money so borrowed, with a lot of usurious interest and extortionate charges claimed to be due by him, and that he insisted upon the payment of "interest," "dues," and "premium," all of which are synonymous and aggregated 12 per cent. interest to start with and a correspondingly increasing ratio as each payment was made by complainants; that the contract entered into between the parties was usurious, because "it reserves 6 per cent. per annum interest and 6 per cent. per annum fixed premium," and that the term "premium" is used merely as a disguise for the word "interest," and that the whole is in excess of the 10 per cent. maximum allowed by the law of the state of Mississippi; that the contract "was made at Jackson, Miss., between complainants and the agent of the defendant association, and the amount of the loan so paid to complainants at Jackson, Miss., and it was the express agreement and understanding of all the parties to the transaction, at the time of making it, that said contract was to be performed by complainants making certain monthly payments to the local agent of said defendant association at Jackson, Miss., and that, as a matter of fact, it was never intended that said note should be paid at New Orleans, or at any other place than at Jackson, Miss."; that said association "was engaged in the ostensible business of a building and loan association, which served as a cloak for its nefarious operations and practice of usury in the state of Mississippi," and that, as a matter of fact, it was not a building and loan association at all, but "was simply a money-lending concern, using the guise of a building and loan association, with complicated and intricate form of contract, merely to hide its illegal and shady transactions, and that none except holders of the guaranty stock were allowed to have any voice at all in the management of the affairs of said corporation, and that, as borrowers, complainants were not members of a building and loan association, but debtors to a lot of money sharks, and that none of the benefits of a bona fide building and loan association could possibly inure to them from their membership in this concern"; that the by-laws of the association were made a part of the contract of loan, and that the premiums charged were fixed therein without legislative authority therefor, and that said premiums were therefore illegal, and were in fact interest. Complainants further alleged their willingness to do equity in the premises, and offered to pay into court "whatever amount that may seem right to the court that they should pay," and that said receiver threatened to foreclose said mortgage and thereby collect a lot of illegal charges, and that said mortgage constituted a cloud upon the title of complainants. Wherefore complainants ask that said receiver be restrained "from attempting to foreclose the mortgage on said property of complainants until the matter has been fully inquired into and adjudicated by this court."

The defendants answered said bill, denying the allegations that the contract was usurious, and that the words "interest" and "premium" were synonymous, and in fact denied that there was any premium provided for in the contract between the parties. They

further denied that said contract was made at Jackson, Miss., and alleged that, while the note and mortgage were executed in Jackson, Miss., it was done for the convenience of the said Luther Manship and his wife, and denied that there was any understanding that said contract was to be performed by complainants making certain monthly payments to the local agent of said association at Jackson, Miss., and that as a matter of fact it was never intended that said note should be paid in New Orleans, or at any other place than at Jackson, Miss., and stated that, "in reference to the allegations as to payments made at Jackson, Miss., defendants say, as a matter of convenience to local borrowers at Jackson, Miss., they were allowed to make their payments to one George Green, and such payments as were made by Luther and B. P. Manship on said loan were made to him, but that it was expressly agreed by the parties that such payments were made to such party as the agent of the said Luther and Belmont P. Manship, and not as the agent of the defendant association." Section 5 of article 3 of the by-laws of the defendant association is expressly made a part of the contract between the said Luther and B. P. Manship and the said defendant association, and expressly provides that "all money due from members to the association or from it to the members shall be payable at the home office in New Orleans, La." The defendants denied all allegations to the effect that the New South Building & Loan Association was anything more or less than a regular building and loan association, and that it was "using the guise of a building and loan association to hide its illegal and shady transactions" by which usury was extorted from the people of Mississippi, and denied "that a fixed premium, which, added to the rate of interest charged in a building and loan contract, exceeds the legal rate of interest charged or permitted to be charged in Mississippi, necessarily makes such contract with a Mississippian usurious."

The defendant Johnston Armstrong, receiver, made his answer a cross bill against the complainants, alleging that he was a citizen of Louisiana, and that said association was likewise a citizen of that state; that it was organized as a building and loan association under and by virtue of the general and special laws of that state, and that subsequent to its organization it adopted certain by-laws; that during the active operation of said association said Belmont P. Manship made a written application for membership therein and subscribed for ten shares of the stock of said association, and that she was admitted into membership in said association "subject to all the conditions and limitations contained in the charter and by-laws of said association"; that subsequent thereto she made application in writing for a loan, which application was accepted; that she and her husband, Luther Manship, executed the note and deed of trust referred to in complainants' bill. The complainant in said cross bill further alleged that said New South Building & Loan Association became insolvent in June, 1899, and that it became impossible and impracticable for it to further carry on its business; that one of the stockholders filed a bill in the circuit court of the United States for the Fifth circuit and Eastern district of Louisiana,

praying that a receiver be appointed to take charge of said association and wind up its affairs; that service on said bill was accepted by said association, and upon presentation of the same to the Honorable Don A. Pardee, circuit judge in and for said Fifth circuit, he (the said Johnston Armstrong) was duly appointed receiver of the association; that he had qualified as such under the original order appointing him, and by proper ancillary proceedings he was likewise appointed receiver by the United States circuit court for all of the districts of Louisiana, Mississippi, Georgia, and Florida, and that he was proceeding to administer the estate in each of said states, subject to the direction of the courts which had appointed him; that upon taking charge of the property and affairs of said association he found that it was necessary to seek the direction of the court appointing him, in order that there might be a homogeneous, uniform, and equitable administration of the affairs of said association throughout the states wherein he had been appointed receiver, and he applied to the court of primary jurisdiction, which was presided over by the Honorable Charles Parlange, United States district judge for the Eastern district of Louisiana, for directions in the premises; that such application was referred to the Honorable E. B. Kruttschnitt as master and commissioner in chancery, who, after a thorough investigation into the affairs of said association, "submitted his findings and recommendations in the premises to the court appointing him"; that said report was excepted to, but was confirmed by the court appointing him; that an order was made by said court directing said receiver as to the method of settlement to be made with all of the borrowing members of said association; that he had been directed to sue in all cases where such method of settlement was rejected; that he had notified complainants of this method of settlement, and that they declined to be bound thereby, and he therefore asked by his cross bill that defendants thereto be required to settle according to the method of settlement which the receiver was directed to make in the premises, and that the deed of trust given by the said Luther and Belmont F. Manship be foreclosed. The receiver filed as exhibits to his cross bill the charter and by-laws of said association, the application for membership, certificate of stock issued thereon, the note and deed of trust executed by said Luther and Belmont P. Manship, a copy of the original bill under which he was appointed receiver and the order thereon, the report of the master and commissioner in chancery and the order of the court thereon, and asked that each be taken and considered as a part of his cross bill.

Complainants in the original bill answered said cross bill, and filed an amended bill, which was in turn answered by the defendants to the original bill; the principal points urged in said amended bill being a repetition of the original bill, with the further allegation that the defendant association, while a solvent, going concern, had borrowed the sum of \$137,000 to loan to prospective borrowers, and that, "as borrowing money to loan is no part of the functions of a building and loan association," complainants allege that said association was organized as a money-lending concern, pure and simple,

and, if such corporations are building and loan associations, then any body of men can organize, secure a charter, call themselves a building and loan association, lend money at usurious rates of interest, and by issuing stock in said association escape the usury laws in the various states in which they do business. It is further alleged in said amended bill that the issuance of stock by the said association and taking stock subscriptions were merely fictions to cover the usurious character of the transaction, and that all payments made by complainants in the original bill, whether upon stock or otherwise, should be credited on the \$1,000 originally borrowed, and that said complainants ought not to be held or considered as members of a building and loan association at all, because of their want of authority to participate in its affairs, and that said association had no authority to issue the class of stock issued to complainants, or to issue stock at all, for that matter. The equities of the amended bill are all denied, and thus the parties reached an issue.

The proof submitted in the case shows that said association negotiated \$137,000 of its bonds, and that the money realized from the sale of said bonds, together with other money in the "loan fund" of the association, was loaned to borrowing members of said association; that there was a local board of said association at Jackson, Miss., as provided for in the by-laws of said association, and that the application for the loan made by Belmont P. Manship was approved by said local board and forwarded to the home office at New Orleans, La., "whose duty it was to pass upon applications for loans, and to either reject or approve the same, in whole or in part, according to its judgment"; that, upon the approval of the application for said loan by the loan committee at the home office, the note and deed of trust were prepared by the general attorney of the association at New Orleans, and a check was drawn by the president and treasurer of said association in favor of Belmont P. Manship on the bank in New Orleans, La., with which said association was then doing business. "All of these papers were then forwarded to T. J. Wharton, an attorney at law at Jackson, Miss., who was designated by said association to prepare the abstract of title to loans described in Exhibit E, and, upon the execution by the said Belmont P. Manship of said note and deed of trust, said check was turned over to the said Belmont P. Manship by the said T. J. Wharton at Jackson, Miss." All payments ever made by the said Belmont P. Manship and her representatives were made either to George Green or to Alexander Montgomery, at Jackson, Miss. These parties were selected by the agent of the defendant association as the proper parties to receive said payments, and when so received they entered the same in the pass book furnished said Belmont P. Manship by the association, and in remitting said moneys said Green and Montgomery reserved a commission of 1 or 2 per cent. for their trouble. All of the exhibits filed with the pleadings or evidence in the cause were admitted to be true. It was shown that the membership of said association "consists of what are known as borrowing and investing members,—the borrowing members being such as procured loans from said association, and the investing

members being those who invested in the stock thereof"; that the members of said association were scattered throughout the states of Georgia, Alabama, Louisiana, Mississippi, Virginia, Tennessee, and elsewhere; that since the appointment of the receiver he had proceeded under the directions given by the decree made by Judge Parlange, which gave specific directions in reference to the method of settlement to be made by the borrowing members of said association, and that he had collected something like \$200,000 from the borrowing members of said association on that basis, of which \$35,000 had been paid by the borrowing members of the association in Mississippi, and about \$111,000 had been paid by the borrowing members of the association in Louisiana; that, while said association was able to meet its outstanding bonds and scrip, it was unable to meet its obligations to the members of said association, and was therefore insolvent; that a majority of the stock of said association is held by the investing members of said association; that notice of the method of settlement directed to be made by said Judge Parlange was mailed to Luther P. Manship, and was received by him in due course of time.

The foregoing statement of the evidence is not intended to be exhaustive, but all the evidence in the case has been duly considered by the court, and that above mentioned, in connection with the pleadings and exhibits filed in said cause, constitutes the material portion of the evidence in the case. This case has been learnedly and exhaustively presented by able counsel, who have filed elaborate briefs and made oral arguments on both sides of the question, and the labor of the court has been materially lessened thereby. In view of the fact that there are over 100 cases pending in the courts over which I preside in Mississippi, involving the same or kindred questions to those here presented, I have tried to give the questions presented as thorough investigation as possible, and have concluded to present my views thereon in writing. The material questions presented to the court may be put under the following heads: First. Is the defendant a building and loan association under the law, and are its contracts with its members to be treated as building and loan association contracts in determining the rights of the parties thereto? Second. Is the contract between the parties hereto usurious? Third. What method of settlement would be equitable and just to all concerned?

I think there is no question that the New South Building & Loan Association is a regular building and loan association, and that all of its contracts with its members are to be dealt with as building and loan association contracts. This association was organized under and by virtue of the laws of the state of Louisiana. Under the laws of that state private corporations are organized principally under section 683 of the Revised Statutes. This section, after containing a general enumeration of the purposes for which corporations are organized, closes as follows: "And generally for all works of public utility and advantage." It has been held that the enumeration of the purposes for which corporations may be organized under this statute are exemplary and not exhaustive. See *Glen v. Breard*, 35 La. Ann.

875. Act No. 151 of the Acts and Resolutions of Louisiana of 1888, which was passed prior to the organization of the defendant association, specifically declares "that the terms 'public utility' and 'advantage' in Rev. St. § 683, and in all acts amendatory thereof, be held to include in their meaning the objects and purposes of homestead or building associations, societies, and companies as now established in this state." In view of this declaration of the legislature, there can be no question that building and loan associations are authorized to be incorporated under the general law of Louisiana, and the plan of incorporation of the defendant association, as shown by the charter, seems to conform to the statutes of that state in respect thereto.

The principal objections urged against treating the defendant association as a building and loan association seem to be that under its charter and by-laws it is authorized to borrow money and to issue different classes of stock, and it is specially urged that the power to borrow money and to issue guaranty and fixed-maturity stock, or, in other words, stock which matures at a definite period, are inconsistent with the building and loan association plan, and that any association embodying and exercising such powers is not a building and loan association at all. I do not think that the power to borrow money and to issue different classes of stock, or the exercise of that power, deprives the defendant association of its character as a building and loan association. The right of this association to issue its paper was raised in the case of *William Gabler v. New South Building & Loan Association*, which was decided by the court of appeals in the state of Louisiana on March 27, 1898, and in that case it was held:

"A building and loan association is like any other corporation, and the powers, which are incident to corporate existence in other corporations, are incident to corporations of the character of the defendant corporation. Like any other private corporation, building associations may do all acts that may be necessary to enable them to exercise the powers expressly conferred and to accomplish the object for which they are created; and it is settled, in this country, at least, that in the absence of express restrictions every private corporation has the power to borrow money or otherwise incur debts."

This case is expressly followed by the supreme court of Mississippi in the case of *Hundermark v. Association*, 29 South. 528. In the latter case the question of the power of the association to borrow money was not raised, but its power to pass certain by-laws was raised, and that power had been upheld in the *Gabler Case*, in referring to which Judge Terral, speaking for the court, used the following language:

"We think it fitting and safe to follow the opinion of one of the superior courts of the state, construing its own statutes. It is also held in the same case that these identical by-laws are proper, necessary, and reasonable, and we concur in that conclusion."

Thompson on Building and Loan Associations, in section 118, states:

"One of the objects of building and loan associations being to loan money, it is essential for the best returns upon the money that the association

keep loaned all of its available money, and, if there be not sufficient money in the treasury to pay withdrawals or meet the proper obligations of the association, it becomes necessary that the association resort to its borrowing powers."

The same authority, in section 275, enters more fully into the subject, and closes the discussion of the power of building and loan associations to borrow money with the following statement: "This proposition is sustained by the weight of authority." In section 276 the author shows that the same rule is recognized by the English authorities.

In section 375 of Thornton & Blackledge on Building and Loan Associations, the authority of building and loan associations to borrow money is clearly upheld, and it is there stated:

"It is likewise an equally well acknowledged rule that the right to contract debts carries with it the power to give negotiable notes or bills in payment of or security for such debts."

In the case of *Cook v. Association* (Ga.) 30 S. E. 912, it was objected that because "the charter in this case gave this association the power to sell or hypothecate securities," etc., such association was not a building and loan association, and entitled to the immunities and privileges thereto; but such view was rejected by the court. In view of the business carried on by building and loan associations in the United States, it seems impossible that such an objection as this ought to prevail, even in the absence of authorities on the subject.

It is further insisted that a building and loan association has no power to issue different classes of stock to its members, and that the principle of strict mutuality incident to building and loan associations prohibits any such exercise of power. It appears from the by-laws of the defendant association that it had the power to issue different classes of stock, and it is therefore insisted that it is not a building and loan association. The stock issued in this particular case, as I understand it, was a class of stock known in building and loan parlance as "stock with a fixed maturity." The decisions on the right of a building and loan association to issue stock of this character are somewhat in conflict. In *Investment Co. v. Alexander* (C. C.) 96 Fed. 870, Judge Simonton upheld a building and loan contract where the maturity of the contract was guaranteed to be within ten years from its date, and was not dependent upon the business or on the termination of the existence of the company. The same conclusion has been reached in several other decisions to which the attention of the court has been called, though in several cases it has been held that such fixed maturity was only an estimate of the time of the maturity of the stock, and that, if the association had the funds to pay it at the time of such maturity without impairing its obligations to the other members of the association, then the member holding such stock had the right to demand the immediate redemption thereof in cash; otherwise, he must wait until the earnings of the association matured his stock. I am of the opinion that building and loan associations are not required to issue the same class of stock to every member of the same, and that it is not a prerequisite to the existence of a building and loan association that every stockholder therein



shall have the same power as every other stockholder. I think that building and loan associations have a right to distribute their stock into such classes as will enable them to do business. That which is desirable for one might not be desirable for another, and, so long as the principle of mutuality obtains among the different members of the different classes into which the membership of the association is divided, I think the principle of mutuality is preserved. At any rate, and regardless of the correctness of these conclusions, it is certainly true that complainants in this cause, having dealt with the defendant association as a building and loan association and having borrowed its money, are now estopped to deny the character of the association, its power to contract, or their liability to it. In the case of *Leahy v. Association* (Wis.) 76 N. W. 625, the court reached the conclusion, after full consideration of the question, that after insolvency and dissolution of the building and loan association holders of such stock or contracts were estopped from denying their validity or denying that they were members of the corporation under the obligation to share equally with its members in the loss of the concern. See, also, the cases of *Gibson v. Association* (Ill. Sup.) 48 N. E. 580, 39 L. R. A. 202, and *Johnson v. Association* (Ala.) 28 South. 2, where it is held that a stockholder and borrower of a building and loan association is estopped from attacking the validity of certain classes of stock authorized by the by-laws and issued at the time he became a subscriber. See, also, *Thomp. Bldg. Ass'ns* (2d Ed.) p. 39, where it is stated:

"In an action by a building association to foreclose a mortgage for the nonpayment of dues by the borrower, it was held that the defendant could not defend the action on the ground that the association was a 'moneyed incorporation,' within the meaning of the statute, and that its charter, as such, before the commencement of the suit, had become void from its failing to comply with the provisions of the general statute, for it belongs to the state alone, by a proceeding for that purpose, to enforce the forfeiture, and that the association, until by a judicial sentence its charter was declared void, was a corporation de facto, and that no private person, dealing with it, could be permitted to say that it was not also a corporation de jure."

See *Homestead Co., v. Linigan*, 46 La. Ann. 1118, 15 South. 369, see *End. Bldg. Ass'ns* (2d Ed.) § 544; *Thomp. Corp.*, § 6021.

In addition to the foregoing suggestions that the defendant association, in my judgment, was organized in conformity to the law of the state where it is domiciled, and that, whether this is true or not, complainants are estopped to raise any questions in respect thereto in this proceeding, said association, as before indicated, was treated as a building and loan association in the *William Gabler Case*, which is followed by the *Hundermark Case*; and it was also so treated in the able report of the master in chancery made by Mr. Kruttschnitt in the case of *Miles v. Association*, and by Judge Parlange in passing upon said report and entering a decree confirming the same, which report and decree were offered in evidence in this case. 111 Fed. 946.

This brings me to the consideration of the question of whether the contract between the parties hereto is usurious, the consideration of which involves the scope and character of building and loan contracts, and also the question of whether this is a Louisiana or Mis-

Mississippi contract. I am of the opinion that the contract is not usurious, and that it is a perfectly legal and valid contract. To enter at large upon the discussion of the principles upon which building and loan associations are founded would serve no useful purpose. It is enough to say that their contracts with their members have given rise to an enormous amount of litigation within the last few years, and some difference of opinion by the courts. I think a majority of the states of the Union recognize the validity of such contracts, and there is no doubt that the weight of authority is in favor of upholding what are known as building and loan contracts. Endlich, in his work on Building Associations, devotes over 20 pages, commencing with page 325 of his second edition, to a review of the various interpretations placed upon "the nature of loans or advancements in building and loan associations." Summing up the situation, this author, in section 365, used the following language:

"An examination of the foregoing decisions would seem to justify the conclusion that the clear weight of judicial authority declines to look upon the advancement between the building association and its advanced members as constituting a loan, pure and simple."

Hon. J. A. P. Campbell, chief justice of the supreme court of Mississippi, in delivering the opinion of the court in the case of Goodman v. Association, 71 Miss. 324, 325, 14 South. 147, uses this language on the subject of building and loan contracts:

"The vital principle of such associations, as known to us, is compounding monthly receipts, whereby to produce astounding results for the mutual benefit of all concerned, and what is called a fine (merely an agreed sum as liquidated damages) is imposed for every default in payment, so as not to derange the process of compounding, which must fail if there is any want of payment as agreed, and failure of which would cause failure of the scheme. We see nothing wrong in members of full age and compos mentis mutually binding themselves to so beautiful a scheme for reciprocal advantage, and being held to the performance of what they have agreed."

With this statement of the court I fully concur. Liberty to contract is one of the essential elements of freedom, and one of the most valuable rights incident to our institutions, and it is very difficult for me to see any reason in law or morals why a party desiring to become a member of a building and loan association may not do so, and if he desires that a part of his contributions shall be credited upon the amount borrowed by him, and that a part shall go to swell the loan fund of the association, to be loaned to his fellow members of the association, and in this way swell the profits and increase the value of his stock therein, and thereby hasten its maturity, I see no reason why he should not be permitted to do so, and why his contract might not be enforced according to his agreement; and, furthermore, I fail to understand what right the court, which may be called upon to enforce such contract, has to appropriate his stock payments or his payments of premiums in any other way than he agreed by his contract that they should be appropriated. In my opinion, the failure to recognize the dual relation which a borrowing member of a building and loan association sustains to the association as an investor in and a borrower from the same, and a further failure to recognize the rights of parties "of full age and compos mentis," as

Judge Campbell puts it, to enter into contracts and be bound thereby, have been the fruitful source of the various opinions of the courts of the country which have refused to recognize anything in the contract of a borrowing member from a building and loan association, except a loan of money pure and simple. The arbitrary appropriation of premiums and stock payments to the liquidation of the debt of a borrowing member of a building and loan association, or the arbitrary combining of premiums and interest charges in order to constitute usury in a contract which is plainly written and easily understood, in direct contravention of the undisputed terms of the contract, is unjustifiable.

I do not overlook the fact that some of the books and some of the courts hold that, when the premium is fixed by the association and not ascertained by public bidding for the loan, it is to be treated as interest and renders the contract usurious. You will find such a statement of the law in *End. Bldg. Ass'ns* (2d Ed.) § 409. In support of this doctrine the author refers to *Bates v. Association*, 42 Ohio St. 655, which turned, doubtless, upon a statute of the state of Ohio (section 2 of the Act of May, 5, 1868, as amended May 9, 1868), which reads:

"Such corporation shall be authorized and empowered to levy, assess and collect from its members such sums of money, by rates of stated dues, fines, interest on loans advanced, and premiums bid by members or depositors for the right of precedence in taking loans, as the corporation by its by-laws shall adopt." 65 Ohio Laws, p. 174.

In this case there was no competitive bidding, and the court uses this language:

"The premium named in the note is unlike the premium named in the statute. It was not measured or ascertained by competitive bidding among the members and depositors, as we understand the statute to require."

From the foregoing quotation it seems to me clear that the case does not support the statement of the author. In section 364 of the same authority, the same case is quoted to support the position that:

"The statute in Ohio is the exact measure of legitimacy and binding extent of the contract. Only under the statute can it be enforced, and only so far as it is in accordance with the statute."

The supreme court of Mississippi followed the misleading statement of the law found in *Endlich on Building Associations* in reference to the effect of "fixed premiums" upon building and loan contracts in *Sokoloski v. Association*, 77 Miss. 164, 165, 26 South. 361, and that doctrine, though there is no similar statute to the one quoted from Ohio in this state, seems now to be thoroughly established in Mississippi; but I decline to follow the *Sokoloski Case*, and other cases following it, in this particular, because in my judgment the court in that case was misled by the statement of an author who did not find any support for the doctrine announced by him in the authority to which he referred. In my judgment, when there is no legislative prohibition, such as is found in Ohio, premiums may be fixed by contract, just as interest may be fixed thereby, and it seems to me certain that, in view of the present extent of building and loan association interests in the United States, fixed premiums are better calculated

to put all the members of such associations on an equal footing than premiums fixed by open bidding, where the amount of same would not be fixed upon any business basis, but would only be determined by the financial exigencies and necessities of those who might be bidding for the particular sum of money offered. In view of the facts of this case and subsequent findings herein, it was not necessary for me to enter into the discussion of this feature of the case; but, as it was raised by the pleadings, I have concluded that it would be well enough to dispose of it.

I now come to the consideration of whether the contract between the parties hereto is a Louisiana or a Mississippi contract. I think it clear that the contract is solvable in Louisiana, and that it is to be governed by the laws of Louisiana. It is true that it is alleged in the bill in this cause that the contract was made payable in Louisiana for the fraudulent purpose of evading the usury laws of the state of Mississippi; but this allegation is specifically denied, and not only does the proof fail to sustain it, but all the circumstances surrounding the transaction seem to me to reach the opposite conclusion. This building association was organized in Louisiana, and its principal place of business was in New Orleans, La. It contemplated doing business in several states, in which the rates of interest vary in amount. The promoters of the organization and the officers of the same all lived in the state of Louisiana, and it was just as natural as it was prudent for Louisiana to be selected as the place where such contracts were to be paid. It would have been remarkable, and something out of the ordinary course of business affairs, if some one place of payment had not been fixed, and if that one place had been fixed elsewhere than where the home office was located and officers of the association resided. Section 5 of article 3 of the by-laws of said association provides:

"All money due from members to the association, or from it to the members, shall be payable at the home office in New Orleans, La."

The note given by Belmont P. Manship and Luther Manship on its face shows that it was payable to the defendant association "at their office in the city of New Orleans, La." The deed of trust given to secure the same recites the fact that said note is payable to the order of said New South Building & Loan Association at their office in the city of New Orleans, La. The subscription to stock signed by Belmont P. Manship provides:

"Agents are not allowed to collect admission fees. Same must be forwarded to the home office direct by the applicant; all other payments to be made to the home office."

It is true that it was provided by section 4, art. 8, of the by-laws of said association, that:

"Members may, if they so desire, make monthly payments on stock to the local treasurer; but such local treasurer shall be deemed to be the agent of the members, and not of the association."

It is further true that the evidence in this case shows that all payments made on this debt were made at Jackson, Miss., to parties selected by the defendant association to collect and remit the same.

I am unable to see how this proves that the contract is a Mississippi contract. To put themselves in an attitude to do business in competition with local building and loan associations, it was necessary to make some arrangement for collections and remittances; and the local arrangement so made was the simple outgrowth of the situation, and does not conflict with the general provisions of the contract that the same should be solvable in the state of Louisiana. There can be no doubt that the contract between the parties hereto would be enforced as written in the state of Louisiana. See *Homestead Co. v. Linigan*, 46 La. Ann. 1118, 15 South. 370; *Richard v. Association*, 49 La. Ann. 481, 21 South. 643. I believe it is admitted that the contract between the parties hereto would be enforced in Louisiana; and it being, in my judgment, a Louisiana contract, it should be enforced elsewhere.

It is urged upon the court that the supreme court of Mississippi is committed to the doctrine that contracts similar to this are Mississippi contracts, and that this court should follow that court. The cases of *Sokoloski v. Association* and of *Shannon v. Association*, 30 South. 51, are cited, and this court is urged to follow the same. The question, in my judgment, is one of general jurisprudence and commercial law, in respect to which the decision of the state court, however much it may be respected, is not binding upon this court, and cannot be followed when this court, in the exercise of an independent judgment, reaches a different conclusion. The contention that federal courts should follow state courts generally grows out of the provisions of the judiciary act found in Revised Statutes of the United States, § 721, which provides:

"The laws of the several states, except where the constitution, treaties or statutes of the United States otherwise require or provide, shall be regarded as rules of decision in trials at common law in the courts of the United States in cases where they apply."

In *Swift v. Tyson* (decided in 1842) 16 Pet. 1, 10 L. Ed. 865, the question involved was whether a pre-existing debt constituted such a valuable consideration as to make a transferee of commercial paper a holder for value. The federal court disregarded the decision of the courts of last resort in the state of New York, in which the contract was made and became payable. Justice Story, in delivering the opinion of the court, used the following language:

"In the ordinary use of language, it will hardly be contended that the decisions of the courts constitute laws. The laws of a state are usually understood to mean the rules and enactments promulgated by the legislative authority thereof, or long-established local customs having the force of laws. And we have not the slightest difficulty in holding that this section, upon its true intendment and construction, is strictly limited to local statutes and local usages of the character before stated, and does not extend to contracts and other instruments of a commercial nature, the true interpretation and effect whereof are to be sought, not in the decisions of local tribunals, but in the general principles and doctrines of commercial jurisprudence."

See, also, *Oates v. Bank*, 100 U. S. 239, 25 L. Ed. 580; *Phipps v. Harding*, 17 C. C. A. 203, 70 Fed. 469, 30 L. R. A. 513; *Watson v. Tarpley*, 18 How. 517, 15 L. Ed. 509; *Brooklyn City & N. R. Co. v. National Bank of the Republic*, 102 U. S. 14, 26 L. Ed. 61; *Bank*

of *Edgefield v. Farmers' Co-op. Mfg. Co.*, 2 C. C. A. 637, 52 Fed. 98; *Butz v. City of Muscatine*, 8 Wall. 575, 19 L. Ed. 490.

The law of the place of performance of a contract is purely a commercial question, and the federal courts have disregarded the state courts on that question in the following cases: *Hartford Fire Ins. Co. v. Chicago, M. & St. P. R. Co.*, 17 C. C. A. 62, 70 Fed. 201, 30 L. R. A. 193; *Andruss v. Association*, 36 C. C. A. 336, 94 Fed. 575 (referred to hereafter in this opinion); *Brower v. Insurance Co. (C. C.)* 86 Fed. 748; and *Association v. Logan*, 14 C. C. A. 133, 66 Fed. 827. I don't think it can be contended that the ruling of the supreme court of this state (Mississippi) in the *Sokoloski* Case, that a fixed premium rendered the contract usurious, or in the *Shannon* Case, that the contract in that case was a Mississippi contract, are founded upon any "rules or enactments promulgated by the legislative authority of the state" or upon "long-established local customs having the force of laws."

In the case of *Brown v. Freeland*, 34 Miss. 181, the court announces the rule applicable to cases similar to this in the following words:

"When a contract is made in one country, to be performed in another, the law presumes, in the absence of any other circumstance, that the parties contracted with reference to the place where it is to be performed; and in that case the contract, as to its nature, construction, and validity, will be governed by the *lex loci solutionis*."

On this subject see, also, the case of *Bennett v. Association*, 177 Pa. 233, 35 Atl. 684, which seems directly in point; *Nickels v. Association (Va.)* 25 S. E. 8; *Association v. Ashworth (Va.)* 22 S. E. 521; *Association v. Vance*, 27 S. E. 274, decided by the supreme court of South Carolina at the November term, 1896; *Turner v. Association (S. C.)* 27 S. E. 947; *Loan Co. v. Cannon*, 96 Tenn. 599, 36 S. W. 386; *Ware v. Investment Co.*, 29 S. E. 744, decided by the supreme court of Virginia, March 17, 1898.

The foregoing decisions all bear directly upon the question under consideration, and are in conflict with the decision of the supreme court of Mississippi in the *Shannon* Case. There are three other decisions on the same subject, two of which have been rendered by the circuit court of appeals for this circuit, and one by the supreme court of the United States, which state the law as I understand it to be, and which I am bound to follow. The first case is that of *Andruss v. Association*, 36 C. C. A. 336, 94 Fed. 575, on appeal from the circuit court of the United States for the Northern district of Texas. That case arose on a bill in equity to foreclose a mortgage. The association was incorporated under the laws of New York, where it had its original office and headquarters. It had procured a permit from the secretary of the state of Texas to do business in that state, as it was required to do by the law of Texas. Andruss applied to said association for a loan, and 30 shares of stock of the association were issued to him. By the terms of his contract with the association Andruss was to pay \$30 of the principal of the debt of \$3,000, \$12.50 interest, and \$12.50 premium each month, until the maturity of his shares of stock should cancel his indebtedness. The by-laws of the association and deed of trust and bond executed by

Andruss all provided that his payments should be made to the secretary of the association at its domicile in New York. The defendant in this case pleaded usury and credit for all money which he had paid on account of subscription to stock in said association. Judge Shelby, delivering the opinion of the court as to the law by which the loan contract was to be governed, and on the defense of usury, and on the claim of the borrower to be credited with amounts paid on account of stock subscribed, said:

"The debt which is the subject of this suit is proved by a bond which is secured by a mortgage. The appellants, who are the obligors of the bond and the mortgagors in the mortgage, are citizens of Texas. The appellee, who is the obligee in the bond and the mortgagee in the mortgage, is a New York corporation. Both the bond and the mortgage are made payable at Geneva, in the state of New York. The by-laws of the appellee corporation provide that all payments shall be made to the secretary of the association at Geneva, N. Y. The appellee is a building and loan association, organized pursuant to the statutes of the state of New York, and both the bond and the mortgage contain a stipulation that it is to be governed by the laws of that state. In view of all these facts, we hold that the contracts in question are not usurious, if they are valid under the laws of the state of New York, the place of performance. *Andrew v. Pond*, 13 Pet. 65-79, 10 L. Ed. 61; *Association v. Logan*, 14 C. C. A. 133, 66 Fed. 827; *Miller v. Tiffany*, 1 Wall. 298, 17 L. Ed. 540; *Sturdivant v. Bank*, 9 C. C. A. 256, 60 Fed. 730; *Dugan v. Lewis*, 79 Tex. 246, 14 S. W. 1024; *Association v. Tinsley (Va.)* 31 S. E. 508. While it is true, as claimed by appellants, as a general proposition, that contracts in New York for more than 6 per cent. interest are usurious and void, yet an exception is made by statute of building and loan associations, or at least it is provided that premiums for loans may be paid such associations without a violation of the usury laws. This statute prevents the contract between the parties from being usurious under the general statutes. *Association v. Read*, 93 N. Y. 474. The claim of the appellant, George W. Andruss, that he is entitled to credit on his bond for borrowed money on account of the payments he made on his subscription for stock, cannot be sustained. He was a subscriber for stock in the association, and he was under contract to pay for it, just as any other stockholder."

It will be observed in this connection that the defenses interposed in this case would have prevailed under the decisions of the supreme court of Texas, and that the federal court declined to follow the ruling of the state court in such cases.

The case of *Hieronimus v. Association (C. C.)* 101 Fed. 12, is as near the exact counterpart of the case in hand as it is possible to conceive. There is a bill for an accounting and a charge of usury and a prayer for cancellation, just as in this case. A party in Alabama borrowed money from a New York building and loan association, agreeing to pay the principal sum at the home office in New York City. He gave a mortgage on lands in the state of Alabama, and dealt with Clark, the local collector, just exactly as complainants did with Green and Montgomery in this case. The by-laws provided for payments to a local collector, just as the by-laws in this case did. The allegations of the bill were that the contract was made payable in New York to avoid the usury laws of the state of Alabama, just as it is alleged in this case. The contract would have been usurious under the laws of Alabama, but was not usurious under the laws of the state of New York. The premium named in the contract was fixed by the association, and not by open bidding. Judge Toul-

min upheld the contract as valid, and in the course of the decision used the following language:

"If there is one thing which, more than another, public policy requires, it is that men of full age and competent understanding shall have the utmost power of contracting, and their contracts, when entered into freely and voluntarily, shall be held sacred, and be enforced by courts of justice."

In passing upon this decision, the circuit court of appeals of this circuit, in an opinion delivered April 9, 1901 (107 Fed. 1005), affirmed the decision and expressed its appreciation of the accuracy with which the law was stated by Judge Toulmin. In passing upon the question of a fixed premium, Judge McCormick, delivering the opinion of the court, said:

"The New York statute governing building and loan associations does not provide the manner or the mode of making loans to members of such associations, or of fixing the premiums to be paid by them; but it does provide that any premiums for loans made to such members shall not be deemed a violation of the provisions of any statute against usury. *Andruss v. Association*, 36 C. C. A. 336, 94 Fed. 575; *Association v. Read*, 93 N. Y. 474. If the statute had provided for the manner or the mode of fixing the premiums to be paid, and such mode had not been followed, then the premium would have been unlawful. *Douglass v. Kavanaugh*, 32 C. C. A. 107, 90 Fed. 375. By the terms of the contract providing for the payment of dues, premium, and interest, as the same is shown in the bill, the complainants are not entitled to the cancellation of the mortgage after paying such charges for a period of seven years; it not appearing that complainants' shares of stock are fully paid."

The supreme court of the United States, in the very recent case of *Bedford v. Association*, 21 Sup. Ct. 597, 45 L. Ed. 834, has, for the first time, so far as I am advised, passed upon a case which, in every essential feature, is parallel with the case in hand. In that case the contract was made between a citizen of Tennessee and a New York building and loan association. The premium was fixed by the association, and not by open bidding. There was a "soliciting agent in Memphis, Tenn., whose duty it was to solicit persons to become members of the association and subscribe for stock." There was a "local board" in Memphis, Tenn., and all applications were forwarded by the local soliciting agent, and had to be "accompanied by a recommendation of what was called the local board in regard to the wisdom of the loan. \* \* \* The local board had officers, one of whom was a treasurer, through whom members might, if they desired, forward payments due to the association; but the by-laws stated that in so doing the local treasurer was acting as the agent for the stockholders, and not for the association." The by-laws and contract provided that payments should be made in New York. The contract was usurious under the laws of Tennessee, but not so under the laws of the state of New York. The statutes of Tennessee provide that premiums shall be fixed in "open meeting" and the money shall go to the highest bidder. See Mill. & V. Code, § 1751. Upon this state of facts the court held that the contract was not usurious, and should be enforced, using the following language:

"It is claimed, however, that, if the transactions between Bedford and the association were otherwise legal, they were affected with usury, and to the extent that they were usurious they were unenforceable. The contention is



that in making the loan of \$4,600 Bedford was required to pay a fixed premium of \$460, and received only \$4,140, and that this constituted usury in Tennessee. This is made out because, it is said, Bedford was required to withdraw his stock and receipt in full, and could therefore get no benefit from future profits of the association, and it is asserted that thereby the loan became 'fixed and certain, and no element of contingency' remained, and the transactions are withdrawn from the principle expressed in *Spain v. Hamilton*, 1 Wall. 604, 17 L. Ed. 619, that 'where the promise to pay a sum above legal interest depends upon a contingency, and not upon the happening of a certain event, the loan is not usurious.' But the fact was not as asserted. The stock was pledged as security for the advance; and the pledge was no more a withdrawal of the stock, terminating Bedford's ownership of it, than his mortgage was an absolute conveyance of his land. It is provided in section 3, art. 19, that in addition to real estate security for a loan a shareholder shall 'transfer in pledge to the association one share of stock held by said shareholder as collateral security on all loans made by the association to him.' Besides, the transactions were not usurious under the laws of New York, where the notes were payable. *Association v. Read*, 93 N. Y. 474. Therefore, the principle expressed in *Miller v. Tiffany*, 1 Wall. 298, 17 L. Ed. 540, applies. It was said in that case: 'The general principle in relation to contracts made in one place to be performed in another is well settled. They are to be governed by the law of the place of performance, and, if the interest allowed by the law of the place of performance is higher than that permitted at the place of contract, the parties may stipulate for the higher interest without incurring the penalties of usury. The converse of this proposition is also well settled. If the rate of interest be higher at the place of the contract than at the place of performance, the parties may lawfully contract in that case also for the higher rate.' In *Loan Co. v. Cannon*, 96 Tenn. 599, 36 S. W. 386, 33 L. R. A. 112, a note secured by mortgage was given to a building and loan association and made payable at Minneapolis. It provided for the payment of 5 per cent. interest per annum and 5 per cent. premium per annum, monthly, on or before the last Saturday of each month, and stipulated, further, that 'any failure to pay interest or premium when due shall, at the election of the payee, make the principal, interest, and premium at once due.' Of the note and mortgage the court said: 'The second assignment of error is that the note and mortgage were both usurious on their faces, and nonenforceable. As already stated, the note stipulated on its face to pay 5 per cent. interest per annum, and 5 per cent. premium per annum, at the office of the company at Minneapolis, Minn. This contract is a Minnesota contract, and is expressly authorized by the charter of the company and the laws of that state, which have been distinctly proved and appear on the record.' The assignment of error was held not well taken."

It only remains to determine what method of settlement would be just and equitable to all concerned. All of the authorities agree that, upon the insolvency and premature winding up of a building and loan association, some method of settlement which would be fair and equitable to all concerned should be adopted. Endlich discusses the question of "Dissolution and Effects of Dissolution" at length in his second edition at pages 505 and 525, and shows that equality of burdens and benefits are the things to be aimed at in such cases, so that all losses may not fall upon any one class of stockholders. See Thompson, on the same subject, under the head of "Dissolution and Settlement." In the very nature of things, courts in trying to apply equitable principles to settlements in such cases have reached different conclusions, but the most equitable and just mode, in my judgment, is announced by Judge Grosscup in the case of *Towle v. Association* (C. C.) 60 Fed. 135, delivered February 6, 1894. The rule in this case formed the predicate of the decree ren-

dered by Judge Parlange on the report of the master in the case of *Miles v. Association*, rendered March 21, 1900, which decree I fully approve as equitable, reasonable, and just to all concerned. The record shows that the fellow members of the complainants are being required to settle and are settling elsewhere under this decree, and to allow borrowers in Mississippi to enjoy the use of the funds of the association free of cost, and to appropriate all of their payments upon the principal of their debt, while their fellow members elsewhere are required to stand by their contracts and the order of court of primary jurisdiction, would be unjust, and I cannot allow any such contention to prevail in this court. It seems clear to me that if all the stockholders of the association shall be made to suffer equally the losses incident to the unfortunate venture of this association, and to share equally whatever benefits are to be derived therefrom, then equal and exact justice will have been meted out to all, and this is my conception of "doing equity" in the premises.

There has grown up in the federal courts within the last few years a sort of comity, by which a receiver, appointed by the court of primary jurisdiction, is recognized by the courts taking ancillary jurisdiction of the case. Ordinarily the court of primary jurisdiction has every opportunity to judge of the justice and necessities of the situation. Therefore, where the rules adopted by the court of primary jurisdiction seem fair and lawful, courts of ancillary jurisdiction follow the same, not because they are courts of inferior jurisdiction in reference to the matters connected with the receivership coming under their charge, but because it is the best method of promoting a homogeneous, harmonious, and equitable administration of the estate. The rule referred to finds expression in the case of *Towle v. Association*, above referred to, where Judge Grosscup uses the following language:

"Under the federal procedure, the receiver appointed in this court is, by a system of ancillary proceedings, likewise appointed receiver in the several circuits in which this property is situated. The administration of the assets is thus centralized. The ancillary is but a part of the home receivership. There is but one administration,—one distribution. Each shareholder, whether he lives in Illinois or Massachusetts, will receive his exact proportionate amount, as if he were a citizen of the same state. For the purposes of the suit there is but one incidental expenditure. It is obvious that no quicker, cheaper, or more equitable administration could be had."

See, also, *McMurray v. Gosney* (C. C.) 106 Fed. 11-13:

"Where the affairs of an insolvent building and loan association are to be wound up in a federal court in the state of its domicile, the rule adopted by that court for accounting and settlement between the receiver of the corporation and its borrowing stockholders will be followed by a federal court of another district which has appointed an ancillary receiver."

I have been much impressed with the fairness of the able and exhaustive report of the special master, Mr. Kruttschnitt, above referred to, and with his method of settlement with borrowing members of the defendant association, which were adopted by the court of primary jurisdiction, and which I also adopt as the proper method of settlement with borrowing members in Mississippi. As a copy of the order made by Judge Parlange in the premises is on file in this

cause, and as the amounts paid by complainants have been agreed upon in the evidence, I take it that the parties can agree upon the amount for which a decree may be entered in this case. Let a decree be entered in accordance with this opinion, and, if the parties cannot agree upon the amount to be inserted therein, let the case be referred to the clerk of this court to state an account in accordance with this opinion, and further specific directions to be given, if necessary.

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UNITED STATES v. COOS BAY WAGON ROAD CO.

(Circuit Court, D. Oregon. August 25, 1901.)

No. 2,406.

FORMER ADJUDICATION—DECREE OF DISMISSAL.

A decree dismissing a bill, entered upon a demurrer to a general replication, upon the mistaken assumption by both court and counsel that the case was governed by a decision of the supreme court, if not a nullity because of the fact that no issue could be raised by such a pleading, was not a decree upon the merits which would bar a second suit.

In Equity. Suit to cancel patents to lands.

John H. Hall, for the United States.

Watson & Beekman, for defendant.

BELLINGER, District Judge. This is a suit by the United States to cancel patents heretofore issued for lands alleged to have been erroneously patented under a grant for a wagon road from Coos Bay to Roseburg, in this state, and to recover their value where such lands have been sold by the defendant company. It is claimed that the lands in question are outside the indemnity limits of the grant, and are therefore not subject to it. A further object of the suit is to cancel a patent issued under the grant to lands occupied by a homesteader, one Samuel C. Braden, whose settlement was begun in 1869, and who has continuously since then resided on and cultivated the tract so occupied, and has in all respects complied with the homestead laws of the United States in respect thereto. That the lands alleged to be outside the limits of the grant are in fact so is shown by the maps and plats of the government surveys in evidence. It is claimed on behalf of the defendant that this question is one of fact, and that the action of the land department in patenting the lands has the conclusive effect of a judgment in respect thereto. This question was heretofore presented in this case upon demurrer to the bill of complaint, and the conclusion reached that the land department cannot enlarge the limits of a grant of lands by issuing patents thereunder for lands lying outside the boundary fixed by the act itself. 89 Fed. 151. That decision is final so far as this court is concerned.

Upon the trial the defendant offered in evidence the record of a decree dismissing the bill of complaint, heretofore entered in this court, in a suit between the same parties and relating to the same land. The hearing was upon a demurrer to a general replication. The decree was rendered upon the assumption that the facts were un-

disputed, and after a statement by counsel, in which both sides were agreed, that the case was within the rule applied in the case of *U. S. v. Dalles Military Road Co.*, 148 U. S. 49, 13 Sup. Ct. 465, 37 L. Ed. 362, as to the conclusive effect of a determination by an officer where full jurisdiction over a subject has been vested in him by a statute of the United States. It goes without saying that there is no such thing as a demurrer to a general replication. Such a replication is a mere formal matter, and has the effect to put the case at issue, and there can be thereafter no judgment without a trial of the questions of fact so presented. The general replication was in proper form,—the form adopted in *Story's Equity Pleadings*; and if it had been otherwise, and liable to objection, nevertheless there could be no decree dismissing the bill on that account. I am of the opinion that the decree attempted to be pleaded is a nullity, but, if it is not a nullity, it is clearly not a decree upon the merits, and is for that reason not a bar to this suit. All the questions in the case, except that relating to the former adjudication, are fully considered in the opinion heretofore rendered on the demurrer to the bill of complaint. 89 Fed. 151. There must be a decree as prayed for, canceling the patents mentioned in the complaint, except as to such lands as have been sold by the defendant, for which the United States is entitled to recover at the rate of one dollar per acre.

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CENTRAL OF GEORGIA RY. CO. v. MAYOR, ETC., OF CITY OF  
MACON et al.

(Circuit Court, S. D. Georgia, W. D. August 13, 1901.)

**CONSTITUTIONAL LAW—DUE PROCESS.**

There is a violation of Const. U. S. Amend. art. 14, prohibiting any state from depriving a person of property without due process of law, where a railroad company has a lawfully acquired possession of terminal facilities under a grant from a city, and is in possession under a claim of right, and the city council passes an ordinance declaring the rights of the company under the grant forfeited, and directs the mayor to take possession of the property, and to use therefor the police force, and this is done.

**In Equity.**

Lawton & Cunningham, Hall & Wimberly, Washington Dessau, and W. A. Harris, for complainant.

Minter Wimberly and Marion Erwin, for defendant mayor, etc., of city of Macon.

John M. Stubbs and Akerman & Akerman, for defendant Macon, D. & S. R. Co.

**SPEER**, District Judge. The Central of Georgia Railway Company has filed its bill praying for an injunction against the mayor and council of the city of Macon and the Macon, Dublin & Savannah Railroad Company. The averments of the bill are as follows: That on the 7th of May, 1901, the complainant was in the peaceable possession of certain properties, rights of way, and franchises in the city

of Macon for railroad purposes. These are fully set out in the bill. Further, that the Central of Georgia Railway Company owns these properties, except that portion known as the "right of way of the old Macon & Augusta Railroad," by virtue of conveyances from the mayor and council of the city of Macon to the Covington & Macon Railroad Company and the Macon & Northern Railroad Company, to which companies the complainant is the legal successor. The complainant holds, it is alleged, the right of way of the Macon & Augusta Railroad by arrangement and contract between it and the Georgia Railroad & Banking Company, which succeeded to the rights of the said Macon & Augusta. Large sums have been expended on these properties, making necessary improvements, and in the construction of roadbeds and tracks and the maintenance of the same. During the long term in which the complainant has held and possessed these properties, the mayor and council of the city have recognized the contracts as being valid, permitted the expenditure of these moneys, and collected taxes from complainant and its predecessors on all of the properties and improvements thereon, and thus recognized the same as the property of complainant. These tracks and roadbeds are a necessary part of complainant's railroad in the city of Macon, in order that it may discharge its duties to the public as a railroad company. The complainant further charges that, becoming apprised from the public prints and otherwise that these properties were about to be seized and wrested by force from its possession by the mayor and council of the city of Macon and by the Macon, Dublin & Savannah Railroad Company acting in conspiracy with it, it addressed a petition to the said mayor and council calling attention to the ownership set up by complainant. Notwithstanding this fact, the said mayor and council, by resolution, immediately proceeded to declare and did declare the right and title of complainant to the premises in question as forfeited, and the mayor of the city of Macon was instructed to immediately take possession of said properties and to institute any and all legal proceedings necessary for the recovery of the same. Because of the suggestion in the resolution that legal proceedings would be resorted to, complainant waited for the commencement of such proceedings, which, however, have not been commenced, but, on the contrary, the said mayor and council, unmindful as well of complainant's rights as the contractual obligation which it had undertaken, proceeded to make certain contracts with the Macon, Dublin & Savannah Railroad Company, and afterwards, on the 30th day of July, 1901, adopted an ordinance by which that body declared all the rights of complainant to the properties in dispute as forfeited, and directed the mayor of the city to take possession of all of the aforesaid properties, and to use therefor "the entire police force of the city of Macon." In the progress of these proceedings, and in pursuance of the general scheme aforesaid, the mayor and council of the city of Macon on the 31st day of July, 1901, granted all of these properties of the complainant to the Macon, Dublin & Savannah Railroad Company. It is charged that these proceedings were inaugurated and practically consummated while complainant was in peaceable and exclusive possession of the properties, and not-

withstanding that fact the complainant was accorded no opportunity whatever to defend its title thereto. In further pursuance of the alleged conspiracy aforesaid, the mayor and council of the city of Macon, on the same day that the mayor was authorized to execute and deliver a deed to the Macon, Dublin & Savannah Railroad Company to these properties, notified complainant that immediate and peaceable possession of all the properties was demanded of it, and was further notified that the mayor and council, through the mayor, would take immediate possession of the properties. Complainant protested, but the said mayor and council did actually oust it from possession, use, and occupation of the properties, and did station policemen along the right of way, with orders to prevent the cars of complainant from being hauled along the side tracks, and complainant, in order to avoid a breach of the peace, was compelled to desist from the use and occupation of its own property. Charging that the mayor and council of the city of Macon is exercising powers granted to it by the state of Georgia for governmental purposes, and has availed itself of such agencies as a municipal corporation to accomplish the unlawful purposes aforesaid, the complainant charges that the action of the mayor and council, in adopting said ordinances, in giving them effect, and in calling out the police for the purpose of wresting complainant's property from it, are all in violation of the prohibition of the fourteenth amendment of the constitution of the United States, which declares: "Nor shall any state deprive any person of life, liberty or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws." The prayers are that the court will immediately restrain and enjoin the defendants from further withholding said property from the complainant, and from interference in any manner in the ownership, possession, and enjoyment of said property; that the mayor and council of the city of Macon be required at once to remove the officers stationed by it on said property, and restore the property to the condition in which the same was prior to the ordinances complained of. There is a prayer for a permanent injunction against both of the parties defendant, and another that the ordinances be declared to be null and void by reason of being in violation of the provision of the fourteenth amendment above quoted, and the tenth section of article I of the constitution, which provides that "no state shall pass any law impairing the obligation of contracts." A further prayer is that the contract between the mayor and council of the city of Macon and the Macon, Dublin & Savannah Railroad Company conveying away properties of complainant be decreed to be void, and ordered to be surrendered up and canceled as a cloud upon the title held by complainant, as an impairment and in derogation of the rights granted and guaranteed to complainants by the constitution of the United States. When the bill was presented to the court, a mandatory decree for injunction was granted in the language following:

"It is ordered that the mayor and council of the city of Macon and its officers are restrained from withholding from complainant the full, complete, and free and undisturbed possession, use, occupancy, and enjoyment

of the property described in the bill, or from in any manner interfering with complainant's possession and free and unrestricted use of said property; and defendants are restrained from exercising any acts of possession or ownership of said property, or from in any manner interfering with complainant in the possession thereof; and it is ordered that the defendants restore at once said property to complainant in the same condition the same was prior to the ordinances and other acts complained of. It is ordered that defendants, if they so desire, may have a hearing before me, at Mt. Airy, Ga., on August 9th instant, on the question whether the restraining order should be revoked or modified, and that, if defendants do not care to be then heard, that the restraining order granted stand of force until the further order of the court."

Pursuant to the terms of this order, on the day fixed by the order a motion was made to revoke the interlocutory decree above mentioned. Defendants filed their answers, both parties presented affidavits and much documentary evidence, and counsel were fully heard. The cause shown against the injunction by the respondents was that the complainant, by a total failure to comply with the conditions of the original grant, had wholly forfeited the terminal facilities which are the subject-matter of this controversy. The respondents further contended that the complainant was not in actual possession of the premises. The mayor and council admit that it did enter said premises, and take possession, but used no force; that it acted in the best of faith, and was unconscious of any adverse claims on the part of complainant at the time it made its grant to the Macon, Dublin & Savannah Railroad; that it believed that the Macon & Northern Railroad Company, which was one of the predecessors of complainant, had abandoned the property claimed by it in 1895, and thought its rental of the same to the Macon, Dublin & Savannah Railroad Company was a trick to make it appear that it was in actual possession of the property. In short, the defense attempted by the respondents was that the complainant either never had title to the properties in dispute, or that such title as it had had been forfeited by a nonuser of the easement granted to it by the city. It is also contended by the respondents that, the complainant having sought the remedy of a court of equity, with ample power to do full and complete justice between the parties, the court will inquire into the good faith of the entire transaction and the relation of parties to each other, and ascertain what is the substantial interest of the public as well as of the parties concerned, and will not permit a complainant to come into court who does not offer to do equity, and will not permit a retention of property fraudulently acquired, and to which it has no title, to the injury not only of the party who in equity and law has the title, but who desires to use it for a great public use. Respondents at first questioned the jurisdiction of the court to grant the relief sought, but not only themselves sought affirmative action and substantial relief on the part of the court, but in the argument expressly admitted the jurisdiction of the court to hear the matters presented by the bill, denying, however, that the complainant had made a case which showed the facts essential to the jurisdiction in equity invoked.

For the purposes of this hearing, the court does not deem it necessary or proper to make inquiry beyond this: Has the mayor and council of the city of Macon, because of its conduct described in the bill and proven in the evidence, violated a right of the complainant

secured to it by the provision above quoted from the fourteenth amendment to the constitution of the United States? It is incontestable that the Central of Georgia Railway Company and its predecessors in such title as it has had been long in the lawfully acquired possession of the terminal properties in dispute, which had been originally granted from the public domain of the city of Macon. It is equally incontestable that it was at the time of the occurrences denounced by the complainant's bill in possession under a claim of right. Such possession and such claim of right, whether finally sustainable upon legal grounds or not, constitute property rights of which the complainant cannot be deprived as long as it chooses to maintain them, save by the customary judicial proceedings; in other words, by "due process of law." There is no room for dispute about the facts here stated, or about the conclusion from the consideration of the facts with proper consideration of the law. As to the facts, the mayor and council of the city of Macon are concluded by their own official action. Their contracts with the predecessors of the complainant, namely, the Macon & Northern Railroad Company and the Macon & Augusta Railroad Company, are in evidence before the court. They unquestionably grant the premises in dispute, with certain limitations, however, imposing duties upon these railroad companies, which, if not performed, are intended to result in a forfeiture. The several resolutions of the city council recognize that these terminal facilities were heretofore granted. Take, for instance, the initial language of the ordinance of July 30, 1901. It recites:

"Whereas, heretofore, to wit, on or about the first day of February, 1866, the mayor and council of the city of Macon made certain grants of right of way and terminal facilities in the city of Macon to the Macon and Augusta Railway Company, formerly the Milledgeville Railroad Company, and at a council meeting held on or about December 31, 1885, and subsequent to that time on March 19, 1886, granted to the Covington and Macon Railroad Company certain rights of way and land for terminal facilities in the city of Macon."

It is true that the subsequent clauses of the same resolution state that these rights thus granted have either been devested from the grantees and their successor by litigation or by forfeiture; but it is seen that the city itself, even in the ordinance by which the wrong and injury complained of has been done, clearly recognizes the original title of the complainant. It is true that in subsequent clauses of the same resolution it denies that this title longer exists, and claims title in itself, and, as we shall see, takes possession by force and arms. Thus the Central of Georgia Railway Company is deprived of properties to which it claims title,—properties long in its occupancy and control, and in the occupancy and control of its predecessors; and, as is clearly deducible from the foregoing, is deprived of this property without due process of law. Now, in its controversies with another party, which involve property rights of this general character, the city of Macon, in contemplation of law, has the right, of its own motion, to exercise no more power than would a private individual claiming title to land possessed under a claim of right by another. If A. should grant to B. a lot of land upon certain conditions definitely set out in the deed, if B. is allowed to take and



hold possession under claim of right, and if a controversy should arise between A. and B. as to whether the conditions had been complied with, and whether a forfeiture for a failure to comply had resulted, A. would have no lawful authority to declare that B. had forfeited the land. His declaration to that intent, like the resolution of the mayor and council of the city of Macon here, would be a mere brutum fulmen. He would have less right to go in upon the lands, and with force and arms throw B. out, and take possession himself. No civilized community could long survive if such methods on the part of its citizens or subjects were tolerated. Each man would be a judge in his own case. Not only would he be judge, but he would also be the executive officer to carry his conclusion into effectiveness. If practiced between individuals, how preposterous would such methods seem to men accustomed to the enjoyment of those benefits which flow from the orderly administration of justice? If such methods were the rule, and not the exception, the reign of law would cease, and society would revert to the condition of those semibarbarous times when the rule was, "Let him take who has the power, and let him keep who can." If such practices would be destructive to social order on the part of the individual, how dangerous do they become when exercised by a government, which has and exercises authority to draw to its support and potentiality all the individuals under its control? If not protected by law, the property of the citizens is at its mercy. The rights of the individual are dependent upon the will of those in power, and the enjoyment of liberty, which is nothing more than the assured consciousness of security in the enjoyment of individual rights, will no longer exist. The great men who framed the constitution of the United States were familiar with innumerable and baleful instances where not only property and liberty, but where life itself, had been destroyed by the exercise of arbitrary power. In many familiar clauses of that great instrument they sought to guard the people of this country from the recurrence of such wrongs. It was, however, believed by many of our thoughtful countrymen of that day that the original draft of the constitution contained no such guaranties against the exercise of arbitrary power as were required for the protection of the citizen. The people were alarmed on this account. Said Chief Justice Marshall in *Barron v. Mayor, etc.*, 7 Pet. 250, 8 L. Ed. 672, decided in 1833:

"In almost every convention by which the constitution was adopted amendments to guard against the abuse of power were recommended. These amendments demanded security against the apprehended encroachment of the general government, not against those of the local government. In compliance with the sentiments thus generally expressed, to quiet the fears thus extensively entertained, amendments were proposed by the required majority in congress, and adopted by the states. These amendments contain no expression indicating an intention to apply them to the state governments. This court cannot so apply them."

Thus it was that the fifth amendment to the constitution, proposed by Madison, one of the framers of the original instrument, which was recommended to the states by the First congress, and adopted soon thereafter, contained the provision that "no person shall be deprived of life, liberty or property without due process of law." This inhibi-

tion, however, as we have seen, related to the action of the general government. There was no adequate restriction on the power of the states in this respect until the adoption of the fourteenth amendment, which, as we have seen, provides: "Nor shall any state deprive any person of life, liberty or property without due process of law." "This amendment," says Justice Brown in *Holden v. Hardy*, 169 U. S. 366, 18 Sup. Ct. 383, 42 L. Ed. 780, "largely extended the power of the federal courts and congress, and for the first time authorized the former to declare invalid the laws and judicial decisions of the states abridging the rights of citizens, or denying them the benefit of due process of law." Nor is the constitution of our own state silent upon this great provision preservative of rights. Paragraph 2 of article 1 of the constitution of the state of Georgia declares that "protection to person and property is the paramount duty of government and shall be impartial and complete," and the cognate section scarcely varies from the provision of the national constitution: "No person shall be deprived of life, liberty or property except by due process of law." What is due process of law? Said the supreme court in *Holden v. Hardy*, supra:

"Due process of law implies at least a conformity with natural and inherent principles of justice, and forbids that one man's right of property shall be taken for the benefit of another, or for the benefit of the state, without compensation, and that no one shall be condemned in his person or property without an opportunity of being heard in his own defense."

It has been elsewhere held that it is essential to due process of law that there shall not only be notice of time and place for a hearing, but, what is more important, that there shall be a tribunal clothed with power by methods and rules prescribed by law to hear and determine the question involved. *Charles v. City of Marion* (C. C.) 98 Fed. 166. Has the Central of Georgia Railway Company the right to invoke this provision of the constitution in its own behalf? The ruling of the highest appellate court of the nation is equally conclusive of that inquiry. A railroad corporation is a person, within the meaning of the fourteenth amendment, declaring that no state shall deprive any person of property without due process of law. *Smyth v. Ames*, 169 U. S. 466, 18 Sup. Ct. 418, 42 L. Ed. 819. Is the city of Macon such an agency of the state as will make it amenable to this provision of the constitution? This is equally clear. "The exercise by a city of its general power given it by the legislature of controlling the streets and of making and enforcing contracts with reference to their occupancy by individuals or corporations, is action by the state, within the meaning of the provision of the first section of the fourteenth constitutional amendment, which prohibits any state from depriving any person of property without due process of law; and the passage of a resolution by the council of a city assuming to declare a forfeiture of a contract previously made with a railroad company, under which the company occupies a street with its tracks, and a declaration by a city of its intention to dispossess the company, and take possession of the street by the use of its police, is a threatened violation of the constitutional rights of the company, which a federal court has jurisdiction to restrain by injunction." *Iron Mountain R.*

Co. v. City of Memphis, 37 C. C. A. 410, 96 Fed. 113. This case, indeed, is one of first importance to the determination of the rights of the parties before the court. It was a suit between a railroad company and a municipal corporation. It was an attempt on the part of the corporation—it is true, with some decent show of affording the railroad company a hearing as to its rights—to declare a forfeiture thereof by resolution, and to use its police force to make that resolution effective. The authorities are there arrayed with much clearness and force by Circuit Judge Taft, who rendered the decision for the circuit court of appeals for the Sixth circuit. A municipal corporation created by the state was there, as we have seen, decided to be an instrumentality of the state, and said the court:

"It necessarily follows that if, in the case at bar, the resolution of the legislative council, under its authority to control the streets, has deprived or was about to deprive the complainant of its property without due process of law, complainant was entitled to a judicial remedy, under the United States circuit court jurisdiction act of 1887-1888 and the fourteenth amendment, against such action. The averment of the bill was that the council passed a resolution of forfeiture and of the declaration of its purpose to take possession of the street, intending to use the police force in enforcing such declaration. It could only use the police force in its governmental capacity as a branch of the state government."

There, as here, the disposition of the land in dispute was vested by the state in the city. There, as here, it was argued that the resolution of the mayor and council of the city of Memphis, like the resolution of the mayor and council of the city of Macon, was in accordance with the language of the original grant; that this language left to the city the right to declare such forfeiture at its option, and upon the declaration of such forfeiture to resume possession of the property. But says the court:

"The language of the conditions of the contract and of the forfeiture clause are like an ordinary condition subsequent in any lease or deed conveying an estate. Such forfeiture clauses always provide that upon the breach of the condition the lessor or the grantor may re-enter upon the premises, and have the same in his former estate; but it would be novel law to hold that under such a clause the lessor or grantor might lawfully by force and arms repossess himself of the estate after a breach of the condition, if such repossession were resisted by the lessee or grantee."

In *Railroad Co. v. Johnson*, 119 U. S. 608, 7 Sup. Ct. 339, 30 L. Ed. 504, the supreme court laid down the rule which has been the common law ever since the statute of 5 Rich. II. c. 7, and was probably then only declaratory of the law that a lessor entitled to possession may acquire such possession by lawful entry, but that entry by force is not lawful. Speaking of the purpose of the law, Justice Miller in this case said:

"Where any person is in the peaceable and quiet possession, he shall not be turned out by the strong hand, by force, by violence, or by terror. The party so using force and acquiring possession may have the superior title, or may have the better right to the present possession, but the policy of the law in this class of cases is to prevent disturbances of the public peace; to forbid any person righting himself, in a case of that kind, by his own hand, and by violence; and to require that the party who has in this manner obtained possession shall restore it to the party from whom it has been so obtained; and then, when the parties are in statu quo, or in the same position

as they were before the use of violence, the party out of possession must resort to legal means to obtain his possession, as he should have done in the first instance."

Did the city of Macon dispossess the Central by force? This is also incontestable. The resolution threatened not the use of a policeman, but of the "entire police force." The ordinary business of the complainant was stopped. Its locomotive engineer was arrested. Placards were posted, stating that the city had taken possession. But this is not all. On the complaint of merchants and manufacturers of Macon, whose business was interfered with, and who protested, the chief magistrate of the city issued the manifesto following:

"Macon, Ga., August 1, 1901.

"To the Watchmen in Charge of the Property Taken from the Possession of the Central of Georgia Railway Company, the Georgia Railroad Company, and the Louisville and Nashville Railroad Company: You will not interfere with the delivery of cars from and to Jaques & Tinsley, English & Johnson, Hayes and Mansfield side tracks by the Southern Railway Company, the Central of Georgia, the Georgia Railroad Company, or the Macon, Dublin and Savannah Railroad Company, until further orders.

"[Signed]

Bridges Smith, Mayor."

It will be observed that this is addressed by the mayor to the watchmen of the city in charge of property "taken from possession" of the Central of Georgia Railway Company and others, and is besides a direct exercise of control over the operations of the railway company on these tracks. The service to certain customers is permitted. It is logically inferable that service to others is denied, but even here the mayor reserves the exercise of control, for the indulgence granted is effective "until further orders." These "further orders" obviously must emanate from the mayor himself. Further discussion is needless. The duty of the court is obvious. The injunction granted will be made permanent until the final hearing, when, since the court now has jurisdiction of the parties and subject-matter, the disputed question of title can be settled after both parties have enjoyed the salutary privilege of due process of law.

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DESERT KING MIN. CO. v. WEDEKIND et al.

(Circuit Court, D. Nevada. September 2, 1901.)

No. 715.

1. EQUITY PLEADING—OBJECTION TO JURISDICTION.

An objection to the jurisdiction of the court for any reason not apparent on the face of the bill must be taken by special plea, and cannot be raised by a motion.

2. FORMER ADJUDICATION—PLEADING.

A motion to dismiss is not a proper mode of raising the defense of former adjudication, but it should be presented either by a plea in bar or by evidence under the general issue taken by answer; and where such defense involves disputed questions of fact the court will not undertake to determine it on such a motion.

In Equity. On motions to vacate and set aside an order to show cause, to dissolve the temporary restraining order issued herein, and to dismiss the bill of complaint.

J. W. Dorsey, A. E. Cheney, and Thos. Wren, for the motions.  
W. E. F. Deal, opposed.

HAWLEY, District Judge (orally). The bill of complaint in this case was filed August 10, 1901. It contains the necessary averments to give this court jurisdiction. The complainant is a California corporation, organized and existing under the laws of that state since May 14, 1901. The defendants are residents of the state of Nevada, and the amount involved exceeds \$10,000. It alleges that complainant—

"Is now, and ever since the 22d day of June, 1901, has been, the owner in fee simple, in the possession and entitled to the possession, of all that certain piece or parcel of land situate, lying, and being in the county of Washoe, state of Nevada, described as follows, to wit: All that portion of the northeast one-quarter of section thirty-two [then describes the same by metes and bounds, containing 60.30 acres], together with the surface of said tract of land, and all lodes, ledges, minerals, and deposits of \* \* \* gold and silver and other metals therein contained beneath the surface of said tract of land within the exterior surface boundaries thereof extended downward vertically indefinitely and from said surface to the center of the earth; \* \* \* that it and its predecessors in interest and grantors have so owned, been in the possession of and entitled to the possession of said above-described premises and property for twenty years last past by title in fee simple, under and by virtue of letters patent issued by the government of the United States of America to the said predecessors in interest and grantors of your orator; \* \* \* that said defendants, their and each of their agents, servants, and employés, notwithstanding your orator's ownership of the said land and premises, and of the gold and silver bearing rock, earth, and ore contained therein, and notwithstanding the exclusive right of your orator to the sole and exclusive possession of said land, and of the sole and exclusive right to said earth, rock, and ore, and to all of said precious metals contained therein, heretofore, to wit, on or about the 22d day of June, 1901, by digging in the earth outside of the boundary lines of your orator's said land, have made mining constructions by means of which they have excavated and dug under the surface of the land of your orator, and within the exterior boundaries of said land at the surface extended downward vertically, and have been digging and extracting large and valuable quantities of said earth, rock, and ore, containing gold and silver, from under the surface of your orator's said land, and within said exterior boundary lines at the surface extended downward vertically, and are still so digging, extracting, and carrying away large quantities of such rock, earth and ore, and are converting the same, and the gold and silver therein contained, to the use of said defendants; that said defendants have already dug, taken, and carried away ores, earth, and rock, bearing gold and silver, of the value of not less than ten thousand dollars, the exclusive property of your orator; \* \* \* that said defendants threaten to continue said unlawful and illegal acts, and \* \* \* will, unless enjoined and restrained by the injunction of this honorable court, continue their said unlawful, wrongful, and illegal acts," etc.

On the day the bill was filed an order was made requiring the defendants to be and appear before this court on the 5th day of September, 1901, then and there to show cause, if any they could, why a temporary injunction should not issue, and in the meantime a restraining order was issued against them; and on the 14th day of August, 1901, complainant moved for an order for leave to make a survey of the premises in order to obtain the necessary facts to present the case on the day set for the hearing of the rule to show cause. Thereafter, on the 22d day of August, 1901, after notice to

the complainant, the defendants moved the court to vacate the order to show cause, to dissolve the restraining order, and to dismiss the bill of complaint, upon the grounds (1) that this court had no jurisdiction to make the order to show cause or to issue the writ of injunction, (2) that the whole subject-matter of the suit is *res judicata*, and (3) that all of the matters and things, and the title to all of the property and premises, set forth in and which constitute the subject-matter of this suit, had been fully and finally adjudicated and determined in and by a court of competent jurisdiction, namely, the state district court in and for Washoe county, Nev., long prior to the time of the commencement of this suit, and that the subject-matter of the suit in the state court "is the same identical subject-matter of this suit." Other grounds were embodied in the motions, but these are the only ones that require special notice.

The affidavits and documentary exhibits offered by the respective parties upon these motions, among other things, show that on April 15, 1901, George H. Wedekind, one of the defendants herein, filed a complaint in the district court of Washoe county, Nev., against C. B. Bell, W. A. Sleep, John Doe, Richard Roe, James Noe, and Samuel Styles. The names of all of said persons except Bell and Sleep being fictitious, and their true names were asked to be inserted as defendants when ascertained. They were never ascertained, and the case came to issue and was tried upon an answer filed by defendants Bell and Sleep alone. The complaint was in the ordinary form of an action in ejectment, with a second count praying for the issuance of an injunction. It alleged that the plaintiff on April 10, 1901, was, ever since had been, and then was the owner and entitled to the possession of certain mines, mining claims, and premises "commencing at a post which is situated 750 feet northwesterly from that certain post and monument situate about 50 feet northeasterly from the corner which is common to sections 28, 29, 32, and 33 of township 20," and then by metes and bounds describes a mining claim 1,500 feet in length and 600 feet wide, "together with all veins, lodes, ledges, and deposits throughout their entire depth, the top or apex of which lies inside of such surface lines extended downward vertically, although such veins, lodes, ledges, or deposits may so far depart from a perpendicular in their course downward as to extend outside the vertical side lines of said mine, mining claim, and premises. And plaintiff further avers that in said premises there is a certain vein, lode, ledge, or deposit of rock in place bearing gold, silver, and other valuable minerals, the top and apex of which lies within the premises above described, which said vein, lode, ledge, or deposit on its downward course extends into the ground and premises hereinafter described beneath the surface thereof; that on or about the 10th day of April, 1901, and while said plaintiff was the owner, in the possession, and entitled to the possession of said vein, \* \* \* the said defendants wrongfully and unlawfully entered in and upon the said vein, lode, ledge, or deposit, beneath the surface, at a point about 200 feet south from said corner common to said sections 28, 29, 32, and 33," and wrongfully and unlawfully dug up, excavated, mined, and removed out of and from

"said vein, lode, ledge, or deposit a large portion of the earth and rock in place bearing gold, silver, and other valuable minerals, and wrongfully and unlawfully ousted and ejected said plaintiff from the possession of all that portion of said vein, lode, ledge, or deposit which lies within the exterior boundary lines of said section 32 extended vertically down, and which said defendants have entered and possessed, \* \* \* and ever since said day have, and now do, wrongfully and unlawfully withhold the possession thereof from the plaintiff"; that the cause came regularly for hearing before Judge Curler, the regularly elected district judge of the Second judicial district court, upon an application for the issuance of a temporary injunction. The hearing was regularly had, and after hearing said judge on the 8th day of May, 1901, denied the same. Thereafter and in due course of time the cause came up for trial before the Honorable George F. Talbot, district judge of the Fourth judicial district, sitting in the place of Judge Curler, who was absent from the state; and after due hearing and regular trial the said judge, on the 25th day of July, 1901, after describing the premises in controversy mentioned in the bill of complaint, entered the following judgment and decree:

"Now, therefore, the law and the premises considered, it is hereby ordered, adjudged, and decreed: (1) That plaintiff is, and ever since the 10th day of April, 1901, has been, the owner and entitled to the full and undisturbed possession of the mining ground and premises hereinbefore described, and of all veins, lodes, ledges, and deposits apexing therein down to their uttermost depths. (2) That said defendants have not, nor has any of them ever had, any right, title, estate, or interest of, in, or to said above-described mining claim or premises, or any part thereof, or of, in, or to the veins, lodes, ledges, or deposits apexing therein, or any part thereof, and particularly of, in, or to that certain vein, lode, ledge, or deposit in and upon which said defendants have sunk shafts and made drifts and excavations, and from which they have dug and extracted ore, as hereinbefore stated, or any part thereof. (3) That said plaintiff do have and recover of and from the said defendants, and each of them, the possession of said mining claim and premises, and leads, lodes, ledges, and deposits, and every portion thereof, and especially that portion of said vein, lead, lode, ledge, or deposit in and upon which said defendants entered by means of shafts, drifts and excavations as aforesaid. (4) That said defendants and each of them, and their servants, agents, and employes, and all persons deriving or claiming title from, through, or under said defendants, or any of them, or acting for, in aid or assistance of, them or any of them, are hereby perpetually enjoined and restrained, all and each of them, from entering into or upon, or in any manner interfering with, said or any of said veins, leads, lodes, ledges, or deposits, and particularly any portion of said vein, lead, lode, ledge, or deposit in and upon which said defendants entered by means of shafts, drifts, and excavations as aforesaid, and from digging, breaking down, or removing any portion of said particularly referred-to vein, lode, ledge, or deposit, or any of said veins, leads, lodes, ledges, or deposits, or from in any manner hindering, preventing, or obstructing said plaintiff from the full and free use, possession, and enjoyment of the same and every part thereof. It is further ordered, adjudged, and decreed that defendants are the owners and entitled to the possession of all lands, ores, mineral, and mineral-bearing rock in that portion of section 32 which is within the exterior boundary lines of the Safeguard location (described hereinbefore), excepting such as may be in lodes or veins apexing outside of section 32 on the Safeguard location, and defendants are not enjoined from working said portion of section 32 within the Safeguard location, except upon said ledge heretofore referred to, and all other ledges apexing

outside of section 32; that plaintiff have and recover of and from said defendants his costs and disbursements herein incurred, taxed at the sum of \$——. Done in open court this 25th day of July, A. D. 1901. G. F. Talbot, District Judge."

It is also alleged that on August 13, 1901, within the time allowed by law, the defendants in that suit filed their notice of intention to move for a new trial therein, accompanied by a statement on motion for a new trial.

In the consideration of the points relied upon by defendants, it must be remembered that they have not interposed any plea to the jurisdiction of the court, or in bar, or to the merits, or made any general appearance in the present suit. Counsel expressly state that:

"The filing of this notice and the making of said motions is intended, and shall be only construed, to be and constitute a special appearance for the purpose of said notice and motions, and nothing more."

An objection to the jurisdiction of the court, for any cause not apparent on the face of the bill, must be taken by special plea. It is only in cases where the want of jurisdiction affirmatively appears upon the face of the complaint that it can be raised by motion. *Wood v. Mann*, 1 Sumn. 578, Fed. Cas. No. 17,952; *Evans v. Davenport*, 4 McLean, 574, Fed. Cas. No. 4,558; *Smith v. Kernochan*, 7 How. 198, 216, 12 L. Ed. 666; *Wickliffe v. Owings*, 17 How. 47, 51, 15 L. Ed. 44; *Jones v. League*, 18 How. 76, 81, 15 L. Ed. 263; *Eberly v. Moore*, 24 How. 147, 158, 16 L. Ed. 612; *Hartog v. Memory*, 116 U. S. 588, 590, 6 Sup. Ct. 521, 29 L. Ed. 725; *Railway Co. v. Pinkney*, 149 U. S. 194, 199, 13 Sup. Ct. 859, 37 L. Ed. 699; *Walker v. Flint* (C. C.) 7 Fed. 435; *Dinsmore v. Railroad Co.* (C. C.) 19 Fed. 153; *Refining Co. v. Wyman*, 38 Fed. 574, 3 L. R. A. 503; *Pierce v. Feagans* (C. C.) 39 Fed. 587, 588. It is equally as well settled that a motion to dismiss is not a proper mode of raising the defense of former adjudication. It should be presented either by a plea in bar, or by evidence introduced under the general issue in an answer. 9 Enc. Pl. & Prac. 612, 613, and authorities there cited.

It is claimed by the moving party herein that the facts set forth in the motions show that in the present suit the complainant is relying upon the same muniments of title as were set up by defendants Bell and Sleep in their answer to the Wedekind suit in the state court, it having derived its title from them during the pendency of said action, and that the corporation complainant herein had full notice and knowledge of the facts prior to its purchase, and became a party privy to said suit, and is as much bound by the judgment and decree in the state court as the parties named therein. It will be time enough to decide these questions and the effect of them when the issue is raised in proper form and in the regular manner as prescribed or required by the rules and practice of this court.

There is another reason why this court should refuse to discuss these or other questions urged upon these motions. The complaint in this suit is general in its averments concerning complainant's ownership of the mineral deposits beneath the surface of its land in section 32, and its right to extract the same. The decree of the



state court is limited. It does not enjoin the grantors of complainant from digging upon or extracting from the land in section 32 the minerals found in any lode or deposit of earth and ore therein which does not have its apex within the exterior boundary of the Safeguard location. The decree expressly declares that:

"Defendants are not enjoined from working said portion of section 32 within the Safeguard location, except upon said ledge heretofore referred to, and all other ledges apexing outside of section 32."

How can this court, upon these motions, determine that the alleged extraction of ores and minerals by defendants from section 32 is upon a lode or deposit which has its apex within the surface boundaries of the Safeguard location? It is true that defendants argued, and the affidavits of Wedekind and Sparks offered in their behalf state, that neither of them, "nor any one employed by or acting for them or either of them, has or have entered upon or within the boundaries of section 32, township 20 north, of range 20 east, except on the dip of, and in following, and within the limits of, said particular vein or deposit described in and adjudged to belong to affiant by said judgment and decree hereto annexed, \* \* \* nor does this affiant or said Sparks claim any right to enter beneath the surface of or within the boundaries of said section 32, save in following and within the limits of said vein or deposit, or in following some other vein adjudged by said judgment and decree to belong to affiant, and not to belong to the defendants in said action." But, on the other hand, the affidavits of Thomas Dougherty, the duly-authorized agent of complainant in the state of Nevada, and of C. B. Bell, a director, state upon information and belief—

"The fact to be that the ore mentioned in said bill of complaint has not been taken from any ledge or deposit of ore whose top or apex is within the boundaries of defendants' land, or either of said locations, but that the top or apex of said ledge or deposit of ore is entirely within the exterior boundary lines of complainant's land, described in said bill of complaint, at the surface extended downward vertically; \* \* \* that he is not able to state the fact as to said apex positively, because and for the reason that said defendants will not permit said complainant, or any of its officers or agents, or either of these affiants, or L. F. J. Wrinkle, to survey or examine the underground workings by means of which the defendants in this cause have extracted said ore, and the fact can only be determined by such examination; \* \* \* that the acts and doings of said defendants, alleged in said bill of complaint, are contrary to and against the said decree of said Second judicial district court of the state of Nevada, set forth in said defendants' moving papers."

Is not complainant entitled to a hearing in this matter? In this respect it certainly cannot legally be said that complainant, or this court, is interfering in any manner with the jurisdiction of the state court, or with its decree. If it should hereafter affirmatively appear in proper proceedings had herein that the acts of the defendants in digging or removing the ore from section 32 were committed by them upon the identical lode, deposit of ore, or mining ground decreed by the state court to belong to the defendants, it will then be the duty of this court to decide, under the facts and the law applicable thereto, whether it should "stay its hand" or proceed with the hearing and trial of the case.

It was agreed between the respective counsel that the question as to the right of complainant to have a survey of the premises in dispute and the hearing of the rule to show cause why a temporary injunction should not issue should be postponed until after the decision upon these motions, and the rights of the respective parties in relation thereto are not in any manner affected by this decision. The motions made by defendants are hereby denied.

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UTAH, N. & C. R. CO. v. UTAH & C. RY. CO. et al

(Circuit Court, D. Nevada. July 22, 1901.)

No. 709.

1. CORPORATIONS—FORFEITURE OF FRANCHISE—CONDITION SUBSEQUENT.

The general rule is that, when the continued life of a corporation is made by the charter or governing statute to depend on a condition subsequent, the nonperformance of such condition is not an ipso facto forfeiture, but is a mere ground of forfeiture, of which the state may avail itself or which it may waive, so that, unless the state proceeds, by quo warranto or otherwise, to oust the corporation of its franchise, its existence cannot be collaterally called in question.

2. PUBLIC LANDS—RAILROAD RIGHT OF WAY—FORFEITURE.

The proviso in section 4 of Act March 3, 1875 (18 Stat. 482), granting right of way over the public lands to railroad companies, that, "if any section of said road shall not be completed within five years after the location of said section, the rights herein granted shall be forfeited as to any such uncompleted section of said road," is a condition subsequent, and the failure to complete the road within the time limited does not operate ipso facto as a revocation of the grant, but merely authorizes the government to forfeit it by judicial proceeding or by an act of congress resuming title to the lands.

3. SAME—CONFLICTING CLAIMS—PRIORITY.

As between two rival railroad companies, each claiming a right of way on the same route over public lands under the statute, that one is prior in right which first definitely adopts the line on which its road is to be built by appropriate corporate action, and then files its map of the location so adopted, since that is an essential act to initiate any right to a particular location. It is immaterial which first entered on the land to make surveys or to do other work thereon prior to such definite location.

4. SAME—RIGHT TO PRELIMINARY INJUNCTION.

A railroad company located its line of road over public lands of the United States, and proceeded, in accordance with the provisions of Act March 3, 1875 (18 Stat. 482), to acquire right of way across such lands. It graded and tunneled a portion of its road through a mountainous country, expending large sums in the work, but subsequently abandoned the line. Some 10 years afterwards a new company, allied to the first, was organized, which located its line over the same route and obtained a conveyance from the old company of its rights therein. It also filed its maps of survey with the land department for the purpose of acquiring the right of way over the public lands, and entered upon the work of completing the road. No action had ever been taken by the government to forfeit the rights of the old company in such right of way. *Held*, that the new company had acquired such prima facie rights in the work done by its predecessor as warranted a court of equity in granting a preliminary injunction restraining forcible interference with its completion of such work by a rival company, which also claimed the same right of way, but which did not definitely locate its line thereon

until later, pending an adjudication of the rights of the respective parties, but that the court would not, on such hearing, enter upon the question of the rights of the parties upon the portion of the line on which no work had been done, and as to which a contest was pending in the land department involving the validity of complainant's survey and maps of definite location.

**In Equity.** On rule to show cause why injunction should not issue.

The subject-matter in controversy in this suit is the right of the complainant to hold and enjoy a certain right of way for a railroad through the state of Nevada. This right of way is based upon the provisions of the act of congress entitled "An act granting to railroads the right of way through the public lands of the United States," approved March 3, 1875 (18 Stat. 482). On April 19, 1901, the Utah & California Railway Company conveyed all its rights and interests in the roadbed and right of way in Lincoln county, Nev., to the San Pedro, Los Angeles & Salt Lake Company. The other defendants are the agents, attorneys, and servants of the respective corporations. The conflict between the parties which resulted in the institution of the present suit was commenced by the order of the commissioner of the general land office, made January 16, 1901, directing a hearing before the local land office in Carson City, Nev., to determine the rights of the respective corporations to the rights of way herein involved. Pursuant to said order, after notice duly given, this hearing was had March 11, 1901, and upon the proofs then submitted the register and receiver found the following facts:

"(1) That during the years between August 28, 1889, to and including February, 1890, the Oregon Short Line & Utah Northern Railway Company caused to be surveyed a line of route commencing at Milford, territory of Utah, and running in a westerly direction to within about four miles from the town of Pioche, in the county of Lincoln, state of Nevada, and between the same dates the said company caused to be graded a large portion of said roadbed, and constructed about  $3\frac{1}{2}$  miles of track leading from the town of Milford in a westerly direction; that in the year 1890 all grading and construction work was abandoned, and the  $3\frac{1}{2}$  miles of track theretofore laid was torn up and removed from said line or route, and since the year 1890 the said Oregon Short Line & Utah Northern Railway Company not having done any work or made any improvements upon its line of survey in the state of Nevada. (2) That in the year 1896 the right of way and the grading done on said line of survey within the state of Nevada was assessed by the assessor of Lincoln county, state of Nevada, for state and county taxes, to the Oregon Short Line & Utah Northern Railway Company; that when the said taxes became due the said Oregon Short Line & Utah Northern Railway Company failed and refused to pay said taxes or any part thereof, and the said property was advertised and sold by the sheriff of Lincoln county, and was bid in by the treasurer of Lincoln county for the said county, and the said property has never been redeemed from said sale by the Oregon Short Line & Utah Northern Railway Company, or by any one in its behalf, and the tax title to said property is now vested in Lincoln county, for the use and benefit of said county and the state of Nevada. (3) That by reason of the fact that the Oregon Short Line & Utah Northern Railway Company has not complied with the provisions of section 4 of the act of congress of March 3, 1875, concerning rights of way for railroads over public land, that company has forfeited all rights, and privileges it had under its survey reverted to the government in the year 1896. (4) That in the year 1896 the Utah & California Railway Company caused to be surveyed a line of route from the boundary line between the then territory of Utah, through the county of Lincoln, in the state of Nevada, and over the line theretofore surveyed by the Oregon Short Line & Utah Northern Railway Company; that prior to the date of said survey all rights and privileges obtained by the Oregon Short Line & Utah Northern Railway Company by its survey made in the years 1889 and 1890 had been forfeited to the government of the United States by reason of the fact that the said company had failed to comply with the act of congress of March 3, 1875, and the said Utah & California Railway Company

had the right to make the survey and locate its line of route over the said line theretofore surveyed and located by the said Oregon Short Line & Utah Northern Railway Company. (5) That certain maps offered in evidence by the Utah, Nevada & California Railroad Company, which had been returned by the honorable commissioner of the general land office at Washington, under date of September 16, 1899, for correction, and on the 25th day of December, 1899, forwarded by the register, by registered package, addressed to the Utah, Nevada & California Railroad Company, Salt Lake City, Utah, were not returned to the United States land office at Carson City, Nevada, or to the register or receiver thereof, until the 1st day of March, 1901, although the said registered package had been received and receipted for on the 23d day of November, 1899, by A. C. Cleveland, one of the directors of the Utah, Nevada & California Railroad Company; and, the said company not having made the corrections as called for by the honorable the commissioner's letter above referred to, for more than a year after receiving notice thereof, the said maps should not be filed. (6) That the attempted transfer of the Oregon Short Line & Utah Northern Railway Company to the Utah, Nevada & California Railroad Company is without merit, because at the date of the attempted transfer the said Oregon Short Line & Utah Northern Railway Company had no right or title to, or claim upon, the said right of way in the state of Nevada, that company having forfeited all right and claim to said right of way by failure to comply with the act of congress of March 3, 1875, as hereinbefore mentioned; and the claim that the Utah, Nevada & California Railroad Company is auxiliary to the Oregon Short Line & Utah Northern Railway Company is without merit, in so far as the said franchise is concerned. Our conclusions drawn from the foregoing facts are that the claims of the Oregon Short Line & Utah Northern Railway Company and the Utah, Nevada & California Railroad Company are without merit, the right under which they claim having been forfeited. We therefore recommend that the maps of the line of route as surveyed by them be rejected, and that the maps of the Utah & California Railway Company, filed in the United States land office at Carson City, state of Nevada, on the 27th day of February, 1897, as corrected, be approved, and that the said company be granted the right of way."

An appeal was taken from the decision of the local land office, and on April 24, 1901, the secretary of the interior rendered the following decision:

"The Commissioner of the General Land Office—Sir: With your office letter of the 23d instant were forwarded articles of incorporation and proofs of organization filed by the Utah & California Railway Company and the Utah, Nevada & California Railroad Company, together with maps of location filed by said companies, respectively, and in said letter it is recommended that the articles of incorporation filed by the last-mentioned company be accepted and filed, and that the map of location showing the second section of road, filed by said company, be approved under the provisions of the act of March 3, 1875 (18 Stat. 482), so far as the same crosses surveyed public land. On May 3 and June 7, 1890, this department approved four maps of location filed by the Oregon Short Line & Utah Northern Railway Company, showing its line of route as surveyed and located from the Utah-Nevada boundary line, near the seventh standard parallel, by way of Cloverdale Junction, to a point near Pioche, Nev., a distance of 70.53 miles. Said company at an expense of several hundred thousand dollars graded nearly the entire line of its road as shown upon said maps, constructed tunnels, and did other work preliminary to the occupation and operation of a railroad upon said located line. It became financially embarrassed, and all of its property, including that above described, was purchased at foreclosure sale by the Oregon Short Line Railroad Company, a corporation organized under the laws of the state of Utah. The work of construction along this line was discontinued in 1890 or 1891, and was not resumed until during the present month, when the Utah, Nevada & California Railroad Company entered upon the construction of the line of road and is now actively proceeding therewith from the Utah-Nevada line towards Cloverdale Junction, Nev. The Utah, Nevada & California Railroad Company was incorporated in February, 1899, under the laws of the state of Nevada. Its articles of incorpo-

ration and proofs of organization, as submitted, have been examined by your office and found to be satisfactory, and it is shown to be entitled to acquire a right of way and to construct and operate a railroad in the state of Nevada. Its maps of location, filed as before stated, show two sections of located road, beginning at the Utah-Nevada state line, and following the old line located by the Oregon Short Line & Utah Northern Railway Company to Cloverdale Junction, which maps your office finds fully conform to the regulations governing the filing of such maps. It is proceeding with the construction of the road along said line of location, with the consent of the Oregon Short Line Railroad Company and the Oregon Short Line & Utah Northern Railway Company. Indeed, it is an auxiliary to these companies. That the rights secured by the approval of the maps of location of the Oregon Short Line & Utah Northern Railway Company, in May and June, 1890, have not become forfeited merely by the failure of that company to construct and operate a railroad along said line of location within the period named in the fourth section of the act of March 3, 1875, supra, is clearly settled by a long line of decisions (see *U. S. v. Northern Pac. R. Co.*, 177 U. S. 435, 20 Sup. Ct. 706, 44 L. Ed. 836, and cases therein cited; also *In re Spokane & P. Ry. Co.*, 26 Land Dec. Dep. Int. 224); but, as those claiming under said location have filed written consent to the approval of the maps of location filed by the Utah, Nevada & California Railroad Company, there is no reason why that company's maps may not be approved (*In re Montana Ry. Co.*, 21 Land Dec. Dep. Int. 250; *In re Noxon*, 27 Land Dec. Dep. Int. 585). I have therefore accepted for filing the articles of incorporation and due proofs of organization submitted by the Utah, Nevada & California Railroad Company, and have approved its map showing the second section of the located road, so far as the same crosses surveyed public lands. As to the unsurveyed lands, the maps will be received for information only. The map showing the first section covers only unsurveyed land.

"It but remains to determine the rights of the Utah & California Railway Company. That company was organized under the laws of the state of Utah, and on June 20, 1896, asked approval, under the provisions of the act of March 3, 1875, supra, of four certain maps of location,—the line shown thereon being identical with that shown upon the approved maps of location filed by the Oregon Short Line & Utah Northern Railway Company, before referred to; and thereupon said last-mentioned company filed a protest against the approval of said maps. The articles of incorporation of the Utah & California Railway Company did not, at the time of the filing of said maps, authorize it to operate a railroad outside of the state of Utah, and it was not until January 2, 1901, that by an amendment of its articles of incorporation it became empowered to construct a line of road in Nevada, even if it could acquire authority so to do from the state of Utah alone. In January of the present year a hearing was ordered by your office at the Carson City, Nev., land office, which resulted in a decision by the register and receiver of that office holding that all rights secured by the approval of the maps of location filed by the Oregon Short Line & Utah Northern Railway Company in 1890 had become forfeited by its failure to construct such line of road within the time named in the act of March 3, 1875. That decision cannot be sustained. The land department cannot declare and enforce a forfeiture of this sort. Following the decision of said local land officers, the Utah & California Railway Company made an ineffectual attempt to take and hold possession of the grade constructed by the Oregon Short Line & Utah Northern Railway Company. It did some work thereon, but not enough to amount to more than a colorable attempt to construct a railroad. At the oral hearing had to-day in this matter, it was not claimed, nor does it seem that it could be, that there was any authority under the laws of Nevada, before about the middle of last month, for the construction and operation by a Utah corporation of a railroad wholly within the state of Nevada. It is represented that at the time named a law was enacted in that state (*St. Nev.* 1899, p. 82, c. 20) whereby such authority was given to corporations of other states upon their compliance with certain named conditions, and it is admitted that these conditions were not complied with by the Utah & California Railway Company prior to the 8th inst. No certified copy of this act

is presented, nor is a copy presented in any form which entitles it to recognition. This company, therefore, cannot even now be held or recognized as entitled to acquire a right of way within the state of Nevada, and this department must refuse to accept for filing its articles of incorporation and proofs of organization. Even if the recent Nevada statute were now before the department, and were shown to go as far as is claimed, the Utah, Nevada & California Railroad Company would be entitled to precedence, because—First, its application was the first to be presented in a perfected form showing a right in the company to acquire a right of way in Nevada; second, it is shown to have actively commenced construction of the line of road before the time when the other company claims to have complied with the recent Nevada statute; third, the obstacle which the outstanding Oregon Short Line & Utah Northern right of way presents to the granting of another right of way over the same ground has been removed as to the Utah, Nevada & California Company by the written consent of the holder filed in this proceeding; and, fourth, the existing grade and tunnels on this ground, placed there by the Oregon Short Line & Utah Northern Company at enormous cost, give its auxiliary company the stronger claim to recognition as between the two new companies, even if they are both willing and able to enter upon the actual construction and operation of a railroad upon said line of location. The Utah & California Railway Company's maps are therefore herewith returned without approval."

On April 6, 1901, soon after the decision of the local land office in their favor, the defendants entered upon the roadbed in question and commenced work thereon, and on the next day, April 7th, the complainant entered upon said roadbed and soon thereafter commenced work thereon, laying rails and performing other work necessary to be done in order to construct a line of railroad thereon, and has ever since been engaged in said construction. It is alleged in the original bill of complaint that the defendants, "at a point at or near tunnel No. 1, on said railroad grade, a distance of about 10½ miles from the said boundary line between the states of Utah and Nevada, at said point known as and called 'Uvada,' and at divers other places upon said grade, at a greater distance from said Uvada, forcibly entered upon said grade, roadbed, embankment, cuts, and tunnels, and constructed in and upon said line of right of way, near the said tunnel, a barbed-wire fence inclosing a cut upon said railroad grade and line, and across said right of way and roadbed, and have also built obstructions of trees and rocks at or near the said place, by hauling trees into cuts upon said line of right of way, and rolling from the banks of such cuts large rocks upon the said trees, thereby constituting an obstruction and barricade for the purpose of forcibly resisting and obstructing your orator, its agents and servants, in and about the work of continuing its construction, and completing and operating its said railroad upon said grade and roadbed. \* \* \* That the said defendants, and their said agents, officers, servants, and employes, have confederated together for the purpose of, and with the intention of, by the means of the barricade, barbed-wire fence, and other contrivances aforesaid, and are designing and intending to, unlawfully, forcibly, and violently interfere with, obstruct, and prevent your orator from peaceably and lawfully occupying, possessing, using, and enjoying its said right of way and roadbed, and peaceably continuing to construct its railroad thereon." The answer denies the commission of any unlawful acts on the part of defendants, and, among other things, alleges "that on the 26th day of March, 1901, the San Pedro, Los Angeles & Salt Lake Railroad Company began a survey and location of right of way, in accordance with the laws of the United States, extending over the same ground and right of way described in plaintiff's bill, and finished the same as far as Clover Valley Junction on the 2d day of April, 1901, on which last date the said San Pedro, Los Angeles & Salt Lake Railroad Company began a survey and location of right of way over that part of the ground described in plaintiff's bill, extending from Clover Valley Junction to the head of Condor Canyon, near Pioche, in the county of Lincoln, state of Nevada, and completed the same on the 7th day of April, 1901, and on or about the 19th day of April, 1901, with the bona fide intention of building a railroad track and improvements thereon, in accordance with the laws

of the United States and the laws of the state of Nevada, and according to the terms of its franchise, took from the defendant the Utah & California Railway Company peaceable possession of said right of way and grade, and began to improve the same for the purposes of building a railroad track thereon, and remained continuously in possession of said right of way, and industriously prosecuted said work of improvement, until compelled to desist therefrom by an order of this honorable court."

Numerous affidavits were presented by the respective parties as to the character of the work done by said corporations on said roadbed. Those presented by complainant fully sustain the averments of its bill of complaint, and many of the acts performed by the defendants are not denied in any of the affidavits on their behalf; their proofs being principally confined to the statement that they were acting in good faith for the purpose of building a railroad on the line of the roadbed, to which they claim to have acquired a valid title, and that the complainant was a trespasser upon their rights, etc. Among other things, the affidavits offered on behalf of complainant show that the work performed by defendants was without any definite design, and was not calculated to improve or repair said grade, but was a mere pretense of work, and done solely for the purpose of claiming to be in possession of said grade and preventing the construction of a railroad thereon; that after the arrival of complainant's servants and agents the men employed by defendants were instructed to put themselves in the way of obstructing the progress of the complainant; that, among other things, they "barricaded" the roadbed, constructed "a barbed-wire fence" across the roadbed, filled up a cut "with trees, rock, and other materials," and finally adopted a "dead line," beyond which they threatened complainant should not go, at which point they were "to make a stand and prevent the further progress" of complainant and its employés.

Jake Johnson, sheriff of Lincoln county, who had occasion in his official capacity to pass over said grade and roadbed frequently from April 9 to June 13, 1901, observed the work done thereon during the months of April and May, and knew one Virgil Kelly, who was in the employ of the San Pedro, Los Angeles & Salt Lake Railroad Company, under the direction of H. B. Maxson, one of the personal defendants herein, and had about 150 men under his charge. In his affidavit on behalf of complainant he says:

"On or about the 11th day of April, 1901, I visited the said Kelly's camp, having been informed that he was obstructing the construction of a railroad, and found that the said Kelly and his men were filling the cuts with trees and large boulders, and placing barriers on the roadbed to prevent the laying of ties and rails. I spoke to Maxson about it, and informed him that he, Kelly, and their men were obstructing, instead of building, a railroad, and that they must remove the obstructions, which they promised to do, and did remove afterwards; that the said men, under the supervision of the said Kelly and Maxson, were only pretending to work on said grade, and not to exceed one-half of them had any tools to work with, but were stationed along the grade to prevent the laying of track by the Utah, Nevada & California Railroad Company; \* \* \* that on the 27th day of April, 1901, while the said Utah, Nevada & California Railroad Company was distributing ties along the line of said roadbed, about 9 miles southwesterly from Uvada, Kelly and his men moved up from a point about 3 miles further west, where they had barricaded a cut with barbed wire, trees, and rocks, and stopped the teams from unloading ties, and grabbed the horses, and would not permit them to unload, and the attorney representing Kelly and his men shouted for them to knock the horses down and not let them pass, and they did for more than three hours by force prevent the distribution of ties and other construction of the road; that the work performed by Kelly and his men was principally obstruction, and during the time they were employed on said grade they performed little or no work that could in any way be called legitimate railroad building or construction, but they did, however, construct about 40 feet of railroad, which consisted of rails of 19-pounds weight, nailed upon round pine and cedar ties with spikes and 10-penny wire nails, and that said track was laid a distance of over 2 miles from where the barbed-wire obstruction was placed, and at a point nearer Uvada; that there

was no necessity for making any barriers of wire, trees, or stone, for at no time during the month of April, and before the serving of the injunction, was the Utah, Nevada & California Railroad construction gang within a point nearer than 2 miles, and during the most of the time were a distance of from 4 to 7 miles, from said obstruction, and said obstructions were made several days before the 27th day of April, the time when said Utah, Nevada & California teams were prevented from laying ties, and long before the issuance or service of the injunction; that ever since the 8th day of April, 1901, the Utah, Nevada & California Railroad Company have been continuously, and now are, in the actual construction of a railroad from Uvada, Utah, to Clover Valley Junction, in said county of Lincoln, and are laying good, substantial rails and ties, and ballasting the same, and have a large force of men in the actual construction of a railroad; that I have no interest whatever in the said suit or controversy, and visited the grade during the month of April, 1901, and was there continuously for 20 days, with instructions from the county commissioners and district attorney of said county to prevent obstruction to track laying and preserve the peace and order of the county."

The affidavit of C. O. Whittemore, one of the personal defendants herein, and of counsel for the defendant corporations, who had the general supervision of the work done on said roadbed on behalf of the defendants, after denying several of the specific statements contained in some of the affidavits of persons who were at the time in the employ of defendants, states that "all of the men who were sent by affiant to work on said grade were instructed to repair the same as fast as practicable, and said men were also instructed to adopt such means as might be necessary, by barbed-wire fence and other barricades, to prevent the occupation and laying of track by the Oregon Short Line Company, or the plaintiff company, on that part of the grade repaired and leveled by the forces employed by the Utah & California Railway Company; and affiant further states that most, if not all, barricades were placed along each side of the grade, and not across the grade, and that all the barricades were constructed for the purpose of preventing the forcible occupation by the plaintiff company of the repaired grade, and to prevent the said plaintiff company from interfering with the work of the Utah & California Railway Company in repairing said grade."

It is alleged in the supplemental bill that since the filing of the original bill herein complainant has "caused surveys to be made of its line of location of its railroad, and caused maps and profiles to be prepared showing the line of right of way for its railroad from Clover Valley Junction \* \* \* southwesterly across the state of Nevada and through the county of Lincoln, Nevada, to the western boundary of said state of Nevada, and that its said map and profiles of the route and line of its said right of way were submitted to the secretary of the interior, and by said secretary of the interior on the — day of —, 1901, duly approved, all in pursuance to and in compliance with the terms of the statute of the United States; \* \* \* that it has duly adopted the line of right of way described upon and embraced in said maps and profiles as the line of right of way for its said railroad, and that it owns and holds the same under and by virtue of the said act of congress, the compliance of your orator therewith, and with the rules and regulations of the department of the interior made in respect thereto," —and prays that the defendants be further restrained and enjoined from entering upon this right of way and railroad grade.

After the testimony was in, the defendant, by leave of the court, introduced a letter bearing date June 21, 1901, from the commissioner of the general land office, directed to the register and receiver of the land office at Carson City, Nev., in which, among other things, the commissioner said:

"With your letter of May 16, 1901, you transmitted nine maps filed by the Utah, Nevada & California Railroad Company, showing the definite location of its line of road between the points described. The first 20-mile section, from Clover Valley Junction southwesterly, was filed in your office May 6, 1901, as appears from a memorandum signed by the register and transmitted with the papers. The rest of the line is shown on eight maps, which, according to a similar memorandum, were filed in your office May 11, 1901. On the days the maps were filed, protests against their acceptance were filed



in your office on behalf of the Utah & California Railway Company. On May 25, 1901, a protest was filed in your office on behalf of the San Pedro Company. The protests allege that the protesting companies were in possession, and working and surveying the said line of route, and having a corps of surveyors employed in the performance of said work. Upon examination it appears that the line of route submitted by the Utah, Nevada & California Railroad Company is made from the same field notes that were used for nine maps filed by the Oregon Short Line & Utah Northern Railway Company in 1890, and approved by the department on November 22, and December 29, 1890, under the act of March 3, 1875 (18 Stat. 482). The Utah, Nevada & California Railroad Company claims to have succeeded to all the rights of the Oregon Short Line Company as to this right of way. As to other lines in Nevada, the department has recognized this company as an auxiliary of the Oregon Short Line Company, and has confirmed it in the rights claimed (decision of April 24, 1901, not published). The questions raised by the protest are—First, whether the surveys made by the Utah, Nevada & California Railroad Company are such as would satisfy the requirements of the law and the regulations; and, second, whether the work done on the proposed right of way by the protestants is such as to give them any rights as against the grant of right of way which has vested in the Oregon Short Line Company, or as against the corporation in favor of which the Oregon Short Line Company has waived its rights. In the affidavits filed by the protestants are certain statements as to the methods in which the surveys of the Utah, Nevada & California Railroad Company was made, to the effect that stakes were set only at considerable intervals, and those that were set are not in many cases in conformity with the field notes. The affidavits allege, further, that the protestants have actually been engaged in construction upon the proposed line; the sum of \$2,340.50 having been expended in grading thereon during the month of May, 1901. It appears that on May 25, 1901, the San Pedro Company filed two maps showing the first two 20-mile sections of the same route southwesterly from Clover Valley Junction, and on June 12, 1901, a map of the third 20-mile section. On May 25th and June 13th, respectively, the Utah, Nevada & California Railroad Company filed protests against the acceptance of these maps, alleging prior rights by reason of its claim through the Oregon Short Line Company, and by reason of the fact that it had already filed its maps for the same line of route. An examination of the maps discloses the fact that while there are some discrepancies between the San Pedro maps on the one hand, and the approved Oregon Short Line maps and those of the Utah, Nevada, & California on the other, the differences are for the most part very small, and that the two rights of way claimed are practically identical. In order that the matter may be properly presented to this office for the determination of the rights of the parties, you are instructed to order a hearing for the purpose of determining the facts concerning the two questions of survey and of work done as hereinbefore specifically stated. You will give the parties due notice of the time set for the hearing, and after the conclusion thereof will render your decision as to the facts shown and allow the usual right of appeal; the entire proceeding to be conducted in accordance with the rules of practice. You will make prompt report and transmit all the papers in the case."

The amended and supplemental bill also sets out in *hæc verba* a judgment for \$4,998.52, entered by default in April, 1894, in the district court of Lincoln county, state of Nevada, in the suit of the state of Nevada against the Oregon Short Line & Utah Northern Railway Company, brought for the collection of delinquent taxes on "possessory claim to surveyed right of way for a railroad of sixty-five miles, more or less, running from the state line on the east, southwest down Clover Valley Wash, thence north up Meadow Valley Wash, to within three miles of Pioche, with sixty miles, more or less, of prepared roadbed, consisting of cuts, fills, tunnels, etc., and known as the 'Milford and Pioche Line of the Oregon Short Line & Utah Northern Railway,' situated in Lincoln county, Nevada," and also sets out all of the proceedings had in said suit. It alleges, among other things, that the defendant the San Pedro, Los Angeles & Salt Lake Railroad Company has, or claims to have since the filing of the complainant's original bill, secured un-

der and by virtue of this judgment a title to the roadbed and right of way of this complainant from Uvada to Clover Valley Junction, and from thence to Pioche, by means of certain contracts and agreements made with the board of county commissioners of Lincoln county, Nev., and certain deeds from other parties. It further alleges that said judgment, and all the proceedings had in the suit in which it was entered, were without jurisdiction, and were and are absolutely null and void, and of no effect, and prays "that said San Pedro, Los Angeles & Salt Lake Railroad Company be enjoined and restrained from further asserting, setting up, or making any claim of right, title, or interest which it pretends to have acquired or to have under and by virtue of any contract, agreement, or conveyance from said Utah & California Railway Company, or under said pretended deed from James A. Nesbitt, treasurer of Lincoln county, Nev., or under said pretended contract made in the name of John Simpson, as chairman of the board of county commissioners of said Lincoln county, Nev., or otherwise, as to any of your orator's said right of way or property, and that each and every of the said pretended deeds, contracts, or agreements, instruments, or conveyances, issued or delivered by either of the said Utah & California Railway Company, the said James A. Nesbitt, treasurer, as aforesaid, and the said pretended contract from the county of Lincoln aforesaid, and the record of each and every of them, may be set aside and canceled, and all of the pretended title, claim, or interest of the said San Pedro, Los Angeles & Salt Lake Railroad Company, pretended to be held under them, or any of them, be held for naught."

During the argument the court's attention was called by defendants' counsel to the fact that on May 4, 1901 (subsequent to the filing of complainant's original bill, but prior to the filing of its amended and supplemental bill), complainant commenced a suit in the district court of Lincoln county, Nev., to set aside the judgment in the tax case on the ground that all proceedings therein were null and void; that the defendant railroad companies, though not made parties, have intervened therein as parties defendants; and that said suit is now pending in said court.

W. R. Kelly, P. L. Williams, C. S. Varian, and T. Coffin, for complainant.

T. E. Gibbon, C. O. Whittemore, and M. A. Murphy, for defendants.

HAWLEY, District Judge (after stating the facts). 1. The complainant on April 27, 1901, filed its bill of complaint and obtained an order requiring the defendants to appear and show cause why a preliminary injunction should not issue; and it appearing to the satisfaction of the court, from the averments of the bill, that there was danger of irreparable injury to complainant before such hearing could be had, the court ordered that the defendants be—

"Restrained and enjoined from entering upon the right of way and railroad grade, cuts, embankment, tunnels, or any other portions thereof, of that certain line of railroad right of way and railroad grade described in the bill of complaint herein, and being in Lincoln county, in said state and district of Nevada, beginning at a point on the eastern boundary line of said state, at or near a point now known as 'Uvada,' and extending thence southwesterly along the said grade and right of way indicated by said railroad bed, cuts, embankment, tunnels, etc., to a point called 'Clover Valley Junction,' a distance of about forty miles, and from said Clover Valley Junction, extending along such right of way, grade, embankment, cuts and fills, northerly or northwesterly, a distance of thirty miles, more or less, to a point at or near the town of Pioche, in said Lincoln county, and from in any manner obstructing, preventing, or interfering with the said complainant, its officers, agents, attorneys, servants, and employes, from proceeding peaceably and continuously with the work of construction of its railroad on and along

the said right of way, railroad grade, and embankment, until the further order of the court herein."

On June 3, 1901, complainant by leave of the court filed its amended and supplemental bill, praying for a restraining order enjoining the defendants from entering upon complainant's right of way from Clover Valley Junction, extending southwesterly, through Lincoln county and across the state of Nevada, to the western boundary of said state, upon the line of railroad right of way as indicated and shown upon certain maps of complainant, filed with and approved by the secretary of the interior. The court made an order requiring defendants to appear on the same day as they were required to appear or answer to the original bill to show cause why an injunction should not issue as prayed for in the supplemental bill. The rule to show cause was heard upon the averments of the original bill and answer of defendants filed thereto, the supplemental bill and demurrer thereto filed by defendants, divers maps of the respective parties, filed and approved, or held for information, by the secretary of the interior, various rulings of the general land office and decisions of the secretary of the interior, and numerous other documents, exhibits, and affidavits more or less relevant to the various questions involved herein, etc. The pleadings and proofs submitted on this hearing are so extremely lengthy as to render it difficult to make any brief statement, even in skeleton form, which will convey a true outline of the general facts presented by the respective parties. Certain matters, however, have been embodied in a statement of facts which will assist in the better understanding of some of the points discussed herein.

There are many links in the chain of evidence offered by the complainant in order to establish its right to the roadbed and right of way from Uvada to Clover Valley Junction, and from thence to Pioche, which would be important and material to be considered upon a final hearing herein, but which, in the light of all the facts, need not now be stated or discussed, as the title to said roadbed and right of way is not properly before the court at this time for determination. In fact, there are many questions involved herein, elaborately argued by counsel, which might, perhaps, be decisive of the real issues between the parties as to the title to the property in controversy, that are not, in my opinion, in a condition to be decided at the present time, which will be readily observed from a reading of the statement of facts, namely, the validity of the tax title acquired by the defendants to the roadbed situate in Lincoln county, and the validity of the surveyed right of way adopted by the complainant through the state of Nevada, and the character and effect of certain work done by the defendants, with reference to which the commissioner of the general land office has ordered a new hearing.

Independent of the question as to whether or not this court has any jurisdiction in the present suit to determine whether the judgment obtained by the state of Nevada against the Oregon Short Line & Utah Northern Railway Company for taxes is valid or invalid, it seems to me perfectly clear that the mere fact that this complainant selected the state court as the proper forum to determine that question is, of itself, sufficient for this court to refuse to discuss the

question or decide it in a collateral proceeding. The condition of affairs and the acts of the respective parties at the time the original bill was filed and the temporary restraining order issued were such as demanded immediate action in advance of the settlement, through the regular channels of litigation, of the principal controlling questions as to the title and legal rights of the respective parties. The situation, is, therefore, somewhat embarrassing and difficult. It is admitted that under the averments of the original bill the court was fully justified in issuing the restraining order. The questions presented are whether or not, under the pleadings and proofs upon the rule to show cause, the restraining order under the original bill should be continued or discharged, and whether, under the supplemental bill and proofs with reference thereto, a temporary injunction should be issued as prayed for therein. The whole case has been argued with signal ability, and all the points have been presented with as much earnestness, care, attention, and force as if the entire matter of a final hearing on the merits was involved.

2. It is earnestly contended by defendants' counsel that the Oregon Short Line & Utah Northern Railway Company had no title to the disputed right of way which it could convey either to the Oregon Short Line Railroad Company or the complainant, and that the purported deeds from the Oregon Short Line & Utah Northern Railway Company and the Oregon Short Line Railroad Company to the complainant, introduced in evidence in this case, conveyed nothing; that the Oregon Short Line & Utah Northern Railway Company forfeited whatever rights it ever had by surveys, location, and work done under the act of March 3, 1875, by failing to comply with the provisions of section 4 of said act and to complete any section of its road in five years; that the Oregon Short Line & Utah Northern Railway Company, prior to the organization of the Oregon Short Line Railroad Company and the complainant company, had forfeited any rights which its survey and location of its right of way may have given it over private lands under the laws of the state of Nevada. The proviso in section 4 of the act of congress of March 3, 1875, reads as follows:

"That if any section of said road shall not be completed within five years after the location of said section, the rights herein granted shall be forfeited as to any such uncompleted section of said road."

In 1865 the legislature of the state of Nevada passed "An act to provide for the incorporation of railroad companies, and the management of the affairs thereof, and other matters relating thereto," approved March 22, 1865. Comp. Laws Nev. (Cutting) § 971 et seq. Section 1024 reads as follows:

"If such railroad company shall not, within four years after the filing of its original articles of association, begin the construction of its road and expend thereon at least 5 per cent. of the amount of its capital stock, and finish the road and put it in full operation within six years, its act of incorporation shall be void."

It is argued by defendants that, because of the failure on behalf of this corporation to do the acts therein required within the time therein specified, its rights became ipso facto void; that by the terms

of the statute the forfeiture clause was self-operative, and became of full force by the lapse of the time mentioned; and that no steps or proceedings on the part of the sovereign power to make it complete or effective were at all essential. There are numerous cases where, upon the particular facts thereof, it has been held that, a statute creating a corporation which declares that unless the corporation performs certain acts within the prescribed time its corporate existence and powers shall cease, or its powers and franchises shall terminate, such statute executes itself. But the fact is that this question is always made dependent upon the special facts, the character of the corporation, and the legal construction to be given to the particular statute. The general rule is that the question whether a railroad corporation authorized by the state has forfeited its corporate rights and franchises cannot be raised in any collateral proceeding, and can only be taken advantage of by the sovereign power which created the corporation, because it is its privilege alone to question the right of the corporation to act under its franchise. The state may waive the conditions, or enforce them, if it sees fit to do so. When the continued life of the corporation is made by the charter or governing statute to depend upon the performance of a condition subsequent, the nonperformance of the condition is not an ipso facto forfeiture, but is a mere ground of forfeiture, of which the state can avail itself, or which it can waive at its pleasure. So that, unless the state takes advantage of the ground of forfeiture, in a proceeding by quo warranto, or otherwise, to oust the corporation of its franchise, the existence of the corporation cannot, upon such a ground, be collaterally called in question. The supreme court of the United States has uniformly held, in construing various acts of congress containing similar provisions to the act of 1875, that the failure to complete the road within the time limited is treated as a condition subsequent, not operating ipso facto as a revocation of the grant, but as authorizing the government itself to take advantage of it, and forfeit the grant by judicial proceeding, or by an act of congress resuming title to the lands. *Schulenberg v. Harriman*, 21 Wall. 44, 62, 22 L. Ed. 551; *Van Wyck v. Knevals*, 106 U. S. 360, 368, 1 Sup. Ct. 336, 27 L. Ed. 201; *Railroad Co. v. McGee*, 115 U. S. 469, 473, 6 Sup. Ct. 123, 29 L. Ed. 446, and authorities there cited; *Bybee v. Railroad Co.*, 139 U. S. 663, 674, 11 Sup. Ct. 641, 35 L. Ed. 305, and authorities there cited; *Railroad Co. v. Mingus*, 165 U. S. 413, 431, 17 Sup. Ct. 348, 41 L. Ed. 770; *U. S. v. Northern Pac. R. Co.*, 177 U. S. 435, 20 Sup. Ct. 706, 44 L. Ed. 836.

The distinction between the cases of *In re Brooklyn, W. & N. Ry. Co.*, 72 N. Y. 245, and *Brooklyn Steam Transit Co. v. City of Brooklyn*, 78 N. Y. 524, and other cases relied upon by defendants, from the present case, is clearly pointed out in *Bybee v. Railroad Co.*, supra, where the court said:

"Counsel for plaintiff has called our attention to several cases decided by the court of appeals of New York which doubtless have a bearing upon this question, but which, when carefully examined, are readily distinguishable. \* \* \* In these cases the legislative act did not avoid the grant upon the nonperformance of the condition subsequent, but declared that the corporate existence and powers of the company to act were at an end. In other words,

it fixed a time for the expiration of the charter, and, when that time arrived, the corporation lost its power to act, or to do any business beyond such as was necessary in the process of winding up. It was not so much a case of forfeiture as of loss of legal entity, or, as expressed in the language of the court of appeals in the case in 78 N. Y.: 'In case of noncompliance, the act itself ceases to have any operation, and all the powers, rights, and franchises thereby granted were deemed forfeited and terminated. There was to be, not merely a case of forfeiture which could be enforced by an action instituted by the attorney general, but the powers, rights, and franchises were to be taken and treated as forfeited and terminated. At the end of the time limited the corporation was to come to an end, as if that were the time limited in its charter for its corporate existence.' More directly in point is the case of *Oakland R. Co. v. Oakland, B. & F. V. R. Co.*, 45 Cal. 365, 13 Am. Rep. 181. In this case an act of the legislature granting a corporation the right of way to lay a street-railroad track provided 'that, if the provisions of this act are not complied with, then the franchise and privileges herein granted shall utterly cease and be forfeited.' A breach of this condition was held ipso facto to forfeit the franchises of the corporation. A distinction was drawn in this case between forfeitures at common law, which did not operate to divest the title of the owner until, by proper judgment in a suit instituted for that purpose, the rights of the state had been established, and a forfeiture declared by statute, in which case the title to the thing forfeited vests immediately in the state, upon the happening of the event for which the forfeiture is declared."

The supreme court then referred to the fact that the doctrine of these cases had not been universally accepted, and that under the facts there stated the principles therein announced have been distinctly repudiated in several states of the Union, and concluded with the statement that:

"It is not, indeed, always easy to determine whether a condition be precedent or subsequent. It must depend wholly upon the intention of the parties as expressed in the instrument and the facts surrounding its execution. If the condition does not necessarily precede the vesting of the estate, or if, from the nature of the act to be performed and the time required for its performance, it is evident that the intention of the parties is that the estate shall vest, and the grantee shall perform the act after taking possession, then the condition is treated as subsequent, and there is no forfeiture without a re-entry by the grantor, or, in the case of the state, without some action on its part manifesting an intention to resume its title. In the case under consideration, the act, as already stated, takes effect as a present grant, and the provision for a forfeiture in case the company fails to complete its road is clearly a condition subsequent."

3. It is next claimed by the defendants that no rights have been acquired by the complainant by virtue of any acts of its own, and in this connection it is argued that the evidence submitted on this hearing clearly shows that the defendant the San Pedro, Los Angeles & Salt Lake Railroad Company was the first to begin its surveys, and that it prosecuted the same diligently and properly to final completion by the filing of its maps and profiles thereof for approval by the secretary of the interior; that it was also the first to begin the actual work of constructing its line of railroad thereon; that it has purchased several miles of the right of way where the same extends across the lands of private parties on the line between Clover Valley Junction and Pioche, and also on the line from Clover Valley Junction southwesterly to the state line. On the other hand, it is claimed by the complainant that, independently of the rights accruing to it under the act of congress of March 3, 1875, and obtained by it from

the various auxiliary railroad corporations, it is first in time and first in right under the laws of Nevada, because it first legally adopted its definite line of location. It must be borne in mind that, at the time the parties plaintiff and defendants entered upon the possession of the roadbed, neither corporation, plaintiff or defendant, had adopted any definite line or survey upon which its road was to be built. The facts are that complainant adopted its definite line of survey by a resolution duly passed by its board of directors on May 9, 1901, and the San Pedro, Los Angeles & Salt Lake Railroad Company adopted its definite line of route upon which it was to construct its railroad at a directors' meeting held May 22, 1901. The rights of the respective parties, upon this branch of the case, do not depend upon the question of prior possession of either party upon any particular part of the roadbed or right of way, either for the purpose of making a survey or doing work thereon. Neither party could gain any right by a possession obtained, or sought to be held, by force or violence. Whatever work was done was performed at their peril. In my opinion it is wholly immaterial which corporation, through its officers, servants, or employes, first put foot upon the soil in dispute. The legal machinery controlling any right to the roadbed or right of way obtained by the surveys, or by possession, could not be set in motion until the corporation claiming the right of way had by corporate acts definitely adopted the line upon which its road was to be built. This is an essential act to be performed in order to enable the corporation to exercise the right of eminent domain under the statute. *Rochester, H. & L. R. Co. v. New York, L. E. & W. R. Co.*, 110 N. Y. 128, 17 N. E. 680; *Southern Pac. R. Co. v. U. S.*, 109 Fed. 913; *Railroad Co. v. Blair*, 9 N. J. Eq. 635, 643, 645; *Sioux City & D. M. R. Co. v. Chicago, M. & St. P. R. Co. (C. C.)* 27 Fed. 770, 774; *Johnston v. Callery*, 184 Pa. 146, 151, 39 Atl. 73.

In *Williamsport & N. B. R. Co. v. Philadelphia & E. R. Co.*, 141 Pa. 407, 414, 21 Atl. 645, 646, the court, in discussing this question, said:

"The successive steps contemplated by the act of 1849, and subsequent legislation, as necessary to vest a title to the roadway in the corporation, are these: (1) A preliminary entry on the lands of private owners for the purpose of exploration. This is made by engineers and surveyors, who run and mark one or more experimental lines, and who report their work, with such maps and profiles as may be necessary to present it properly to the company that employs them. (2) A selection and adoption of a line, or one of the lines, so run, as and for the location of the proposed railroad. This is done by the corporation, and it requires the action in some form of the board of directors. This makes what was before experimental and open, a fixed and definite location. It fastens a servitude upon the property affected thereby, and so takes from the owner and appropriates to the use of the corporation. (3) Payment to the owner for what is taken and the consequences of the taking, or security that it shall be made when the amount due him is legally ascertained. The title of the owner is not divested until the last of these steps has been taken. \* \* \* As to third persons and rival corporations, however, the action of the company adopting a definite location is enough to give title. \* \* \* In other words, this is the method by which the corporation exercises the power of eminent domain, with which the state invested it at its creation, and takes what before belonged to others for its corporate use. It may acquire land by purchase; if its charter authorizes it to do so, before a location of its road; but, if

it does so, it holds the land as any other purchaser would, subject to the right of any one having the right to do so to enter and appropriate it by virtue of the right of eminent domain. That a corporation cannot exercise the power to appropriate land until it has located its line is well settled. Thus, if a company has an option between two or more lines or routes, it must make its election by an actual adoption of one of them before it can acquire title by appropriation upon either. 1 Redf. R. R. 240. The reason for this is that the act of location is at the same time the act of appropriation."

In *Railroad Co. v. Blair*, supra, where many similar points were presented, the court, with reference to the necessity of adopting a definite line of location, among other things said:

"It may be true that the complainants first actually surveyed in the passes where the conflicts occur, although there seems to be some doubt on this subject. But, assuming it to be true, the mere experimental surveying of a route will not confer any vested or legal right, until it shall have been adopted. Until then the company is in no wise committed to it. If done by their direction, they may change their mind and go elsewhere. It may be the mere act of their engineer; and he may recommend it or not. If he should, the company may reject it, and select another route. Although the complainants, therefore, may have first surveyed the conflicting passes in the mountains, yet the Warren Company afterwards surveyed the same passes, and first adopted the route, and first filed their survey in the office of the secretary of state. This gave them a legal right to the route surveyed, and in my view excluded the complainants from occupying the same lands."

4. Has the complainant made out such a case upon this hearing as entitles it to a continuance of the restraining order heretofore issued? This is the vital point involved in the present hearing. It has frequently been held that the question whether the defendant should be enjoined from the commission of certain acts before the rights of the respective parties have been fully investigated and tried rests solely in the discretion of the court. 10 Enc. Pl. & Prac. 983, and authorities there cited. But in all cases essential facts must be clearly proven, in order to put the power of the court in motion and justify the issuance of the writ. As was said by the court in the early case of *Bonaparte v. Camden & A. R. Co.*, 1 Baldw. 205, Fed. Cas. No. 1,617:

"There is no power the exercise of which is more delicate, which requires greater caution, deliberation, and sound discretion, or more dangerous in a doubtful case, than the issuing of an injunction. It is the strong arm of equity, that never ought to be extended unless to cases of great injury, where courts of law cannot afford an adequate or commensurate remedy in damages. The right must be clear; the injury impending or threatened, so as to be averted only by the protecting, preventive process of injunction."

The facts and circumstances of each particular case must always be considered, and the power of the court, whether in favor of or against the issuance of the writ, should always be exercised in furtherance of justice. It is "the strong arm of the court, and to render its operation benign and useful it must be exercised with great discretion and when necessity requires it." In the exercise of their discretion courts often take into consideration, even in grave and doubtful cases, the question as to whether the damage and injury committed or threatened by the defendant will be immediate, certain, and great if the injunction does not issue, and whether the loss and injury and



inconvenience to the defendant would be comparatively small and insignificant if it does issue; and in the consideration of these questions the courts have frequently said that an injunction should issue to restrain interference with the property, although the ultimate relief sought might finally be denied. *City of Newton v. Lewis*, 25 C. C. A. 161, 79 Fed. 715, 718, and authorities there cited; *Indianapolis Gas Co. v. City of Indianapolis* (C. C.) 82 Fed. 245; *Allison v. Corson*, 32 C. C. A. 12, 88 Fed. 581, 584, and authorities there cited; *Charles v. City of Marion* (C. C.) 98 Fed. 166. It is true, as counsel for defendants contend, that the writ of injunction will not ordinarily be granted, where the legal rights of the parties are in dispute, until the title and the legal rights to the property in controversy are established at law. But this rule is subject to many exceptions. The authorities are numerous where the courts, in a great variety of cases, in the exercise of the sound discretion with which they are invested, have interfered by injunction before the legal rights of the parties have been settled, and where the title to the real property remained undetermined.

In *Erhardt v. Boaro*, 113 U. S. 537, 5 Sup. Ct. 565, 28 L. Ed. 1116, it was held that if there was irremediable mischief, going to the destruction of the substance of the estate, done by parties in possession, the estate being in litigation at law, an injunction should be issued to prevent it. In that case the lower court had issued an injunction, but after a regular trial at law the defendant obtained judgment, and thereupon the court dissolved the injunction and dismissed the bill. From the decree in this regard an appeal was taken. In the course of the opinion the court said:

"It was formerly the doctrine of equity, in cases of alleged trespass on land, not to restrain the use and enjoyment of the premises by the defendant when the title was in dispute, but to leave the complaining party to his remedy at law. A controversy as to the title was deemed sufficient to exclude the jurisdiction of the court. In *Pillsworth v. Hopton*, 6 Ves. 51, which was before Lord Eldon in 1801, he is reported to have said that he remembered being told in early life from the bench 'that if the plaintiff filed a bill for an account and an injunction to restrain waste, stating that the defendant claimed by a title adverse to his, he stated himself out of court as to the injunction.' This doctrine has been greatly modified in modern times, and it is now a common practice in cases where irremediable mischief is being done or threatened, going to the destruction of the substance of the estate, such as the extraction of ores from a mine, or the cutting down of timber, or the removal of coal, to issue an injunction, though the title to the premises be in litigation. The authority of the court is exercised in such cases, through its preventive writ, to preserve the property from destruction pending legal proceedings for the determination of the title. *Jerome v. Ross*, 7 Johns. Ch. 315, 332, 11 Am. Dec. 484; *Le Roy v. Wright*, 4 Sawy. 530, 535, Fed. Cas. No. 8,273. As the judgment in the action at law in favor of the defendant has been reversed, and a new trial ordered, the reason which originally existed for the injunction continues."

See *Wilson v. Rockwell* (C. C.) 29 Fed. 674; *Northern Pac. R. Co. v. City of Spokane* (C. C.) 52 Fed. 428; *St. Louis Min. & Mill. Co. v. Montana Min. Co.* (C. C.) 58 Fed. 129; *Buskirk v. King*, 18 C. C. A. 418, 72 Fed. 22, 25, and authorities there cited.

In *Rochester, H. & L. R. Co. v. New York, L. E. & W. R. Co.*, 110 N. Y. 128, 133, 17 N. E. 680, 681, the judge at special term vacated

the injunction, theretofore granted, restraining the defendant corporation from interfering with the plaintiff's roadbed, on the ground that the plaintiff had not acquired title to the land nor any right to occupy it. He stated that the proceeding of defendant was "outrageous," but considered that he had no right to interfere. The general term, in their opinion, considered that a case had been made for the allowance of a preliminary injunction, and that the same should be continued pendente lite, on the ground that the plaintiff had acquired a vested and exclusive right to construct and operate its railroad on the line it had located. The court of appeals came to the conclusion that the general term were right in the view they took of the matter. The court, after referring to the provisions of the general railroad act of that state for the organization of railroads, said:

"Clearly there is involved in these provisions the intention of the legislature that, after the initial proceedings have been taken, which the statute points out as the first action of the new corporation, the lands over which the company's route is located shall be subjected to the right of the company thereafter to construct thereon. The legislative scheme contemplates the determination of the line of route to be in the discretion of the company, to be exercised in the mode prescribed by law; and its exercise, when in good faith and within the limits of its corporate powers, is only reviewable by the court in the case of an application by an occupant or owner of lands feeling aggrieved by the proposed location of the road. This right to locate its line of road, at its election, is delegated to the corporation by the sovereign power, as is the right subsequent to acquire, *in invitum*, the right of way from the landowner and any land needed for the operation of its road. In this sovereign power is the source of the franchise, which the corporation possesses, to construct and operate a railroad; and its grant is for public, and not for private, purposes. Public considerations enter into the grant of the franchise, and public policy favors the enterprise for the public convenience and use. When, therefore, a corporation has made and filed a map and survey of the line of route it intends to adopt for the construction of its road, \* \* \* in our judgment, it has acquired the right to construct and operate a railroad upon such line, exclusive in that respect as to all other railroad corporations and free from the interference of any party. By its proceedings it has impressed upon the lands a lien in favor of its right to construct, which ripens into title through purchase or condemnation proceedings. We could not hold otherwise without introducing confusion in the execution of such corporate projects, and without violating the obvious intention of the legislature. The plaintiff's franchises were invaded, and its enjoyment of the statutory privileges disturbed, by the action of the defendant company in so building tracks upon plaintiff's line of route as to obstruct and interfere with its proposed construction. The remedy by injunction was clearly available to the plaintiff on principles of equity jurisprudence."

On the question of injunction, this court, in the consideration of the line of survey from Clover Valley Junction to the southwestern end of the state line, as set forth in the supplemental bill, is hampered in the expression of its opinion upon the acts of the respective parties because no intelligent discussion could be had in regard thereto without reviewing the manner in which the surveys on behalf of the complainant were made, and the character of the work done on the surveyed line by the defendants thereon, and upon both of these points the land department of the government, having jurisdiction of these questions, has demanded a further hearing. Under these conditions I deem it to be my duty to respectfully decline to express my individual views in regard thereto. It is enough, for the purposes of

this opinion, to say that as to this portion of the line of survey the facts, as presented to this court, stand upon a different plane in some respects from the question relating to the line of survey over the roadbed from Uvada, via Clover Valley Junction, to a point near Pioche. My conclusion upon the whole case is that the complainant has made out such a prima facie case as to entitle it to an injunction pendente lite as to that part of the right of way covered by the roadbed from Uvada to Clover Valley Junction, and from thence to Pioche, and that it has not made out such a case as to entitle it to the additional injunction as prayed for in the supplemental bill. Let a decree be entered accordingly.

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HARRISON v. GRAHAM.

(Circuit Court, D. Maine. August 7, 1901.)

No. 544.

**NE EXEAT—CANADIAN DEBTOR—ADEQUATE REMEDY IN CANADIAN COURTS.**

In this case the complainant is a resident of New York, and the respondent has a fixed, permanent residence in Montreal, Canada. The complainant's claim has been due for 18 months, during which it might have been sued in the courts of the province of Quebec, which were no more remote from the complainant's domicile than the circuit court for the district of Maine. A writ of ne exeat was asked for against the respondent during a brief pleasure trip in the state of Maine. Service of subpoena in the cause in the circuit court had been made on the respondent within the district of Maine. Held that, independently of the question arising from the fact that the complainant's claim is based on an open and unliquidated account, a writ of ne exeat is refused by the circuit court, because, for other reasons, if a decree be obtained against the respondent in the circuit court, it would be respected by the courts of the province of Quebec.

Henry Brill and George E. Brill, for complainant.

PUTNAM, Circuit Judge. This is an application for a writ of ne exeat. The complainant is a citizen of New York, and resides in that state. The respondent is a subject of Great Britain. He has a fixed residence at Montreal, where he is permanently established in business, and there is no reason for apprehending that a judgment obtained against him in the proper court of the province of Quebec could not be enforced against him or his property. He is a traveler in Maine for a brief season, and for pleasure. The alleged cause of action accrued about 18 months ago, and, if the complainant had so desired, suit could have been brought at any time during that period in the courts of the province of Quebec. Service of subpoena in this cause has been duly made on the respondent, so that this court has jurisdiction to proceed to a personal decree against him, and, if the complainant obtains one, it will undoubtedly be enforced in Canada. *Ritchie v. McMullen*, 159 U. S. 235, 16 Sup. Ct. 171, 40 L. Ed. 133.

In *Rice v. Hale*, 5 Cush. 238, 241, Chief Justice Shaw refers to the well-known rule of practice, saying that this writ is not grantable "when the account is open and unliquidated, although the plaintiff

states in his affidavit that a certain sum is due." This general statement of the rule omits, of course, its qualifications, and it cannot be given in its entirety with so much positiveness. The bill in this case claims a balance due as the result of a joint enterprise, and it is accompanied with an affidavit setting out, in general terms, that the complainant is entitled to recover at least \$6,000. The bill would require some investigation before the court could determine whether it is within the rule referred to by Chief Justice Shaw, but we have not found it necessary to make an examination in this direction. The writ of ne exeat, like all other special writs issued by the chancellor, when exercising his equitable jurisdiction, is an equitable one, and therefore it cannot be granted without some regard to a comparison of the relative mischiefs which the refusal or allowance of it would involve. We, of course, have no knowledge how much hardship, and, consequently, how much practical injustice, would be imposed on the respondent by an arrest on foreign soil, where he is sojourning temporarily for pleasure, if the alleged cause of action against him should prove to be baseless; while we can perceive that there is no substantial hardship to the complainant involved in the denying of the writ now asked for, inasmuch as he has had ample opportunity of proceeding against the respondent at Montreal, no more remote from the residence of the complainant than is the habitat of the United States circuit court for this district, and inasmuch, also, as we are well assured that his decree, if he obtains one in this suit, will be respected by the courts of the province of Quebec.

The petition for the writ is denied.

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MOORE et al. v. HAMMOND et al.

(Circuit Court, D. Oregon. August 9, 1901.)

No. 2,646.

**1. ACCOUNTING.**

There is no case for an accounting because of defendant's refusal to carry out an agreement to obtain a loan, where complainant could benefit thereby only to the extent of obtaining a commission, and the question of whether there should be a commission was by the agreement left for future determination of the parties, and it does not appear whether the loan could have been procured but for defendants' refusal to cooperate.

**2. CONTRACT—CONSTRUCTION.**

The agreement between complainant and defendants being to obtain subsidies for and procure the construction of a railroad, to share in the profits from the construction, complainant, though assisting in obtaining subsidies taken in the name of defendants, is not entitled to an interest therein, it not appearing there were any profits in the construction.

**3. PARTNERSHIP.**

Where complainant and S. agreed to do a certain thing, they to share in the profits, and S. and defendants then made an agreement to do it, and share in the profits, complainant and defendants do not become partners, but any remedy of complainant for profits obtained by S. and defendants is against S.

H. H. Emmons, G. C. Moser, W. M. Gregory, and Geo. A. Brodie,  
for complainants.

C. W. Fulton, for defendants.

BELLINGER, District Judge. The complaint in this case alleges: That in April, 1894, the defendant Stanton entered into a contract with one Campbell and complainants, by which the parties agreed to unite their efforts to secure the right of way, together with certain bonuses and subsidies, for a railroad from Astoria to Goble, and to build and equip, or procure other parties to build and equip, the same. Each of the parties was to give such time to the undertaking as was necessary, and to pay his own expenses. Of the profits, Stanton, Campbell, and complainants were each to receive one-third; and in pursuance of the agreement each expended considerable time and money. In November, 1894, Stanton and one Kimball, acting under the contract, and for the benefit of the parties thereto, entered into a contract with Hammond and Bonner, who had knowledge of Stanton's agreement with complainants and Campbell, by which it was agreed, as appears from a copy attached to the complaint, that the parties to the agreement should unite their influence in securing for Hammond and Bonner the Sea Side Railway, which they were desirous of purchasing. Hammond and Bonner stipulate in said agreement that they will buy such road, and will enter into a contract with the Astoria Subsidy Committee for the building of the road from Astoria to Goble upon the best terms obtainable. Stanton and Kimball agree to finance the entire enterprise, it being mutually understood that the plan of borrowing money at an average term of about two years at 6 per cent. per annum, and the payment of such commissions as may be agreed upon between the lenders and the parties aforesaid, "is accepted." After this agreement was entered into, Stanton reported the same to Campbell and complainants, and notified them that the contract was for their mutual benefit. Hammond and Kimball were informed that complainants and Campbell were, by agreement with Stanton, to aid in the subject-matter of the contract, and to share in the profits to accrue thereunder. Thereupon Kimball, Stanton, Campbell, and Hammond (they being at Astoria, and the other parties being out of the state) did unite their influence in securing for Hammond "the most favorable contracts, as contemplated by said contract." It is further alleged that about the 1st day of December, 1894, Hammond, and Bonner acting by Hammond as his agent, in pursuance of the contract referred to, entered into a contract with certain persons, described as the "Committee of Direction," and the Astoria Savings Bank, said individuals and bank constituting the Astoria Subsidy Committee heretofore referred to, for the construction of the said Astoria-Goble road; that at the time this contract was entered into conveyance had been made to said subsidy committee of a large amount of land to be used as subsidies for the building of the road in question; and it is alleged that thereupon it became the duty of Hammond and Bonner to co-operate with Stanton, Kimball, Campbell, and complainants for the purpose of raising money, as contemplated in their contracts; and

that, among other things, it was their duty to consult and agree with said last-named parties and complainants as to the amount of money necessary to be raised, the manner of raising the same, the form of the obligations and securities, the amount of the commissions that should be paid, and the manner of pledging said subsidy, as well as of all the property held by Hammond and Bonner as trustees under said contracts,—all of which things it was necessary to do before Stanton, Kimball, Campbell, and complainants could begin to finance the enterprise. It is further alleged: That it became the duty of Hammond and Bonner to work with the said Stanton, Kimball, Campbell, and complainants to secure additional subsidies, as provided for in their contract, and to confer with the said last-named parties as to the desirability of interesting other parties in said enterprise and giving them a share of the profits; and that it became the duty of Hammond and Bonner, in every department of the work contemplated in said contract, to mutually confer and co-operate with said Stanton, Kimball, Campbell, and complainants, and to work in good faith, and to each aid the other parties thereto whenever possible. That Stanton, Kimball, Campbell, and complainants proceeded in good faith, with the knowledge and approval of Hammond and Bonner, to carry out the conditions of their agreements, and particularly to secure additional subsidies and the necessary money with which to build the road; and they did secure, or aid in securing, certain additional subsidies, especially with reference to real property on the west side of the Astoria harbor. That, notwithstanding the duty of Hammond and Bonner in that regard, said Bonner personally did nothing towards the performance of his covenants in said agreement, but said Hammond claimed to act for both Bonner and himself, and for a time co-operated with Stanton, Kimball, Campbell, and complainants in order to secure additional subsidies, and pretended to co-operate with them; but it is alleged that said Hammond and Bonner never acted in good faith in trying to secure said money, and did not in fact and in good faith try to secure said money, or aid in securing the same, and did not proceed in good faith in the performance of any act in aid of the said parties of the other part. That a large amount of work was done by said Stanton, Kimball, Campbell, and complainants in furtherance of said contract, but that Hammond at no time aided the other parties in their efforts to secure money with which to build the road, although he did aid said parties in securing additional subsidies; and that said Hammond refused to co-operate with the other parties in raising said money, refused to state what commissions he was willing to pay in securing the same, and refused to work with or aid them in trying to secure said money; but having, in the name of himself and Bonner, the contract for said subsidies, and acting for himself and Bonner, he refused to make any contract for procuring said money, and refused to inform the other parties, or any parties whom they sought to interest, or from whom they sought to secure said money, what kind of a contract he would make or agree to. That in fact said Hammond refused to carry out his part of the contract, and by reason of this default the other parties were prevented from procuring

the necessary money with which to build said railroad, and were prevented from financing the enterprise, which otherwise they would have been able to do, and would have done. That, pending said negotiations, Bonner assigned all his interest in the contract to Hammond, and during the same time Kimball, with the approval of Hammond, assigned all his interest in said contract to Stanton, and thereupon it was agreed that the interests of Kimball and Stanton in said contract should be held by Stanton for the benefit of himself, Campbell, and complainants, of all of which Hammond had notice. That thereupon Hammond proceeded to procure said railroad to be built, and procured to be conveyed to him said subsidies so to be paid for the building of said road, by which he acquired a large amount of property particularly described in the complaint. It is further alleged that Stanton has been asked to unite with complainants in bringing this suit, but has refused to do so; whereupon complainants bring this suit, and pray for an accounting, and that Hammond be decreed to account for all the property acquired or earned in the matter of the said purchase of the Sea Side Railway and the construction of the Astoria-Goble road, and for a decree that the complainants be adjudged to be the owners of an undivided two-thirds of four-ninths of the real property conveyed in aid of the said road, and that the Astoria Company (being the said subsidy committee) be required to convey to complainants such undivided interest; and for such other relief as shall be required by the principles of equity and good conscience.

The injury complained of grows out of Hammond's alleged refusal to co-operate with complainants and their associates in raising money for the enterprise in question. It is alleged that Hammond refused to make any contract for procuring said money, or to inform them, or any parties whom they sought to interest, or from whom they sought to secure said money, what kind of a contract he would make, and he refused to make any agreement in respect thereto; and it is alleged that they were, by this refusal on Hammond's part, prevented from procuring the necessary money with which to build said road, and were prevented from financing the enterprise. The extent of complainants' damage from this refusal on Hammond's part is not stated, and cannot be estimated. It is a matter of inference that complainants and their associates were to receive or share in such commissions for procuring a loan of money as might be agreed upon between the lenders and said parties. The value of such services is not stated, nor can it be known whether the parties would have succeeded in procuring the loan but for Hammond's alleged refusal to co-operate in what was proposed. What complainants did do was to aid in securing "certain additional subsidies, especially with reference to real property on the west side of Astoria harbor." But this would not entitle them to any interest in the subsidies so procured. The preliminary agreement between Stanton, Campbell, and complainants was for a division of profits arising from the construction of the road by themselves or by other parties whom they might "procure" to build it. There is nothing to warrant an inference that there would have been or have been profits in the con-

struction of the road. There is nothing in the facts that gives any assurance of profits or pecuniary benefit, except the commissions that would have resulted, if a loan had been negotiated, and if the contract of loan had included an agreement for commissions; and in such case the amount as well as the fact of the commissions was left to the uncertainty of the future agreement. These facts do not make a case for an accounting. Furthermore, complainants were strangers to Hammond. If the latter has made profits out of his contract with the Astoria Subsidy Committee, and if Stanton is entitled to share in those profits, and if complainants had an agreement with Stanton to share in his share, and Hammond knew it, this does not constitute them partners with Hammond. Bates, Partn. §§ 164-167. In such case complainants' remedy is against Stanton. If, in such a case, it is proper to join Hammond as a defendant, it is merely for the purposes of discovery as to the profits secured by Stanton, and not for relief, as to which complainants must look to Stanton.

The demurrer to the bill of complaint is sustained.

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FT. MADISON WATER CO. v. CITY OF FT. MADISON.

(Circuit Court, S. D. Iowa, E. D. December 17, 1900.)

No. 333.

**1. MUNICIPAL CORPORATIONS—CONTRACTS FOR WATER—IOWA STATUTE.**

McClain's Code Iowa, § 641, authorizes cities to contract with an individual or company for the erection of waterworks and the furnishing of water for public use, "and to pay therefor such sum or sums as may be agreed upon between said contracting parties." Section 643 provides that "such city shall levy each year and cause to be collected a special tax as provided for above sufficient to pay off such water rents so agreed to be paid to such individual or company constructing said works: provided, however, that said tax shall not exceed the sum of five mills on the dollar for any one year." *Held*, that the latter provision was not a limitation upon the power to contract conferred upon a city by section 641, but merely provided for a special fund to be applied on the rentals contracted to be paid by the city, and that the application of such fund thereon, if insufficient to discharge the contract obligation in full, did not release the city from further liability.

**2. SAME—CONTRACT CONSTRUED.**

In 1885, while such sections of the Code were in force, a city contracted by ordinance for the erection of waterworks by an individual, and bound itself to pay rental for a certain number of hydrants, and for additional ones in case of extensions of the mains made by order of the city; the contract containing the following provision: "Said hydrant rental to be paid quarterly out of the special tax fund to be levied and collected as other taxes of the city are for this purpose." *Held*, that such provision could not be construed as limiting the liability of the city for hydrants furnished in accordance with the contract to the sum collected from the special tax levy, and that it was no defense to an action to recover unpaid rentals that the city had levied such special tax to the limit allowed by the statute, and applied all the proceeds in payment of such rentals.



**At Law.** Action to recover rentals for hydrants supplied to defendant city under contract.

James C. Davis, for plaintiff.

E. C. Weber and F. T. Hughes, for defendant.

McPHERSON, District Judge. The plaintiff in its petition alleges that it is the successor and assignee of one Inman, who in 1885 made a contract with the defendant city, the latter acting by ordinance, and Inman by a written acceptance of the ordinance. The petition is in paragraphs, as follows, in substance: In paragraphs 1, 2, and 3 the citizenship of the parties and the amount in controversy, conferring jurisdiction upon this court, are alleged. Paragraph 4 alleges that said ordinance was adopted by defendant May 29, 1885, whereby a contract by Inman accepting the ordinance was made, by virtue of which contract Inman agreed to furnish the city and its citizens with a public and private supply of water for 20 years. Paragraph 5 alleges that it is the successor and assignee of Inman of said contract rights, and makes a copy of said ordinance and acceptance a part of the petition. Paragraph 6 alleges that Inman, and plaintiff as his successor, on the \_\_\_\_\_ day of \_\_\_\_\_, 1885, in said city, erected the water plant, and at all times since have supplied the city and its inhabitants with a public and private supply of water. Paragraph 7 alleges that from time to time, by direction of the city, plaintiff has put in additional hydrants, as provided by section 4 of the ordinance, until in the year 1896 plaintiff had placed and had in operation 138 hydrants, and from said date until the present had maintained the 138 hydrants, and given the city the service of said hydrants, furnished water, etc., and that the city has paid for the said service, excepting as hereinafter alleged. Paragraph 8 alleges that there is now due and owing it from defendant for the quarter ending June 30, 1900, one quarter's rental of 40 hydrants at the rate of \$75 per annum and 98 hydrants at the rate of \$60 per annum, making the amount due for the quarter \$2,220, and, unless the same is sooner paid, there will become due September 30, 1900, the further sum of \$2,220. Paragraph 9: October 5, 1900, an amendment to the petition was filed, repeating the foregoing allegations, and alleging the nonpayment, etc., of the \$2,220 falling due on September 30, 1900, as above set forth. Plaintiff demands judgment for \$4,440, with interest and costs. Defendant has filed its answer, as follows: Paragraph 1 admits paragraphs 1, 2, 3, 4, 5, and 6 of the petition. Paragraph 2 alleges an absence of information as to the recitals of paragraph 7 of the petition. Paragraph 3 pleads said ordinance by referring to it, and alleges that it owes plaintiff no sum for either quarters, for that the ordinance provides the hydrant rental shall be paid quarterly out of a special fund to be levied and collected as other taxes of the city, and the ordinance contract relating to the hydrant rentals is in excess and beyond the proceeds of the five-mill tax upon taxable property within the fire limits to benefit or protection, and is void and of no effect. Paragraph 4 alleges the city has collected and paid the

five-mill levy, which from the year 1896 has not raised sufficient to pay said rental, and the city has not any right to pay out of the general fund on such account. Paragraph 5, further answering paragraph 8 of the petition, alleges the water furnished was not of the quality, or thrown to such height, as the ordinance requires. Plaintiff has demurred to the answer as follows: To paragraph 3 of the answer for the reason that said ordinance creates an absolute liability, and the facts stated constitute no defense. To paragraph 4 of the answer because the facts stated are no defense as to the liability of the city, and because said facts can only be inquired into in proceedings looking to the collection of the judgment that may be rendered herein. And to paragraph 5 of the answer because the city is estopped, having received the water and the service, etc.

At the hearing on the demurrer, paragraph 5 of the answer, by agreement in open court, was to be considered as withdrawn, as were all denials of the answer, and the case considered fully tried, as well as a hearing on the demurrer. Therefore plaintiff is or is not entitled to judgment for the amount sued for, with interest, as the ordinance pleaded by both parties shall be construed.

The ordinance covers many details which need not be set forth. It provides for the erection of the works, charges to be made private consumers, the placing of the mains, penalties for any person interfering with the property, etc., and so on. Sections 4, 5, and 6 of the ordinance are as follows:

"Sec. 4. The city of Ft. Madison, to supply itself with water for fire protection, hereby agrees to rent from said George B. Inman, his heirs, successors or assigns, fifty-one (51) fire hydrants during the continuance of this franchise, paying therefor an annual rental of seventy-five dollars (\$75) each for the first forty (40) hydrants, and the sum of sixty dollars (\$60) each per year for all hydrants over forty (40); said hydrant rental to be paid quarterly out of the special tax fund to be levied and collected as other taxes of the city are for this purpose.

"Sec. 5. The city of Ft. Madison may from time to time order additional water mains and pipes to be laid in the streets of said city, and the said George B. Inman, his heirs, successors or assigns, agrees to lay such additional mains when so ordered by the city, provided that no extension so ordered shall be less than for one block, and out of each and every extension so made the city shall rent one additional hydrant for every block laid.

"Sec. 6. The annual rental for all additional hydrants so ordered by the city shall be \$60 each, to be collected and paid for in the same manner as the fifty-one (51), and the time when said hydrant rental shall commence shall be at the time said hydrants or additional hydrants shall be erected and ready for use, and the city clerk shall have been notified thereof by the said George B. Inman, his heirs, successors and assigns, or his or their duly authorized agent."

I set forth the three sections to the end it may be seen I have fully considered all having any bearing on the question. But, in my judgment, section 4 only is material. That section provides the city will rent the hydrants, and that Inman and his assigns will furnish them as ordered by the city. The city agrees to pay a stipulated price per annum, payable quarterly, for the hydrants thus ordered by the city, and supplied and operated by plaintiff. After agreeing to pay the rentals, section 4 of the ordinance concludes as follows: "Said hydrant rental to be paid quarterly out of the

special tax fund to be levied and collected as other taxes of the city for this purpose." The defendant city is subject to the general laws of the state pertaining to cities of the second class. The ordinance (if valid) and its acceptance constituted a contract which cannot be impaired by any subsequent legislation of the state. And it is conceded, as all will admit without such concession, that the ordinance is valid unless the concluding clause of section 4 is invalid, if it is to be construed as binding the city in excess of the special levy of five mills. It need only be stated that the city has such powers, and such only, as are recited in the statutes; and the ordinance in question and its acceptance, making a contract, must be construed under the statutes of Iowa in force in 1885. What were the statutes of Iowa in force in the year 1885, when this contract was made? Section 615, McClain's Code, provided for the general welfare of the city, and for the protection of both corporate and private property. Section 641 provided that contracts might be made by a city with another party for the erection, maintenance, and operation of waterworks for public consumption and for individual consumers, and concluded with these words: "And to pay therefor such sum or sums as may be agreed upon between said contracting parties." If this were all, there would be no room for contention, because thus far we have a plain and absolutely binding contract, binding plaintiff to build its plant, maintain and operate the same, and furnish and operate such hydrants as the city may require. The city did require 138 hydrants, and the plaintiff furnished them and operated them during the times in question; and the city has agreed to pay for them, but has defaulted. If this were a suit on a contract between individuals, no one would question the validity and binding force of the contract. And the statute just referred to (section 641 of McClain's Code) says the city shall "pay therefor such sum or sums as may be agreed upon between said contracting parties." But in the year 1885 there was another statute of Iowa in force. McClain's Code, § 643, provides, after reciting that if the contract is with an individual, as follows:

"Such city shall levy each year, and cause to be collected, a special tax as provided for above, sufficient to pay off such water rents so agreed to be paid to said individual or company constructing said works: Provided, however, that said tax shall not exceed the sum of five mills on the dollar for any one year."

And the clause just quoted gives rise to the only contention: Is the five-mill levy the only revenue to be raised or applied on the contract? Defendant contends that this clause is a limitation upon the power to contract. Its counsel in effect, but not in terms, contend that plaintiff must build additional mains and put in additional hydrants in such numbers as the city from time to time may demand, and that such parts of the contract would be binding upon plaintiff; but that the city need not pay therefor in excess of the moneys raised by the five-mill levy. Can it be possible that plaintiff must put the hydrants in, and the city pay nothing therefor? Or, having put them in, can plaintiff take such number out as will reduce the rentals to such sum that the five-mill levy will pay for the balance?

If so, and the city will not direct what hydrants are to be taken out, how will that controversy be settled? Or shall it be the last put in shall be the first taken out? And shall this be regardless of the growth of the city in this, that, or the other direction? Aside from precedents, I do not believe that section 643 of the statute is a limitation upon the powers otherwise conferred by section 641. In my judgment, section 643 creates a fund to be applied on the contract price, and not in extinguishment of the contract price. I believe section 643 provides a sinking fund, or a security for the payment, and, when this sinking fund or security falls short of the sum necessary, a general liability for the balance exists, which can be enforced. As well say, when the mortgage security is exhausted a note thereby secured is at an end, as to say this contract in suit is paid off by the five-mill levy. Who would claim a debt is discharged because the sinking fund is exhausted? I have given much attention to this case, and can view the question in no other way, and can reach no other conclusion. Such conclusion I would announce if there were no authorities, and I consider myself bound by the decided cases: (1) *Creston Waterworks Co. v. City of Creston*, 101 Iowa, 694, 70 N. W. 739; (2) *U. S. v. Clark Co.*, 96 U. S. 214, 24 L. Ed. 628. If the question in the case at bar be, what construction has been placed upon these Iowa statutes by the Iowa supreme court, then the only answer is found in 101 Iowa, 694, 70 N. W. 739. If the construction of these Iowa statutes by the Iowa supreme court is binding upon this court, then the questions in the case at bar are foreclosed. And, if the question is not put at rest by the Iowa supreme court, then the case by the United States supreme court several times approved ought to put it at rest, as it is binding upon this court. The fact that that case was decided by a divided court, or the fact that the supreme court of Missouri and others have criticised it, is to me an argument of no great persuasive force. The case has not been overruled, and with propriety cannot be disregarded by this court.

Counsel for both parties herein have cited many cases which I do not care to review. Plaintiff's counsel with much confidence cites *Grand Junction Water Co. v. City of Grand Junction* (Colo. App.) 60 Pac. 196, and the case is entitled to much weight. Defendant's counsel cites several Missouri cases, only one of which to me seems at all in point. But defendant's counsel lays much stress upon the case of *Boro v. Phillips Co.*, 4 Dill. 216, Fed. Cas. No. 1,663. Judge Caldwell wrote the opinion. In that case the law required in express terms that the money be paid by the treasurer of the district, and not by the county, and, of course, Judge Caldwell held that the county, as a county, was not liable. Counsel for defendant might have cited the case of *Dashner v. Mills Co.*, 88 Iowa, 401, 55 N. W. 468, making a like holding as decided by Judge Caldwell in 4 Dill. 216, Fed. Cas. No. 1,663. But the decisions of Judge Caldwell and the supreme court of Iowa (88 Iowa, 401, 55 N. W. 468) do not have the slightest application to the case at bar. In those cases there were no contracts by the county. In the case at bar we have a contract by the city. In those cases the districts had a legal being. In

the case at bar no such district is recognized as an entity. If, after judgment herein, and a failure to discharge by payment of the judgment, a mandamus should issue to levy and collect taxes for such purposes, the question should arise, it can then be determined upon whom of the taxpayers of the city the burden shall rest. If the Dashner Case (88 Iowa, 55 N. W.) like the 4 Dill. case, is in point, the answer is that the Creston Waterworks Case (101 Iowa, 70 N. W.) was otherwise decided at a later date. And defendant's counsel cite with confidence the New Mexico case of Raton Waterworks v. City of Raton, 49 Pac. 898. Much that is said therein does not tend to support their view. But in New Mexico there was no statute, as in Iowa, allowing the city to make an absolute contract to pay such rentals as might be agreed upon.

Finally, defendant's counsel say that in 1897 the Iowa statute was changed to harmonize with their views. The answer to that is that such change in the law, instead of being an argument for it, is a strong argument against the city. The old law could not be changed to affect the contract in suit, because of the constitutional provision against impairing the obligation of contracts. What the law for future contracts may be does not now concern us. As to prior contracts the law had been settled by the supreme court. Why add words when it was well understood? I will not pursue the matter further.

I maintain plaintiff should recover herein for three reasons, viz.: (1) The fair construction of the statutes in force in 1885 requires such holding. (2) The said Iowa statutes have been so construed by the Iowa supreme court, and that decision is binding upon this court. (3) If it is a matter of general law, and not Iowa's local law and decisions, then the decision in 96 U. S., 24 L. Ed., is binding, and the more so in view of the fact the case has been many times approved by that court. *Macon Co. v. Huidekoper*, 99 U. S. 592, 25 L. Ed. 333, note; *Knox Co. Court v. U. S.*, 109 U. S. 229, 3 Sup. Ct. 131, 27 L. Ed. 915; *Macon Co. v. Huidekoper*, 134 U. S. 336, 10 Sup. Ct. 491, 33 L. Ed. 914.

A judgment is accordingly ordered for the plaintiff, and against the defendant city, for the full amount sued for.

#### BARNARD v. RANDLE.

(Circuit Court of Appeals, Eighth Circuit. September 23, 1901.)

No. 1,483.

**1. TRIAL—DEMURRER TO EVIDENCE—WAIVER.**

A defendant waives his demurrer to the plaintiff's evidence by the subsequent introduction of evidence to the merits on his own behalf.

**2. WRIT OF ERROR—NECESSITY OF EXCEPTIONS.**

Where no objection is made or exception taken to the evidence introduced by the opposite party, and no ruling thereon is invoked or made, there can be no error for review.

**3. SAME—GENERAL FINDING—CONSIDERATION OF FINDINGS OF FACT OR CONCLUSIONS OF LAW DRAWN FROM THE EVIDENCE.**

Where a jury is waived, and the case is tried by the court, and no special finding of facts is made, the only questions arising on the evi-

dence which can be presented to or considered by this court are the rulings upon the admission or rejection of evidence in the progress of the trial, and, in cases where that question is presented by a proper request at the close of all the evidence, the sufficiency of the evidence to warrant the finding.

(Syllabus by the Court.)

In Error to the Circuit Court of the United States for the Eastern District of Missouri.

For the opinion of the circuit court, see 99 Fed. 348.

George W. Taussig, for plaintiff in error.

Shepard Barclay, John E. McKeighan, M. F. Watts, and Alex. W. Hope, for defendant in error.

Before SANBORN and THAYER, Circuit Judges, and LOCHREN, District Judge.

SANBORN, Circuit Judge. This was an action against the surety upon a bond, George D. Barnard, the plaintiff in error, and it resulted in a judgment against him for the full amount claimed in the petition. The first specification of error is that the demurrer to the petition should have been sustained, because it does not state facts sufficient to constitute a cause of action. The defendant in error, Charles H. Randle, alleged in his petition that on October 29, 1892, George D. Barnard, as surety for A. C. Ricksecker, entered into a bond to the defendant in error in the penal sum of \$5,000, whereby he promised to pay that sum in the event that Ricksecker should not completely perform every provision of a certain contract between Ricksecker and Randle of the same date as the bond; that by this contract Ricksecker agreed to rent a certain building in the city of Chicago for 183 days from May 1, 1893, and to pay the defendant in error as rent therefor \$140 for every day of the term, in monthly installments, in advance, on the first business day of each calendar month, but that Ricksecker did not comply with this contract, in that he failed to pay more than \$10,000 of the rent for the use of the building during his occupancy thereof; and that the payment of this amount had been demanded of both Ricksecker and the plaintiff in error, but they had refused to pay it. This petition states a complete cause of action, and the first specification of error is groundless.

The second is like unto it. It is that the court erred in refusing to give the declaration of law requested by the plaintiff in error at the close of the testimony of the defendant in error that the plaintiff in the cause was not entitled to recover in the action. While this request was made, and an exception taken to the refusal to grant it, the plaintiff in error subsequently proceeded to introduce evidence on his own behalf, and thereby waived his exception. A defendant waives his demurrer to the plaintiff's evidence by the subsequent introduction of evidence to the merits on his own behalf. *Insurance Co. v. Frederick*, 58 Fed. 144, 147, 148, 7 C. C. A. 122, 126, 19 U. S. App. 24, 31; *Insurance Co. v. Heiserman*, 67 Fed. 947, 15 C. C. A. 95, 32 U. S. App. 409; *Jefferson v. Burhans*, 85 Fed. 924, 927, 29 C. C. A. 487, 490; *Railroad Co. v. Mares*, 123 U. S. 710, 713, 8 Sup.

Ct. 321, 31 L. Ed. 296; *Insurance Co. v. Crandal*, 120 U. S. 527, 530, 7 Sup. Ct. 685, 30 L. Ed. 740.

The next two specifications of error are that the contract and bond pleaded in the petition were admitted in evidence. An examination of the record discloses the fact, however, that they were received without objection or exception, and hence the question of their admissibility is not here for review. In an action at law this is a court for the correction of the errors of the court below only, and where no objection is made or exception taken to the evidence introduced by the opposite party, and no ruling thereon is invoked or made, there can be no error for review.

The fifth specification is that the court erred in admitting in evidence the lease dated April 29, 1893, between the plaintiff in error and A. C. Ricksecker, the lessee. The answer of the defendant admitted the execution of the bond, and its condition that the plaintiff in error would pay the penalty if Ricksecker failed to perform every provision of the contract of the same date with the bond. It denied that Ricksecker failed to comply with the contract, and then alleged as a separate defense that Randle had failed to complete his part of the contract in that he had agreed to construct the building, and to furnish its rooms with good and substantial plain furniture, on or before the 1st day of May, 1893, and he had not so completed and furnished it on that day. The answer also alleged as another defense that after the execution of the contract of October 29, 1892, Randle and Ricksecker, without the knowledge of the plaintiff in error, changed it so that they agreed that the building, instead of being completed on May 1, 1893, should be completed on a subsequent date, and so that the defendant in error should not be obliged to supply the furniture for the rooms in said building until a later date than May 1, 1893. The condition of the bond was that Ricksecker should rent the building for a term of 183 days commencing on May 1, 1893, and should pay rent therefor at the rate of \$140 per day. The lease which was offered in evidence was dated April 29, 1893, was signed by Randle and Ricksecker, and it stipulated that Randle rented the building from May 1, 1893, until October 31, 1893, and that Ricksecker agreed to pay rent during that period at the rate of \$140 per day. The only objections interposed to its introduction in evidence were that it was incompetent, irrelevant, and immaterial. No reason was then suggested why it was incompetent, or in any way inadmissible, and, as it appeared to comply with the substantial terms of the contract and bond pleaded, it was properly received in evidence over this general objection. In this court the admission of this lease is attacked on the grounds: (1) That Randle testified that it was not executed until May 11, 1893; (2) that the lease was not made after, but before, the completion of the building,—that it did not commence on May 1st but on May 11th; (3) that under the contract Randle agreed to furnish the chamber service without charge to Ricksecker, while the lease relieved Randle of this obligation, and imposed it upon Ricksecker; and (4) that the contract restricted Ricksecker's privilege of subletting, while the lease gave him the privilege of sub-

renting the basement. None of the questions raised by these objections were suggested to the court below. That court did not rule upon them, because it did not hear them, so that there was no error in its admission of the lease over the general objection presented to it. Moreover, these objections are technical and untenable. When the lease was offered in evidence, Randle had not testified that it was not executed until May 11th, nor that the term was not to commence until after May 1st, and the slight variations between the terms of the contract and the lease were insufficient to exclude it, in any event, from the consideration of the court as evidence.

The sixth error specified is that the court admitted in evidence a contract dated October 29, 1892, between George D. Barnard and A. C. Ricksecker, to the effect that, in consideration of the signature by Barnard of the bond in suit and of his advancing \$500 in money to Ricksecker, the latter agreed to repay him this \$500 and 25 per cent. of all the net profits arising from the leasing of the property referred to in the contract and bond between Ricksecker and Randle; that that contract was referred to and made a part of the agreement between Ricksecker and Barnard, and that Ricksecker would submit all trades or deals made by him to Barnard for his approval. The objection to this contract was that it was incompetent, irrelevant, and immaterial. But, inasmuch as one of the defenses in the answer was that Barnard had been relieved from his obligation as surety by trades or deals made between Ricksecker and Randle without the knowledge of Barnard, this agreement that these trades and deals should be submitted to Barnard for his approval was, with the other evidence in the case tending to show that they were so submitted, certainly competent and material evidence for the defendant in error. There was no error in the receipt of this contract in evidence.

There are eight more specifications of error. The next one is "that upon the evidence in the case the defendant in error was not entitled to recover," and the remaining seven challenge in different ways the finding of facts and conclusions of law of the court below. But this case was tried by the court after a waiver of the jury, pursuant to the provisions of section 649, Rev. St. There is no special finding of facts, but a mere general finding in favor of the defendant in error. This general finding prevents all inquiry by this court into the special facts or conclusions of law on which it rests. Where a jury is waived, and the case is tried by the court, and no special finding of facts is made, the only questions arising on the evidence which can be presented to or considered by this court are the rulings upon the admission or rejection of evidence in the progress of the trial, and, in cases where that question is presented by a proper request at the close of all the evidence, the sufficiency of the evidence to warrant the finding. No such request was presented in this case, and no finding of fact or conclusion of law of the court below is presented for our consideration. *Boardman v. Toffey*, 117 U. S. 271, 272, 6 Sup. Ct. 734, 29 L. Ed. 898; *Norris v. Jackson*, 9 Wall. 125, 19 L. Ed. 608; *Cooper v. Omohundro*, 19 Wall. 65, 69, 22 L. Ed. 47; *Mar-*



tinton v. Fairbanks, 112 U. S. 670, 673, 5 Sup. Ct. 321, 28 L. Ed. 862; Smiley v. Barker, 83 Fed. 684, 688, 28 C. C. A. 9, 13, 14, 55 U. S. App. 125, 134; Hoge v. Magnes, 85 Fed. 355, 358, 29 C. C. A. 564, 567, 56 U. S. App. 500, 505; Insurance Co. of North America v. International Trust Co., 71 Fed. 88, 90, 17 C. C. A. 616, 618, 36 U. S. App. 291, 303; Walker v. Miller, 59 Fed. 869, 8 C. C. A. 331, 19 U. S. App. 403; Searcy Co. v. Thompson, 66 Fed. 92, 13 C. C. A. 349, 27 U. S. App. 715.

The judgment below is affirmed.

### HOCKETT et al. v. ALSTON.

(Circuit Court of Appeals, Eighth Circuit. September 30, 1901.)

No. 1,553.

1. **EJECTMENT—POSSESSION.**

Possession of land, or of the improvements upon it, is prima facie evidence of the right of possession, and it must prevail in an action of ejectment, in the absence of competent evidence of a superior countervailing right.

2. **SAME—EVIDENCE—SHERIFF'S CERTIFICATE WITHOUT WARRANT OF LAW.**

A sheriff's certificate of sale and conveyance of land, or of improvements thereon, unwarranted by any law or order or process of any court, is not evidence of any title or of any right of possession in its grantee in the property which it describes.

3. **JUDICIAL NOTICE—LAWS OF INDIAN TRIBES.**

The courts do not take judicial notice of the laws of the Indian tribes in the Indian Territory, but they must be pleaded and proved before effect can be given to their provisions in judicial proceedings.

(Syllabus by the Court.)

In Error to the United States Court of Appeals in the Indian Territory.

This writ of error questions a judgment for the plaintiff in an action for the possession of certain improvements upon lands in the Indian Territory made and held by the defendants. The plaintiff below, Sarah Carlton Alston, the defendant in error here, alleged in her complaint that she was the owner and entitled to the possession of the Fred Hockett farm, a frame house, stables, and outbuildings situated on lands which were patented to the Cherokee Nation on December 31, 1838; that on August 30, 1897, these improvements were sold to her by the sheriff of Cooweescoowee district of the Cherokee Nation of the Indian Territory, under an act of the national council of that nation approved September 30, 1895; that this sheriff delivered to her a certificate of purchase in these words:

"Wagoner, I. T., August 30, 1897.

"Sold to Sarah Carlton Alston the following described intruder improvements, known as 'Fred Hockett Farm,' about three and one-half miles north-east of Wagoner, I. T.: One frame house, 16x32, stables and other outer buildings, about 100 acres in cultivation,—for the sum of eight hundred and ninety-five (\$895.00) dollars. First installment paid, one hundred and forty-nine <sup>20</sup>/<sub>100</sub> (\$149.20) dollars. Sold under an act of the national council approved September 30th, 1895.

J. C. Ward,

"Sheriff Cooweescoowee District, Cherokee Nation,

"By J. W. Leach, Deputy."

—And that the defendants, Fred Hockett, Agnes Hockett, and Will Hockett, the plaintiffs in error here, had been since August 30, 1897, and still were, in the unlawful possession of this property. The defendants denied the

plaintiff's ownership and right to the possession of the improvements, denied that there had ever been any legal sale thereof by the sheriff, and alleged that they had made them, and had been in the possession of them since 1889. At the trial the plaintiff proved by one of the defendants that the latter's wife had claimed to be a citizen of the Cherokee Nation, but that her claim had been disallowed; that he had put improvements of the value of about \$1,500 upon the property, and had occupied it since September, 1889. The plaintiff then proved that she had purchased the improvements from the sheriff named in her pleading, and had obtained the certificate copied above. Objection was made to her introduction of this certificate on the grounds that there was no proof of the act of the Cherokee Nation under which the sale took place, or of any compliance with that act, but this objection was overruled. There was no other evidence of title to or right of possession of the improvements in the plaintiff, and yet the court instructed the jury that she was entitled to recover them. This instruction and the overruling of the objection to the introduction of the sheriff's certificate, together with many other rulings of the trial court, are assigned as error. These specifications were considered by the court of appeals of the Indian Territory and overruled, and it is to review the judgment of that court affirming the judgment of the trial court in favor of the plaintiff that this writ of error was sued out.

Lovick P. Miles, for plaintiffs in error.

James S. Davenport, for defendant in error.

Before SANBORN and THAYER, Circuit Judges, and ADAMS, District Judge.

SANBORN, Circuit Judge, after stating the case as above, delivered the opinion of the court.

This was an action in the nature of ejectment to recover possession of improvements upon land of the Cherokee Nation in the Indian Territory which had been made by, and were in the possession of, the defendants. The trial court held that the certificate of a sheriff of the Cherokee Nation that he had sold these improvements to the plaintiff, without proof of any law or of any order or decree of the court empowering him to do so, established his grantee's right to the possession and to a recovery of this property from the defendants, and this ruling was affirmed by the court of appeals of the Indian Territory. A brief reference to a few axiomatic principles of the law demonstrates the fatal error into which these courts have fallen. Possession of real estate and of the improvements thereon is *prima facie* evidence of the right of possession, and the defendants had been in possession of this land and of the improvements which they had made upon it for more than nine years before this action of the plaintiff was commenced. This title by possession must prevail until the plaintiff establishes by competent evidence a superior right to the possession of these improvements. *Ricard v. Williams*, 7 Wheat. 59, 105, 5 L. Ed. 398; *Keane v. Cannovan*, 21 Cal. 291, 305, 82 Am. Rep. 738; *Foster v. Evans*, 51 Mo. 39, 40; *Wilson v. Fine* (D. C.) 38 Fed. 789, 793.

This plaintiff claimed title under an act of the national council of the Cherokee Nation approved September 30, 1895, but she did not prove or produce any evidence of the character, contents, or provisions of that law, and this court is ignorant of its terms and of its

effect. The courts do not take judicial notice of the laws of the Indian nations in the Indian Territory, but they must be pleaded and proved before effect can be given to their provisions in judicial proceedings. *Wilson v. Owens*, 86 Fed. 571, 573, 30 C. C. A. 257, 259, 57 U. S. App. 500, 503. No judgment, order, or execution from any court authorizing the sale of this property by the sheriff of the Cooweescoowee district was pleaded or proved. There was therefore no evidence that this sheriff had any more power than any other stranger to sell and convey the property here in controversy. A sheriff is nothing but the agent of the government to do the acts which the laws authorize him to perform, and his acts, without proof of his lawful authority to perform them, are as ineffective in judicial proceedings as the acts of a private agent without proof of authority from his principal. There was no provision of the law, as in *Jordan v. Bradshaw*, 17 Ark. 106, 109, 65 Am. Dec. 419, that the certificate of this sheriff should recite the authority under which it was issued, and that this recital should be evidence of the fact so stated. There was no proof of any law which authorized the sheriff to make the sale, or the certificate thereof. There was no evidence of any execution, process, order, or judgment of any court which directed him to sell or convey this property. The record is entirely barren of any evidence of any authority on his part to make either the sale or certificate thereof, and that instrument constitutes no evidence of any title or right to the possession of the improvements in controversy. A sheriff's deed, unwarranted by any law or order or process of a court, is not evidence of any title or right of possession in its grantee in the property which it describes.

Counsel for the plaintiff below devote much time and space to an endeavor to support the contention that the defendants are unlawfully in the possession of these improvements; that they are trespassers and intruders upon this land in violation of the laws of the United States and of the Cherokee Nation. It is unnecessary to the decision of this case to consider or decide whether they are trespassers or not. If they are, there is no evidence here that the plaintiff has any right to disturb them. Under the record before us, she also seeks to intrude upon this property without right, under a sheriff's certificate of sale issued without warrant of law or order of court. The possession of a trespasser or of an intruder is superior to and must prevail over the claims of all who have no superior legal rights to the title or the possession.

The judgments of the court of appeals in the Indian Territory and of the United States court for the Northern judicial district of the Indian Territory are reversed, and the case is remanded, with directions to grant a new trial.

## UNITED STATES v. AMERICAN SURETY CO. OF NEW YORK.

(Circuit Court, D. Maine. August 30, 1901.)

No. 182.

## 1. UNITED STATES — ACTIONS BY—SUBJECTION TO SUMMARY EQUITABLE PROCEEDINGS.

Where the United States voluntarily submits itself to the jurisdiction of a court by instituting a civil action therein, it may be subjected to equitable proceedings of a summary character with reference to the subject-matter; as when the action is on a statutory contractor's bond which also secures claims of others, aggregating an amount exceeding the penalty of the bond, by reason of which fact the surety is compelled to invoke the aid of a court of equity to marshal the claims, the court may stay the action until the United States submits its claim for adjustment to the court of equity, or may permit the surety to present the same facts in the action at law, and render judgment therein in accordance with the rights and equities of all parties in interest.

## 2. SAME.

The court states its reasons why summary jurisdiction should not be exercised in this particular case.

Action at Law. On motion for a stay of proceedings.

Isaac W. Dyer, U. S. Atty.

Anthoine & Talbot, for defendant.

PUTNAM, Circuit Judge. This is a suit at common law, brought on the same bond which is under consideration in this court in the cause in equity of the American Surety Company against the Lawrenceville Cement Company and others. It is enough to say that William Morgan, one of the defendants in this case, was a contractor with the United States, and that the other defendant, the American Surety Company, is a surety on his bond as such contractor. In the equity cause the American Surety Company filed its bill, alleging that the claims on it as surety for Morgan, including the claim of the United States, are in excess of the penal sum of the bond, namely \$18,000, and that it is willing to discharge those liabilities to the full amount of the penal sum as soon as it can be ascertained to whom it shall be paid, and in what amounts. The bill was brought for the purpose of assisting the American Surety Company in making that ascertainment, and for marshaling the various claims against it as such surety. All the claimants are respondents to that bill except the United States. The United States were allowed to intervene therein, and they did appear by their attorney for the district of Maine, and file an intervention. Afterwards, on their motion, the attorney was allowed to withdraw his appearance, but the intervention remains, although, so far as yet ascertained by us, the intervention is of no substantial value; at least, the United States have so far refused to submit their claim to the adjudication of the court in the equity cause, and persist in having their rights determined in this common-law suit. The pendency of the equity cause, under the circumstances, is a matter of which we can take judicial notice. *Machine Co. v. Goddard*, 37 C. C. A. 221, 95 Fed. 664, decided by the circuit court of appeals for this circuit on June 1, 1899.

The suit in equity to which we have referred is the same in which opinions were filed by us on July 17, 1899 (96 Fed. 25), and August 23, 1901 (110 Fed. 717).

Under these circumstances, the American Surety Company has filed its motion in this case, asking that the further prosecution of this action be stayed until the United States submit to the equity jurisdiction in the other cause, and file and prove their claim, if any they have, therein. We are very strongly of the impression that we have the power to grant this motion, and that, also, if there were no other practical remedy, we should do so. It is true that no proceeding by any judicial tribunal can be taken against the United States, not even to the extent of restraining them, in the cause in equity, from proceeding in this suit, although that cause is only ancillary to this and to the other common-law suits against the same parties pending in this court. Notwithstanding this, however, where the United States have voluntarily submitted themselves to the jurisdiction of judicial tribunals by asking relief, they subject themselves to equitable proceedings of a summary character with reference thereto. This was strikingly illustrated in *The Siren*, 7 Wall. 152, 19 L. Ed. 129, and in *Carr v. U. S.*, 98 U. S. 433, 25 L. Ed. 209. Indeed, this goes so far that there can hardly be any doubt that, by bringing a suit at common law, the United States subject themselves to set-offs, even of an equitable character. While counter proceedings in suits by the United States are ordinarily referred to the statutes recognizing expressly rights of set-off in such suits, yet even the supreme court seems to have recognized them as existing independently thereof. *U. S. v. Ringgold*, 8 Pet. 150, 163, 8 L. Ed. 899.

In *Stanley v. Schwalby*, 147 U. S. 508, 513, 13 Sup. Ct. 418, 37 L. Ed. 259, the court recognized anew the rule that, where the United States intervene by way of suggestion in a suit between private individuals, notwithstanding the United States do not become parties to the case, the court, on their suggestion, has the power to stay the suit altogether, or to adjust its judgment according to the rights disclosed. This constitutes a summary exercise of an equitable power, arising from the necessity of the case, because the United States cannot, under the circumstances, become parties of record. On the same principle, where individuals are unable to make the United States parties to a suit brought for the purpose of working out an equitable solution of all questions involved, the court may stay a countersuit brought by the United States, or adjust its judgment therein according to the fundamental rights of all interested.

We will observe that the intervention of the United States in the equity cause referred to, even if under compulsion of the granting of the motion under consideration, would not be making the United States defendants in litigation. It would be strictly analogous to the right which the United States have to intervene as claimants to a fund in the registry of the court, a right which sometimes affords them their only practical remedy, and, therefore, a right which the high executive officers of the government are justified in availing of, notwithstanding the various decisions of the supreme court that even the attorney general cannot waive exemption to suit. Therefore, we

are strongly of the impression that it is within our power to grant this motion, with certain modifications and conditions. Nevertheless, it is necessary for us to inquire what would be gained thereby. So far as we can perceive, nothing would, except a speedier adjustment of all the questions involved, because we are of the opinion that the American Surety Company may, in this suit at common law, present to the court all the facts which are justifiable in the equity cause, so that thus, in this suit, we may apply the same rule of priority, if priority exists, or of pro rata distribution, if the law requires pro rata distribution, as the chancellor would. Consequently, as we are of the opinion that ultimately the United States can recover no more in this suit than if they were compelled to submit to our jurisdiction in the equity cause, so that all that could be gained thereby would be a speedier termination of the questions involved, our conclusion is that there are not sufficient substantial interests at stake to justify us in proceeding in the summary way which this motion asks for. We reach this conclusion, not only because the exercise of summary power in staying a suit jeopardizes the ultimate rights of the parties, or, at least, embarrasses them in reaching the determination of those ultimate rights in the appellate tribunals, but, also, because, unless there is a strong necessity therefor, the court, as now constituted, is unwilling to make use of discretionary powers, and prefers to let litigation take its regular course, according to the rules of the common law.

As, however, we cannot foresee all future developments, and as they may justify some action on this motion, we will not deny it, but we merely postpone its consideration.

Ordered, that the motion filed by the American Surety Company on August 14, 1901, be held for further consideration, in accordance with the opinion of the court passed down this day.

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PEACOCK, HUNT & WEST CO. v. WILLIAMS.

(Circuit Court, D. South Carolina. July 30, 1901.)

PLEADING—JUDGMENT ON FRIVOLOUS ANSWER.

Under the rule of decision in South Carolina that the whole pleading must be clearly frivolous to authorize the court, under the statute, to render judgment thereon on motion, an answer in a federal court, which contains a positive denial under oath of material jurisdictional allegations made in the complaint, cannot be adjudged frivolous.

At Law. On motion for judgment.

C. J. C. Hutson and Ficken, Hughes & Ficken, for plaintiff.

T. M. Raysor and Mordecai & Galdsden, for defendant.

SIMONTON, Circuit Judge. This case comes up on a motion by plaintiff for judgment as demanded in the complaint upon the ground that the answer filed herein by defendant is frivolous. The motion has been heard by consent of all parties. It is based upon

section 268 of the Code of Procedure of South Carolina, which is in these words:

"If a demurrer, answer or reply be frivolous, the party prejudiced thereby, upon a previous notice of five days, may apply to a judge of the court, either in or out of the court, for judgment thereon and judgment may be given accordingly."

Rule 10 of this court provides that:

"The form of pleadings in all civil actions, except in equity and admiralty, and the rules by which the sufficiency of the pleadings is to be determined, are these now and such as may from time to time be prescribed by the Code of Procedure in this state."

The motion proceeds upon the allegation that the answer is frivolous. "To be adjudged frivolous, the whole answer must be clearly so." *Grayson v. Harris*, 37 S. C. 606, 16 S. E. 154. The complaint is on two causes of action, a promissory note in each case. The causes of action are stated in precisely the same way, *mutatis mutandis*. The first and second paragraphs of the complaint are as follows:

"(1) That the plaintiff is now, and at the times hereinafter mentioned was, a corporation duly organized under the laws of the state of Georgia, having been incorporated under the name of the Peacock & Hunt Naval Stores Company, and having had its corporate name changed to the Peacock, Hunt & West Company.

"(2) That the plaintiff is a citizen of the state of Georgia, having its residence and place of business in the city of Savannah, in said state of Georgia. That the defendant is a citizen of the state of South Carolina, and resides at or near the town of Norway, in the said state of South Carolina."

The jurisdiction of the circuit courts of the United States is a limited jurisdiction; that is to say, they cannot take cognizance of any case in which the plaintiff and defendant are not residents and citizens of different states, or in which a federal question is not involved. Being courts of limited jurisdiction, the presumption is always against the jurisdiction (*Grace v. Insurance Co.*, 109 U. S. 278, 3 Sup. Ct. 207, 27 L. Ed. 932), and the plaintiff must state distinctly, and show affirmatively in his pleading, that the jurisdiction exists (*Godfrey v. Terry*, 97 U. S. 171, 24 L. Ed. 944). This being so, the averments of these two paragraphs in this complaint are of the most material character. Without such averments, the suit would be dismissed for want of jurisdiction. Not only is the purport of these paragraphs material, but the facts stated are also material. The averment is that the plaintiff is a corporation of the state of Georgia. If this be so, it is treated as a citizen of the state of Georgia (*Muller v. Doves*, 94 U. S. 444, 24 L. Ed. 207), and a resident of that state (*Bank v. Earle*, 13 Pet. 519, 10 L. Ed. 274; *Railroad Co. v. Wheeler*, 1 Black, 286, 17 L. Ed. 130; *Steamship Co. v. Tugman*, 106 U. S. 113, 1 Sup. Ct. 58, 27 L. Ed. 87). The answer, in its first paragraph, directed to the first paragraph of the complaint, categorically denies its allegations. In its second paragraph, directed to the second paragraph of the complaint, it denies each and every allegation thereof, except that the defendant is a resident of the state of South Carolina. The answer is under oath. It does not aver want of knowledge of the corporate

character of the plaintiff, or information and belief relating thereto, or want of sufficient information thereof, but it asserts categorically, as a matter of fact within the knowledge of defendant, that plaintiff has no such corporate character. It is a grave assertion. If hereafter it be shown to be false, it is difficult to see how defendant could protect himself from the false allegation under oath, for he bases this assertion upon his own knowledge, and not from any information of others. Be this as it may, it is a grave assertion, raising a material issue in the case,—the issue upon which the right of this court to hear and determine the case exists. Whatever may be said of this part of the answer, we cannot say that it is frivolous. It cannot be said that it controverts no material allegation in the complaint, or that it is manifestly insufficient (*Bouv. Law Dict.*), nor that it fails to deny the allegations of the complaint (*American Co. v. Hill*, 27 S. C. 164, 3 S. E. 82), or that upon mere inspection, without examination or research, it is utterly invalid (*Grayson v. Harris*, *supra*; *Boyleston v. Crews*, 2 S. C. 422; *Cahoon v. Railroad Co.*, 10 Wis. 293). It is contended however, that the defendant, having contracted with the plaintiff as a corporation, is estopped from denying its corporate character. This would unquestionably be true if there were anything in this record to show that the contract was made with a corporation. The note is to Peacock, Hunt & West Company. Is the inevitable conclusion from this fact that Peacock, Hunt & West Company is a corporation? May it not be a joint-stock company unincorporated? May it not have been only a co-partnership name? Perhaps, if a defendant is sued by a corporation created by the laws of his own state, he may be bound to take notice of its existence as a corporation. It would not be the case when suit is brought by a foreign corporation. It does not appear to me that the two first paragraphs of the answer are frivolous. This conclusion having been reached, the whole answer is saved. "To make an answer frivolous, the objection must extend to and embrace the whole answer, so that nothing is left of it." *Tharin v. Seabrook*, 6 S. C. 113; *Grayson v. Harris*, *supra*. The motion is refused.

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PEACOCK, HUNT & WEST CO. v. WILLIAMS et al.

(Circuit Court, D. South Carolina. August 10, 1901.)

**EQUITY JURISDICTION—FEDERAL COURTS—CREDITORS' SUITS.**

Federal courts in equity are precluded by the constitution from entertaining jurisdiction over, or giving judgment upon, a common-law demand, and such a court cannot entertain a suit by a creditor, whose claim is evidenced by notes not reduced to judgment for the sequestration of the debtor's property, the appointment of a receiver, and an injunction against suits elsewhere, notwithstanding such a suit is authorized by the statutes of the state.

In Equity. On demurrer to bill.

C. J. C. Hutson and Ficken, Hughes & Ficken, for complainant.  
T. M. Raysor and Mordecai & Gadsden, for defendants.



SIMONTON, Circuit Judge. The bill in this case is filed by Peacock, Hunt & West Company, in behalf of itself and other creditors of B. B. Williams, against the said B. B. Williams and others, his creditors. The bill sets out the claim of complainants,—two promissory notes past due, upon which no judgment at law has been had. It then alleges the insolvency of Williams, that a valuable portion of his property is under mortgages past due and unpaid, that suits were being pressed against him by sundry of his creditors, that he is removing and concealing his assets with intent to defraud. It prays that a receiver be appointed to take charge of his property, and that an injunction issue restraining suits against him except in this court. A rule to show cause having been issued, Williams and sundry of his creditors have shown cause, and numerous affidavits have been filed. The chief ground at present relied upon is interposed in the way of demurrer to the bill that it is without equity. And the question raised is, can a creditor upon notes, not reduced to judgment, come into this circuit court of the United States, and obtain the sequestration of the property of his debtor, the appointment of a receiver, and an injunction against suits elsewhere? An established principle in equity, existing from the earliest times, is that no relief can be had in equity where the party has a plain, adequate, and complete remedy at law. This principle has been embodied in the judiciary act of 1789 with regard to the federal courts, and has been formulated in the Revised Statutes. As an application of this principle, it has been held in the decisions of all the states that a party cannot seek relief in a court of equity on a common-law contract until he has exhausted his legal remedy. The legislation of most of the states has modified—perhaps we should say has changed—this application of the principle in equity, and has allowed a creditor under certain circumstances to anticipate his remedies at law, and to come at once into a court of equity. Such legislation has been had in the state of Mississippi, and especially in the state of South Carolina. Rev. St. S. C. § 2016; *Pelzer v. Hughes*, 27 S. C. 409, 3 S. W. 781. It is observed, however, that the aid of a statute was necessary in order to give this relief. No such statute exists in the legislation of congress with regard to the federal courts. A creditor who comes into a court of equity upon a bill of this kind, in order to obtain the equitable relief which he seeks, must first establish his right to sue as a creditor, must prove that he is a creditor. Upon presenting his bill therefore, he must ask leave to prove his debt in the court of equity, and, having done so, to show his right to the equitable relief. Just here the federal courts have decided that, whatever may be the legislation of the states upon the subject, the federal courts in equity are precluded by the constitution of the United States from entertaining jurisdiction over or giving judgment on a common-law demand. It is true that, notwithstanding the rule that the legislation of the states cannot either enlarge or diminish the jurisdiction of the federal courts, yet the courts of the United States can and will administer equitable rights created by state legislation, and will enforce

them when there is jurisdiction of the parties and of the subject-matter. *Smith v. Railroad Co.*, 99 U. S. 398, 25 L. Ed. 437. But they have refused to apply this principle to legislation of the states authorizing an application to a court of equity by a creditor who has not established his claim. *Scott v. Neely*, 140 U. S. 106, 11 Sup. Ct. 712, 35 L. Ed. 358. In this case was a statute of the state of Mississippi distinctly giving this relief. It was a case in which the creditor sought to set aside conveyances made in fraud of creditors. The court puts its refusal to entertain jurisdiction upon the ground that, inasmuch as the complainant had a legal claim, the constitution of the United States secured to the defendant a trial upon its merits before a common-law jury. *Cates v. Allen*, 149 U. S. 451, 13 Sup. Ct. 883, 37 L. Ed. 804. The whole question is reviewed, and the authorities are discussed and distinguished, in *Hollins v. Iron Co.*, 150 U. S. 371, 14 Sup. Ct. 127, 37 L. Ed. 1113. In this case the court refused to interfere notwithstanding that complainant filed a creditors' bill against the debtor, an insolvent corporation. Mr. Justice Field, in *Scott v. Neely*, states the law thus:

"In all cases where a court of equity interferes to aid the enforcement of a remedy at law, there must be an acknowledged debt, or one established by a judgment rendered, accompanied by a right to the appropriation of the property of the debtor to its payment; or, to speak with greater accuracy, there must be, in addition to such acknowledged or established debt, an interest in the property, or a lien thereon, created by contract, or some distinct legal proceeding."

In the case at bar there is no acknowledged debt. In fact, the debt is denied. But, were it acknowledged, there must be, besides this, an interest in the property, or a lien thereon; neither of which exists here, for none such has been created by contract, or by any distinct legal proceeding. Taking all this into consideration, and noting also that the insolvency of the defendant Williams—the whole basis of the suit—is earnestly and vehemently denied, the bill cannot be maintained. It is to be regretted that complainants cannot be relieved. If the suits now pressed against Williams go into judgment, the relief the present complainant can get at law may be barren of result. But "*vigilantibus lex semper subvenit*," and the established law of this court cannot be violated in order to protect the complainant, whose misfortune it is to be too late. The bill is dismissed, without prejudice, for want of jurisdiction.

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#### BOUDROT V. COCHRANE CHEMICAL CO.

(Circuit Court, D. Massachusetts. August 1, 1901.)

No. 1,092.

1. NEW TRIAL—CONFLICTING EVIDENCE.

The federal circuit court has the same power to grant a new trial in a case of conflicting evidence as under other circumstances.

2. DIRECTION OF VERDICT.

The federal circuit court has power to direct a verdict for the defendant, though there is evidence for the plaintiff which, but for conflicting proofs offered by defendant, would be sufficient to take the case to the jury.

**2. NEW TRIAL.—GROUNDS.**

A laborer in the employ of a chemical company producing sulphuric acid, and working on the top of a fines burner, claimed to have been overcome by smoke and gas escaping from the lump burners, so that he caught his sleeve in certain moving mechanism, which broke his arm. He testified that he was alone and that he refused to continue his work until the defendant's foreman promised to inform him when ore was dumped into the lump burners, causing the escape of smoke and gas, but that the foreman subsequently left the locality, and the accident occurred during his absence. One of defendant's witnesses, who stood unchallenged, testified that he was working with plaintiff, relieving him, and had left the place of work briefly for water, when the injury occurred. Plaintiff made no attempt to reconcile witness' presence with the case made by him. *Held* sufficient to justify setting aside verdict for plaintiff.

At Law. On motion by defendant for a new trial.

Jesse C. Ivy and Edward E. Clark, for plaintiff.

Orville D. Baker, for defendant.

PUTNAM, Circuit Judge. The plaintiff was a common laborer, engaged in the employment of the defendant corporation, which was the producer, among other things, of sulphuric acid, for that purpose roasting pyrites in two classes of burners, one known as "lump burners" and the other as "fines burners." The lump burners were fed from time to time through doors opened for that purpose, and the plaintiff claimed that, when so fed, they emitted masses of smoke or gas, or both. So far as this is concerned, the plaintiff had sufficient evidence to go to the jury on his proposition that they emitted both, and also on the further proposition that the smoke and gas were in sufficient masses to rise through the building, including the place where the plaintiff was at work when injured.

The defendant's witnesses testified quite positively that the gases and smoke were practically innocuous; but they were all accustomed to working about the burners, so that the plaintiff had a clear right to go to the jury on the proposition that their testimony was to be taken qualifiedly, and as given relatively to the witnesses' special immunity from the effects of the gases and smoke, whatever they were. So far as this is concerned, there can be no question that the plaintiff was entitled to go to the jury on the proposition that the lump burners, when fed, gave out masses of gas and smoke, which would blind or choke, and even render unconscious, persons, like himself, not accustomed to them.

The plaintiff was set at labor doing some brickwork on the top of one of the fines burners. The previous day he had been doing the same kind of work on the top of another of the fines burners. He was not accustomed to this class of work, and, on account of moving mechanism on the top of the fines burners, which it was impossible for him to observe at all times, the work was especially dangerous for a green hand like himself. Moreover, he was justly entitled to go to the jury on the claim that at certain times the gas and smoke emitted from the lump burners, when fed, did rise over the fines burners, so as to be obnoxious, if not dangerous, to an unaccustomed person like himself. The testimony of the witnesses for defendant

shows also that, on account of the heat on the top of the fines burners, it was necessary that a person working there should be relieved at short intervals.

On this motion many incidental questions have been discussed by counsel, but as to none of them would the court be able to take the case from the jury, except as to the single point which we regard as raising the main issue of fact in the case. This observation is particularly applicable to the propositions urged on the court by the defendant with reference to the apparent discrepancies in the plaintiff's testimony, and to the matters of time, both absolute and relative, as stated by the plaintiff and by the persons in the defendant's employ who had charge of the lump burners. How necessary it is to leave, for the most part, such questions to the jury, is particularly illustrated in this case by the testimony of McGinley, who was plainly a reliable witness, but whose statements as to time agree neither with those of the plaintiff nor with any of the witnesses for the defendant, but which approach the former rather than the latter.

The suit is not based on a claim that the plaintiff was set at work at an improper place, and, perhaps, in view of his experience the previous day, it could not have been so claimed successfully. It rests on the proposition that the plaintiff refused to work the second day on the top of the fines burner until he had received the promise of the defendant's foreman that he would himself let the plaintiff know when the ore was dumped into the lump burners; that, relying on this promise, the plaintiff pursued the work; that the foreman, for a time, personally observed his promise, and attended himself in accordance therewith; that subsequently the foreman left the locality, unknown to the plaintiff; that during his absence from the locality the plaintiff's back was turned to the lump burners; that thereupon, and unknown to him, the gas and smoke escaped from the lump burners, and blinded him, or overcame him; and that, while thus blinded or overcome, his sleeve caught in the moving mechanism, and his arm was broken. So far as the motion for a new trial is concerned, the vital question is whether the foreman made the promise alleged by the plaintiff, as this is positively sworn to by the plaintiff. It is met by the testimony of the witnesses for defendant as positively and directly as any part of the case, and the parties may well be held to stand or fall with the determination of the issue on that particular fact.

Thus the case before us is strictly one of conflicting testimony, although we realize that the conflict may not be of that character which cannot be explained on any other theory than of willful falsification. If the testimony in behalf of either the plaintiff or the defendant stood alone, there could be no question that a jury might justly be expected to return a verdict based upon it. Therefore we deem it necessary, before proceeding further, to examine the rights and duties of the court—First, with reference to ordering a new trial in a case of conflicting testimony; and, second, with reference to its power to have directed a verdict for the defendant at the close of the proofs, as we were requested to do. The second proposition we deem it proper to touch on, because it is evident that, if we conclude to

grant a new trial, as now asked for, and the suit is tried anew, the question will then arise whether or not, if the evidence remains practically the same, it will be within the power of the court to direct a verdict.

The court has no doubt that it has the same power to grant a new trial in a case of conflicting testimony as under other circumstances. This proposition was directly in issue, and determined in favor of the power, by the circuit court of appeals for the Sixth circuit in *Felton v. Spiro*, 24 C. C. A. 321, 78 Fed. 576. That decision is an authority which, under the circumstances, we ought to follow, although, independently of it, we know of no limit to the power of the court to set aside verdicts which are clearly erroneous without regard to any other particularities whatever. As to the second question, we differ from the conclusion in *Felton v. Spiro*, as we understand it, that it is not in the power of the circuit court to direct a verdict for the defendant where there is evidence for the plaintiff, covering the whole case, which, except for the conflicting proofs offered by the defendant, would be sufficient to go to the jury. We think the circuit court of appeals for the Sixth circuit, on this question, overlooked the expressions of the supreme court to such an extent that we could not properly follow it. There are many observations in the authorities, and, indeed, some in the opinions rendered in behalf of the supreme court, which go to the extent of *Felton v. Spiro*; but the true rule we believe to be that represented by what was said by Mr. Justice Miller in behalf of the court in *Pleasants v. Fant*, 22 Wall. 116, 121, 122, 22 L. Ed. 780. "Must," says the learned judge, "the court go through the idle ceremony, in such a case, of submitting to the jury the testimony on which plaintiff relies, when it is clear to the judicial mind that, if the jury should find a verdict in favor of the plaintiff, that verdict would be set aside, and a new trial had?" This case is cited with approval in *Coughran v. Bigelow*, 164 U. S. 301, 307, 17 Sup. Ct. 117, 41 L. Ed. 442. Also the observations of Mr. Justice Brewer in his opinion rendered in behalf of the court in *Patton v. Railway Co.*, 179 U. S. 658-660, 21 Sup. Ct. 275, 45 L. Ed. 361, and which is later than *Felton v. Spiro*, lead directly to the conclusion that a judge of the circuit court is authorized to direct a verdict in favor of one party "when, in his deliberate opinion, there is no excuse for a verdict save in favor of" that party; and this without any limitation whatsoever. To our mind, these expressions shadow out the power and duty of the circuit court, even where there is direct testimony on behalf of each party to the controversy, covering the entire case. In a conflict of proofs, with numerous witnesses, and with many facts in dispute, some of a complicated character, all of which appertain to the case at bar, the court, during the progress of the suit before the jury, may not be able to weigh the proofs correctly, and therefore, at least at the first trial, it may, as it did in the present instance, properly postpone its conclusion until after the verdict, when it can have a careful re-examination with the assistance of counsel; but for a court to continue in this line, refusing to direct verdicts, and, it may be, granting new trial after new trial, results in indefinitely postponing justice, and

sometimes in enormously enhancing the cost of litigation, without opportunity of relief, while to order a verdict submits the whole case at once to the appellate tribunal, with an opportunity for a seasonable and authoritative determination of the merits.

The plaintiff's appearance as a witness was, on the whole, excellent. The court instructed the jury with reference to the effect of the testimony of interested parties thoroughly, and apparently to the entire satisfaction of the defendant. The defendant was assisted by counsel of very large experience in the trial of jury causes. The case, on every hand, was developed with great care and thoroughness. There was nothing in the conduct of the jury, either in this cause or in subsequent causes in which its services were availed of by the court, which would raise any suspicion that it had any desire except to fulfill strictly the oath which it took. Nevertheless, there is one feature which the trial developed, bearing on the issue of the alleged promise by defendant's foreman, which the jury must have failed to properly appreciate, and which renders it clear that the verdict should not have been rendered. Among other witnesses called by the defendant was McGinley, already named, unchallenged so far as integrity was concerned. He testified that he was at work with the plaintiff on the top of the fines burner on the day the plaintiff was injured, engaged in the same work as the plaintiff, and relieving him. He also testified that he left the place of work briefly for a drink of water, and that during his absence the plaintiff was injured. His testimony is supported by the direct evidence or by the silence of several other witnesses who were in the immediate neighborhood of the fines burner, and who went at once to the aid of the plaintiff when he was injured; and no serious attempt was made to challenge it. There can be no moral doubt that McGinley was on top of the fines burner, at work with the plaintiff, prior to the injury, and that the injury occurred while McGinley was absent obtaining water, as already stated. This fact is incompatible with the case as made by the plaintiff at the trial. The court perceives that there is a possibility of shaping this fact so as to leave a theoretical reconciliation, but an attempt to do this would involve a substantially different claim from that on which the plaintiff went to the jury, and a substantially different rule of law, as the court fully explained in its charge in the presence of the parties. No attempt was made by the plaintiff to reconcile the fact of McGinley's presence with the case as made by him at the trial, and whatever theories the court might now suggest in that direction would not be justified, because the court cannot now properly place the case where the plaintiff did not assume to place it. Therefore, as the jury should have regarded the presence of McGinley as wholly and essentially incompatible with the testimony of the plaintiff, which he made the basis of his case, that he asked the foreman, "The man—where is the man I had the day before?" that he said, "I wants a man here;" that thereupon the foreman said, "You go ahead, and I will watch for the gas for you, and smoke,"—it follows that the jury failed to appreciate the force of this when it found that the foreman promised the plaintiff in the form testified to by the latter, as it must have done in order to have

rendered a verdict for the plaintiff, unless it misunderstood and disregarded the instructions of the court bearing on this particular topic.

While, as already said, various other matters in conflict between the plaintiff and the other witnesses are not of such character as would alone have justified the court in taking the case from the jury, yet these are sufficient to give color and support to the proposition on which we allow the motion for a new trial to turn, and leave us satisfied that justice will be promoted by sending the case to another jury, under circumstances where, perhaps, it can be better developed by the parties, as well as better understood.

Ordered, the verdict for the plaintiff is set aside, and a new trial is granted.

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In re TALBOT.

(District Court, D. Massachusetts. October 15, 1901.)

No. 4,661.

**BANKRUPTCY—PROVABLE DEBT—CLAIM OF WIFE FOR MONEY LENT.**

The provability of a wife's claim against the estate of her husband in bankruptcy for money lent him from her separate estate depends upon its enforceability, either at law or in equity, in the courts of the state. In Massachusetts, where such contracts are held contrary to public policy and not enforceable either in law or equity, such a claim cannot be proved as a debt in bankruptcy.

In Bankruptcy. On review of decision of referee.

William D. Whitmore, Jr., for creditor.

Alfred W. Putnam, trustee, pro se.

LOWELL, District Judge. In this case a wife seeks to prove against the estate of her bankrupt husband for money advanced to him from her separate estate as a loan. In *Re Blandin*, 1 Low. 543; Fed. Cas. No. 1,527, Judge Lowell held that a claim like this could be proved. In *re Blandin* has been cited with approval by the supreme court of the United States in *Fleitas v. Richardson*, 147 U. S. 550, 555; 13 Sup. Ct. 495, 37 L. Ed. 276, and by several inferior federal courts. Under ordinary circumstances, I should follow it without question. The decision was rested upon the ground that although the claim was not provable in a Massachusetts court of insolvency, because in that court only legal debts could be proved, yet it was provable in bankruptcy, because "equitable debts are within the scope of the bankrupt act." Judge Lowell assumed that the wife's claim here in question was enforceable in a Massachusetts court of equity. "And it is generally true that a contract void at law is void in equity. To this general rule there are well-known exceptions, one of which is a contract between husband and wife concerning her separate property, which courts of equity will uphold and enforce. In this way a wife may become the creditor of her husband. I do not understand that it has ever been decided in this

commonwealth that these doctrines do not fully apply in equity to separate property held under the statute." 1 Low. 544, Fed. Cas. No. 1,527. But in *Woodward v. Spurr*, 141 Mass. 283, 6 N. E. 521, it was decided, even after equitable debts had by statute been admitted to proof in insolvency, that the claim of a wife could not be proved in insolvency, because:

"It has been held in this commonwealth, by a series of decisions, that where money is lent by a wife to her husband, or conversely, there is no remedy, either at law or in equity, against him or against his estate. These decisions do not rest upon the ground of the marital incapacity to sue, but upon the ground that by the policy of the law the attempted contract of borrowing and lending between husband and wife is void, by reason of their incapacity to deal with each other. To make a contract which is clearly invalid at common law the foundation of an equitable liability is to disregard well-established principles. When contracts are themselves not authorized, validity cannot be imparted to them by affording a remedy for the breach of them through the medium of a court of equity." 141 Mass. 286, 287, 6 N. E. 524.

And in *Bank v. Tyndale*, 176 Mass. 547, 550, 57 N. E. 1022, 1023, 51 L. R. A. 447, 450, it was said:

"But a party cannot be relieved in equity, we think, by reason of an estoppel, any more than at law, from the effect of a positive rule of law. It is the rule of law that controls the conduct of parties, not the conduct of parties the rule of law. To hold otherwise would be to permit parties to set aside at their pleasure, with the aid of a court of equity, the rule of the common law which has been declared and recognized by the legislature and by this court, that contracts between husband and wife are void."

It follows, therefore, that the premises upon which Judge Lowell based his decision in *Re Blandin* are no longer sound. He supposed that a Massachusetts court of equity would enforce a liability like that here sought to be proved. Since his decision, the courts of Massachusetts have decided that the liability cannot be enforced in equity any more than at law, because enforcement is contrary to the public policy of the commonwealth. In *Fleitas v. Richardson*, 147 U. S. 550, 13 Sup. Ct. 495, 37 L. Ed. 276, the court, while citing with approval *In re Blandin*, yet recognized that the provability in bankruptcy of a claim must depend upon the validity of the claim in the state where it arose. "The law of Louisiana as to the rights of married women, which must have a controlling influence on the decision of this case, differs widely from the common law." 147 U. S. 552, 13 Sup. Ct. 496, 37 L. Ed. 278. "Such being the nature of the liability of the husband to the wife for her paraphernal property under the law of Louisiana, it was clearly provable by her against him as a debt under the bankrupt act of the United States." 147 U. S. 555, 13 Sup. Ct. 497, 37 L. Ed. 279. From these cases it appears that the provability of the wife's claim must depend upon its enforceability, either at law or in equity, in the courts of the state. A claim like that here in question cannot be enforced in Massachusetts by either legal or equitable proceedings, and so it cannot be proved in this court of bankruptcy. After *Woodward v. Spurr* was decided, Judge Lowell appears to have reached this conclusion, for in his work on Bankruptcy, dealing with the provability of the claims of a wife against a husband, he says, "In Massachusetts, notwithstanding the



recent statutes, a debt between husband and wife, being void at law, creates no equitable liability." Lowell, Bankr. p. 140.

The judgment of the referee, following *In re Blandin*, is reversed, and the claim of the wife is denied proof.

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In re DOLE.

(District Court, D. Vermont. October 3, 1901.)

**1. BANKRUPTCY—ESTATE—RENTS OF MORTGAGED PROPERTY.**

An agreement by a mortgagor to collect the rents from the mortgaged property, which was in his possession, and to pay the same to the mortgagee on the mortgage debt, does not make him the agent of the mortgagee to collect such rents, nor give the mortgagee title to such as are uncollected or have not been paid over at the time the mortgagor is adjudged a bankrupt.

**2. SAME—RENTS ACCRUING AFTER ADJUDICATION.**

Rents accruing after adjudication for mortgaged property of the bankrupt which comes into possession of the trustee, and before the mortgagee has taken such action as to entitle him to possession of the property, belong to the estate.

In Bankruptcy.

May & Simonds, for petitioner.

Trustee, pro se.

WHEELER, District Judge. This is a review of a decision of the referee denying a petition of the Caledonia National Bank for the payment of rents accrued and accruing on the bankrupt's real estate to the petitioner as mortgagee. As to the rents accrued before adjudication, the cashier of the bank appears to have notified the bankrupt that he must collect the rents and pay the same on the mortgage, which the bankrupt agreed to do, and upon this the bank relied and was controlled. There does not appear to have been any notice to the tenants, or other possession taken by the mortgagee, and without such the rents would belong to the mortgagor. His agreement to collect them was merely an agreement to collect what was his own, and the agreement to pay over was no more than an agreement to pay his own debt, and neither or both would have any effect upon the title to the rents accrued or accruing. Something more was necessary in order to make the rents become the property of the bank. It was the same as if he had agreed to sell any other property of his own and pay the proceeds upon his debt, which, if done, would pay so much, but, if not done, would not at all affect the title to the property. What was agreed to be done was within his own right, and did not make him an agent of the bank about doing what would be for himself. The agreement upon performance would have been effectual, but unperformed left the rents as they were before. Upon the bankruptcy proceedings, the rents went with the other property to the trustee. After the adjudication the rents continued to accrue to the trustee, and would so continue until something should be done that would change the accruing to the mortgagee. Nothing appears to have been done in that direction but to give notice to the tenants

to pay to the mortgagee. The property and its revenues were after that in the custody of the trustee as an officer of the court, which could not be affected adversely but by application to the court, and no such application was made. The trustee had nothing to do but to collect the rents as a part of the estate in bankruptcy. He would not be warranted in giving them up, otherwise than with the property itself.

Decision of referee affirmed, without prejudice.

### In re LENGERT WAGON CO.

(District Court, S. D. New York. October 9, 1901.)

#### 1. BANKRUPTCY—JURISDICTION OF BANKRUPTCY COURT—INSOLVENCY PROCEEDINGS IN STATE COURT.

Bankruptcy proceedings properly instituted vest the court of bankruptcy with exclusive jurisdiction to administer the estate of the bankrupt, and oust the jurisdiction of a state court which has appointed a receiver in insolvency proceedings, and a receiver appointed by the court of bankruptcy is entitled to possession of the property.

#### 2. SAME—PROPERTY IN POSSESSION OF STATE RECEIVER.

Under the rule of comity between federal and state courts, a receiver appointed by a court of bankruptcy will be required to apply to a state court for an order requiring its own receiver to turn over property of the bankrupt of which it has obtained possession in insolvency proceedings.

**In Bankruptcy.** On motion to compel a receiver appointed in proceedings in a state court to turn over property of a bankrupt corporation.

Edwin C. Dusenbury, for receiver in bankruptcy.

George W. Carr, for receiver in state court.

ADAMS, District Judge. Certain judgments were entered against the Lengert Wagon Company in the supreme court of the state of New York, and thereunder, on the 20th of September, 1901, property of the corporation was levied upon by the sheriff of New York county under executions issued upon the judgments. Thereafter proceedings were instituted in the state court by the directors of the corporation for a voluntary dissolution thereof on the ground of the insolvency of the corporation, and a temporary receiver of the property and effects of the corporation was appointed by an order of the court dated the 23d of September, 1901. The receiver under this order did not obtain possession of the property from the sheriff, but it is contended that his title related back to the date of his appointment, and he was entitled to the actual possession. In re Christian Jensen Co., 128 N. Y. 550, 553, 28 N. E. 665; In re Schuyler's Steam Towboat Co., 136 N. Y. 169, 32 N. E. 623, 20 L. R. A. 391; Moran v. Sturges, 154 U. S. 256, 283, 14 Sup. Ct. 1019, 38 L. Ed. 981. On the 25th of September, 1901, involuntary proceedings against the corporation were commenced in this court. On the 27th of September, 1901, a receiver of the property of the bankrupt was appointed under section 2 (3) of the bankruptcy act, and an attempt made by him to

obtain possession of the property. This was resisted by the receiver and sheriff in the state court, and the receiver in this court now applies for an order specifically directing those officers to turn the property over to him. The contention on their part is that, as the state court obtained jurisdiction of the matter and possession of the property before the proceedings were instituted in this court, the possession cannot be disturbed by process issued from this court; citing *In re Chambers*, 3 Am. Bankr. R. 537, 98 Fed. 865; *Trust Co. v. Benbow*, 3 Am. Bankr. R. 9, 96 Fed. 514. But the proceeding in the state court is one incident to the insolvency of the corporation, and it seems to be well settled that the bankruptcy act gives exclusive jurisdiction to the United States courts in such matters, where proceedings are properly instituted, and ousts the state courts of all jurisdiction with respect to the possession or distribution of insolvent estates. *Tua v. Carriere*, 117 U. S. 201, 6 Sup. Ct. 565, 29 L. Ed. 855; *In re Smith* (D. C.) 92 Fed. 135; *In re Independent Ins. Co.*, Fed. Cas. No. 7,018; *Thornhill v. Bank*, Fed. Cas. No. 13,992; *Griswold v. Pratt*, 9 Metc. (Mass.) 16; *In re Storm* (D. C.) 103 Fed. 618. The receiver of this court is therefore entitled to the custody of the property, but in view of the comity which exists between the federal and state courts, and the fact that the receiver is an officer of the state court, and acting under its immediate direction, application should be made to it for a proper order in the case. *In re Lesser* (D. C.) 100 Fed. 433, 439. In the meantime the receiver in the state court will be restrained from disposing of the property in any way.

When the property is delivered to the receiver of this court, the sheriff may apply here for the allowance of his reasonable disbursements.

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**In re BAILEY.**

(District Court, D. Vermont. October 10, 1901.)

No. 708.

**BANKRUPTCY—PREFERENCE—NEW CREDIT.**

An insolvent debtor owed an account for goods, to apply on which he gave a check, which was protested, and not paid. He afterwards ordered more goods, and subsequently made a payment on account. *Held*, that such payment could not be applied to the check, so as to make the date of the check the date of the preference, and entitle the creditor to set off the new credit in bankruptcy against such preference.

**In Bankruptcy.** On review of decision of referee. Submitted on report.

**WHEELER**, District Judge. The bankrupt appears to have been owing the Burlington Grocery Company \$492.20, to have given it a check for \$287 and an order for \$114.99 more goods, and, the check being protested and unpaid, to have afterwards paid \$292.07 on account, leaving \$790.28 due at the time of adjudication. This payment of \$292.07 appears to be a preference, which must be surrendered before proof of the claim; but the act provides that if, after

a preference, the creditor gives further credit for property which becomes a part of the estate, the new credit may be deducted from the preference to be surrendered; and the creditor insists that this new credit of \$114.99 should be deducted from the preferences by the payment of the \$292.07, and proof allowed on surrender of the balance. This would be right if the check had constituted the preference; but it did not. The \$292.07 did not pay the check, but was paid upon account, and the check was never paid. The situation was the same when this payment was made as if the check had never been drawn, for the debt covered the whole amount due, including that for which the check was given. The payment constituted the preference, and there was no new credit given afterwards for property that became a part of the estate. The whole payment must therefore be surrendered before proof can properly be allowed.

Decision of referee affirmed.

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In re KERSTEN et al.

(District Court, E. D. Wisconsin. August 23, 1901.)

**1. BANKRUPTCY—ACTS OF BANKRUPTCY—ADMISSION BY PARTNER.**

An admission in writing, signed by one of two members of a firm of private bankers, and purporting to be made on behalf of both, that they are unable to pay their debts, and are willing to be adjudged bankrupts, constitutes an act of bankruptcy, under Bankr. Act 1898, § 3a, cl. 5, and its force is not impaired by the statement, as a reason for such inability, that they have been dispossessed of their property by proceedings instituted under the state banking law, such admission as an act of bankruptcy having reference to a present inability to pay, and not to the ultimate insufficiency of assets.

**2. SAME—SUFFERING PREFERENCE.**

Where the members of an insolvent firm appeared in a suit against them for the appointment of a receiver, and named persons for such receiver, they must be held to have "suffered or permitted" any preference obtained by creditors through such suit.

**3. SAME—HEARING AND PETITION—DEFENSES.**

The fact that the assets of an alleged bankrupt partnership are in the possession of a receiver of a state court cannot be pleaded in defense to a petition in bankruptcy against the partnership, nor considered on the hearing of such petition, since the question which court has jurisdiction to administer the estate can only arise after an adjudication has been made and a trustee appointed.

In Bankruptcy. On petition in involuntary bankruptcy.

Sheridan & Wollaeger, for petitioning creditors.

A. J. Schmitz, for bankrupts.

J. C. Kerwin, for answering creditors.

SEAMAN, District Judge. This is an application by the requisite number of creditors and amount of claims for an adjudication of bankruptcy against Theodore Kersten and Henry Kersten, as co-partners in a private banking business, and the issues arise upon answer and plea interposed by certain other creditors of the firm. The primary question is whether a case is presented by the petitioning creditors, and I am satisfied that upon one or the other grounds al-

leged, if not upon both, the petitioners are clearly entitled to the exercise of the bankruptcy jurisdiction, and an adjudication against the co-partners individually and collectively. Section 4b of the bankruptcy act expressly includes "private bankers" in its provisions. The fact of insolvency stands undisputed. The one act of bankruptcy within the terms of the law appears in an admission in writing made by Theodore Kersten, and purporting to be so made on behalf of himself and Henry Kersten, constituting the firm, that they are unable to pay their debts, and are willing to be adjudged bankrupts. It is true that the writing states, as the reason for such inability, action by the bank examiner in dispossessing them, and the filing of a complaint and appointment of a receiver, under the provisions of chapter 317 of the Laws of Wisconsin for 1901, and that it also appears that the instrument is not signed by Henry Kersten. But I am of opinion that the force of the admission of their inability to pay the debts of the firm is not impaired by the specification of the cause thereof, as the conditions thus stated are proven to exist in fact, and unquestionably prevent any payment of debts by the co-partners; and the test for the purposes of this admission as an act of bankruptcy is not that of ultimate sufficiency or insufficiency of the assets to meet the indebtedness, but of present inability to pay. In respect of the single signature to the admission, it purports to be made on behalf of both, and the right to so bind upon express authority is undoubted, however the rule may be as to the implied authority of one co-partner to thus make the admission for the firm; and such authorization may be presumed from acquiescence or failure to disaffirm when the opportunity for such issue is presented. So the admission must be treated as an unqualified act of bankruptcy within the terms of section 3 (5). The further ground, appearing from the proofs, and covered by the amendment allowed, relates to the action of the alleged bankrupts in their petition to the circuit court of Calumet county in the suit there pending for the appointment of a receiver, naming persons for such appointment in the event of granting the application, and, I have no doubt, amounts to a general appearance for all the purposes of that suit. Thus appearing as parties in such proceeding, it must be held that any preference thereby obtained by certain creditors was "suffered and permitted" by them, and constituted an act of bankruptcy within section 3 (3); and the fact of such operation of the proceeding under the state enactment appears in the proof of payments made to creditors within the preceding four months, and the absence of any provision in such cases analogous to section 57g of the bankruptcy act.

The further question, as to jurisdiction over the assets of the bankrupts, now in the possession of the receiver appointed by the circuit court of Calumet county, which is set up in a plea by the answering creditors, is not one affecting the jurisdiction of the court to proceed to an adjudication in bankruptcy, and cannot be raised at this stage of the proceedings, nor in the form here presented. It is true that jurisdiction over the estate of a bankrupt is essential for its due administration under the provisions of the act of congress, but, if the jurisdiction of the bankruptcy court to that end is ultimately ques-

tioned, the issue can arise only after bankruptcy is adjudged, and a trustee or other custodian is appointed, and qualified to take possession. The showing in this record of the action pending in the circuit court of Calumet county, and of its custody of the estate, through a receiver, under the provisions of the state statute, while tending to establish an act of bankruptcy, as above indicated, appears thus far to be an exercise of the jurisdiction which is clearly vested in that court by the laws of the state. If such action involves administration of the estates of debtors within the statute, in the nature of insolvency proceedings, it cannot be doubted that jurisdiction to that end is suspended when an adjudication of bankruptcy intervenes and becomes paramount under the bankrupt act adopted by congress in conformity to the powers reserved by the constitution. As the national act is thus made controlling, its limitations of jurisdiction are equally binding upon state and federal courts, and it is as well the right as it is the duty of the circuit court of Calumet county in the action there pending to direct its own course when advised of the proceedings in bankruptcy. While it may be found that this court has acquired exclusive authority to administer the estate, no supervisory jurisdiction exists over the proceedings of the state court. Each exercises independent judgment as to the extent of its jurisdiction when the question arises, and surely this court must not take it up prematurely, or in any sense forestall just consideration by the state court having prior custody of the estate. If the adjudication of bankruptcy so operates, as remarked in the recent decision of the supreme court in *Bryan v. Bernheimer*, 5 Am. Bankr. R. 623, 629, 21 Sup. Ct. 557, 559, 45 L. Ed. 814, that the property of the bankrupts is "thereby brought within the jurisdiction of the court of bankruptcy," it nevertheless rests with the state court, in the first instance, at least, to determine its course when such contingency is duly presented. Moreover, the judicial custody can be changed only through action by the state court for its release, or through plenary procedure, in conformity with the law which governs both jurisdictions, and in accord with comity. An adjudication of bankruptcy will be entered in accordance with this opinion, and the matter referred to Referee Forward, of Oshkosh. It is so ordered.

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In re WAGNER.

(District Court, E. D. Kentucky. September 20, 1901.)

**1. MECHANICS' LIENS—PRIORITY AS BETWEEN LIENHOLDER AND MORTGAGEE—KENTUCKY STATUTE.**

The mechanic's lien law of Kentucky, as amended in 1896, provides (Ky. St. [2d Ed.] § 2463) that mechanics and material men shall have a lien upon the land and improvements, which "shall be superior to any mortgage or incumbrance created subsequent to the beginning of the labor or the furnishing of the materials; and said lien, if asserted as hereinafter provided, shall relate back and take effect from the time of the commencement of the labor or the furnishing of the materials," provided that such lien shall not take precedence of a mortgage or other contract lien or a bona fide conveyance "for value without notice," unless prior to the recording of such mortgage or other lien the me-

chanic or material man shall have filed his claim for lien, or a preliminary statement showing that he has performed labor or furnished material, or expects to do so. *Held*, that since the statute does not prescribe what shall constitute notice to affect a mortgagee who takes his mortgage after a mechanic or material man has commenced to perform labor or furnish materials, or whether such notice must be actual, or only constructive, such question must be determined under the general doctrine and rules of equity, and that under such rules the knowledge of an agent who acted for a mortgagee in taking a mortgage that buildings were being erected on the property was notice to the mortgagee of the rights of a material man who was at the time furnishing lumber for such buildings, and the lien of the latter, duly perfected under the statute, was entitled to precedence over the mortgage.

**2. SAME—KNOWLEDGE OF IMPROVEMENT AS NOTICE OF LIEN.**

Where an agent for a mortgagee in taking a mortgage had knowledge that improvements were being made upon the property, out of which mechanics' liens might arise, and required the mortgagor to secure releases from the mechanics and material men, he is not justified in accepting a statement of the mortgagor that the releases obtained cover all claims; and the fact of such statement will not relieve the mortgagee from the effect of such knowledge of his agent as notice to him of claims which were not in fact released, and the existence of which the agent could have ascertained by reasonable inquiry.

In Bankruptcy. On review of decision of referee giving priority to a mechanic's lien on property of the bankrupt over a mortgage.

Myers & Howard, for Myers.  
H. C. Theisson, for Humpert.

COCHRAN, District Judge. In this case there has arisen a question as to priority of liens on certain real estate of the bankrupt, Wagner, in Covington, Ky., between Joseph Humpert and P. N. Myers. Humpert's lien exists by virtue of the mechanic's lien law of this state; Myers', under a mortgage given by Wagner. The referee decided in favor of Humpert, and on petition of Myers has certified his finding to the court for review.

Humpert furnished lumber to Wagner, which was used in the erection of certain improvements, to wit, a brick cottage, a frame house, and an addition to a brick house on said real estate. He began June 18th, and quit October 9, 1900. In November, 1900, within the time allowed by law, to preserve his lien, he filed an original and amended statement in the clerk's office of the Kenton county court, which were in due form, claiming a lien on the property for the sum of \$377.87, the balance then due him. On July 12, 1900, shortly after Humpert began furnishing lumber, Myers loaned Wagner \$1,000 upon a mortgage on said real estate, which was lodged for record and recorded in said office on that date. At that time, as before stated, Humpert had not filed any statement setting forth his lien. The question of priority between these two liens depends upon section 1, art. 1, c. 151, Acts 1891-93, entitled "An act concerning liens," approved February 25, 1893, as amended by section 1, c. 29, Acts 1896, approved March 21, 1896, which is the same as section 2463, Ky. St. (2d Ed.), under which Humpert's lien has arisen, and which is as follows:

"A person who performs labor or furnishes materials in the erection, altering or repairing a house, building or other structure, or for any fixture or

machinery therein, or for the excavation of cellars, cisterns, vaults, wells, or for the improvement in any manner, of real estate, by contract with, or by the written consent of, the owner, contractor, sub-contractor, architect or authorized agent, shall have a lien thereon, and upon the land upon which said improvements shall have been made or on any interest such owner has in the same, to secure the amount thereof with costs; and said lien on the land or improvements shall be superior to any mortgage or incumbrance created subsequent to the beginning of the labor or the furnishing of the materials; and said lien, if asserted as hereinafter provided, shall relate back and take effect from the time of the commencement of the labor or the furnishing of the materials. Provided, that such lien shall not take precedence of a mortgage or other contract, lien or bona fide conveyance for value without notice, duly recorded or lodged for record according to law, unless the person claiming such prior lien shall, before the recording of such mortgage or other contract, lien or conveyance, have filed in the clerk's office of the county court of the county wherein he shall have performed labor or furnished material, or shall expect to perform labor or furnish materials, as aforesaid, a statement showing that he has performed or furnished, or that he expects to perform or furnish, such labor or materials, and the amount in full thereof, and his lien shall not, as against the holder of said mortgage or other contract, lien or conveyance, exceed the amount of the lien claimed, or expect to be claimed, as set forth in such statement. The statement aforesaid shall, in other respects, be in the form of the tenor prescribed by section six of the act to which this is an amendment. The liens provided for herein shall in no case be for a greater amount in the aggregate than the contract price of the original contractor; and should the aggregate amount of liens exceed the price agreed upon between the original contractor and the owner, then there shall be a pro rata distribution of the original contract price among said lien-holders."

This statute expressly provides that the mechanic's or material man's lien created by it shall date from the beginning of the labor or the furnishing of the materials, and that it shall be superior to, or take precedence of, any mortgage or conveyance made subsequent to that time, except one for value without notice, and that it shall be superior to, or take precedence of, such mortgage or conveyance if the required statement is previously filed. As this was not done in this case, it follows that if Myers took his mortgage, which was for value, without notice of Humpert's lien, it should have priority, otherwise not. And the burden was on Myers to establish that he so took it. Myers did not testify in the case at all. The only testimony in it is that of his attorney who made the loan for him. He testified that before making the loan he examined the records of the Kenton county court for liens on the property, and found none; also that he stated to Wagner that he must obtain a release of their liens from all persons engaged either in laboring or furnishing materials in the erection of said improvements, and that, in pursuance of this requirement, Wagner gave him such a release signed by seven persons, who designated themselves therein, respectively, as brickmaker, plasterer, contracting carpenter, stone mason, furnisher of stone, bricklayer, and painter, and represented to him that these were all the persons so engaged. This testimony presupposes that Myers' attorney knew when he made the loan that the property was being improved, and that by mechanics and material men, and the release states the character of the improvements that were being made. He did not expressly deny that when he made the loan for Myers he had notice of Humpert's lien, or that he was furnishing lumber for



the improvements, nor did he so state that he believed that the persons signing the release were all the lienholders. Such denial and statement are to be inferred only from his testimony, as above recited. The release is dated July 31, 1900, and there is no explanation as to how this came to be so, on the basis, as testified to by Myers' attorney, that it was delivered, and the representation as to the parties signing was made, before the making of the loan and mortgage on July 12, 1900.

Assuming, however, that Myers himself did not have any direct information as to Humpert's lien, and that his attorney did not either, but, on the contrary, believed that the parties signing the release were all the lienholders, was Myers a mortgagee without notice, within the meaning of the statute? The answer to this question is contingent upon the effect to be given to the two facts, to wit, that Myers, through his attorney, if not directly, knew when the loan was made that the property was being improved, and the character of the improvements, and that Wagner represented to Myers' attorney at that time that the parties signing the release were all the persons engaged in furnishing either labor or material for said improvements. In determining the effect of these two facts we are not without aid from the decisions of the court of appeals of this state, if, indeed, they have not settled the matter. The early mechanic's lien laws of Kentucky were local in their character; that is, limited to certain cities and counties. As a rule, they did not require that a statement should be filed in the clerk's office of the county court to preserve the lien, and did not expressly provide that, if asserted in the manner and time required, the lien should date from the beginning of the furnishing of the labor or materials. But it was held by the court of appeals, in construing these statutes, that it did so date, and that it took precedence of any mortgage or conveyance of the property thereafter made, whether with or without notice of it. *Institution v. Lowe*, 1 B. Mon. 257; *Trustees v. Young*, 2 Duv. 582. Judge Robertson, in the latter case, said:

"Any other construction of the beneficent statute enacted for the encouragement and security of building mechanics might frustrate its object and make it a mockery. They undertook to work, as in this case, on the faith of the plighted lien for the entire job; and shall they have either to quit work, or go on without the security of a lien for what they might do after the interposition of a stranger's intermediate purchase or incumbrance? This, in our judgment, is not so, and ought not to be so."

The mechanic's lien laws of a great many of the states are similar to these early laws of Kentucky, as thus construed, in this respect. 15 Am. & Eng. Enc. Law, p. 86. They are, no doubt, relieved of any serious hardship to a subsequent mortgagee or purchaser by the consideration that by reasonable inquiry he can ascertain whether the property is being improved, and, if so, the extent of any liens on it due to this fact. The theory upon which they proceed is thus stated by Sanborn, circuit judge, in the case of *Wisconsin Trust Co. v. Robinson & Cary Co.*, 15 C. C. A. 668, 68 Fed. 778:

"The theory and reason of the statute are that during the construction of the new building or improvement, and for 90 days thereafter, the new building or improvement itself shall be notice to all purchasers and incum-

brancers of the lien upon it, and that all who take any title to or mortgages upon the land on which it stands during this time shall take the title cum onere, and with constructive notice of every mechanic's lien that has attached to it. It is for this reason that the statute does not require the filing of any account to preserve the lien against them, and declares that the omission to file it shall not defeat the lien, except against purchasers and incumbrancers in good faith whose rights accrue after the 90 days have expired."

The mechanic's lien law of 1858 (Myers' Supp.) was quite similar to these earlier laws. It contained, however, this distinguishing provision, to wit:

"Sec. 12. The lien herein provided shall not be effectual or valid against a bona fide purchaser for a valuable consideration, without notice, actual or constructive, of such lien; but if the purchaser receives notice of the lien before the payment of the whole purchase money, the lien shall operate on the purchase money remaining unpaid. The pendency of a suit to enforce the lien, or a written statement of the lien, its amount, and the property liable to it, filed in the clerk's office of the county court of the county in which the land is situated, shall each be deemed constructive notice of the lien to subsequent purchasers; upon such a statement of the lien being filed in the clerk's office of the county court, the clerk shall endorse therein the time of filing same, and shall forthwith cross-index the same in the names of the owners of the property, subject to the lien, and of the claimant of the lien, in the index to the book in which mortgages are recorded, for which, and for receiving, filing away and preserving the statement, he shall receive fee of twenty-five cents."

In the case of *Gore v. Cushing*, 5 Bush, 304, the word "purchaser," in this section, was construed to include "mortgagee." And in the case of *Foushee v. Grigsby*, 12 Bush, 75, it was held that a firm, one of whom was the brother-in-law of one of the members of another firm owning and improving a hotel in Lexington, and both of whom lived in that city, and knew that the property was being improved, which became the surety of the latter firm for money borrowed, and received a mortgage on said property to secure it, was a bona fide mortgagee for value, without notice, actual or constructive, of the liens of the mechanics and material men growing out of the improvements. The reasoning upon which this conclusion was reached is thus stated by Judge Pryor in the opinion delivered by him on behalf of the court:.

"The fact that some of the appellants were at work on the property, and material being furnished by others, at the time the mortgage was executed, was not an actual notice of the existence of the lien. It was notice that the property was being repaired, but gave no evidence to the purchaser of the nature of the contract between the employer and the employes, or that the money for the labor and materials furnished was unpaid. It is the lien that the purchaser must have notice of, and not the fact that the property is being improved. If the fact that work was being performed on the building was sufficient to put the purchaser on inquiry, it could only be deemed constructive notice, and would not affect the rights of the purchaser. The statute creating the lien in favor of the mechanic has defined the character of the constructive notice necessary to defeat the claim of the purchaser, and give to the mechanic a prior lien: 'The lien shall not be effectual or valid against a bona fide purchaser for a valuable consideration without notice, actual or constructive. The pendency of a suit to enforce the lien, or the filing of the account or statement in the clerk's office of the county court, as required by the 6th section of this chapter, shall be deemed constructive notice;' showing clearly that the legislature never contem-

plated that the purchaser should make inquiry of the laborer on the building to know whether he was paid by the day, or by the contractor or the employer, or whether he was himself the contractor, and the employer was in arrears to him. Constructive notice, as fixed by the statute, consists in filing the claim in the county clerk's office or in bringing the action to enforce the lien; and, as neither mode can be adopted until the work is completed, the purchaser must have actual notice of the lien, so as to affect his rights. If the law is defective, the legislature alone has the power to amend it; and to charge the purchaser by reason of a constructive notice other than that designated by the act creating the lien would be in disregard of the plain letter of the statute."

On the basis that knowledge by persons closely connected with the owner of property that it is being improved by mechanics and material men is, at best, constructive notice, the reasoning of the court is correct. But it is questionable, to say the least, whether such knowledge does not constitute what Mr. Pomeroy calls "actual notice inferred from circumstantial evidence." 2 Pom. Eq. Jur. § 600. This mechanic's lien law of 1858 was substantially embodied in the General Statutes of Kentucky, adopted April 22, 1873. Section 14 of chapter 70 thereof is the same as section 12 of the law of 1858. In the latter law there was imported a provision requiring the filing of statement in the office of the clerk of the county court within a certain time, for the purpose of preserving the lien, as well as to give constructive notice of its existence, and such has been a feature of the mechanic's lien law of Kentucky ever since. No change was made in that law, as contained in the General Statutes, until the "Act concerning liens," approved February 25, 1893 (Acts 1891-93, c. 151, p. 505). Section 1 thereof, which is the same as section 2463, Ky. St. (1st Ed.), is as follows:

"A person who performs labor or furnishes material in the erection, altering, or repairing a house, building, or other structure, or for any fixture or machinery therein, or for the excavation of cellars, cisterns, vaults, wells, or for the improvement, in any manner, of real estate by contract with, or by the written consent of, the owner, shall have a lien thereon, and upon the land upon which said improvements shall have been made, or on any interest such owner has in the same, to secure the amount thereof with costs; and said lien on the land or improvements shall be superior to any mortgage or incumbrance created subsequent to the beginning of the labor or the furnishing of the materials; and said lien, if asserted as hereinafter provided, shall relate back and take effect from the time of the commencement of the labor or the furnishing of the materials."

If this were the sole provision of this act, there would be room to claim that it was a reversion to the local laws as they existed prior to the law of 1858, and as they were construed in the cases referred to in respect to giving precedence to the lien created by it to any mortgage or conveyance subsequent to the beginning of the improvement. But section 15 thereof, the same as section 2477, Ky. St. (1st Ed.), is as follows:

"The liens declared in this article shall, if the lienholder complies with the requirements of sections six, seven, and eight hereof, and does so within the time therein fixed, be valid and effectual against any creditor of, or bona fide or other purchaser from, the owner of said property."

In view of this section, it would seem that a lien arising under this statute would not be superior to a mortgage for value, without

notice, created subsequent to the beginning of the lien; and in the case of *Association v. Volmering* (Ky.) 47 S. W. 1084, which arose under that statute, it was assumed that such was the case. For the court there held that the mechanic's lien was superior to the mortgage, not because it was prior in time, simply, but because, in addition to this, the mortgagee had notice of the lien when he took the mortgage. And it was held that knowledge on the part of the mortgagee that the property was being improved constituted notice of the mechanic's lien. Guffy, J., said:

"The main question presented for decision is whether or not the appellees acquired mechanics' liens upon the property in question superior to that of appellant's mortgage lien. It seems evident that at the time of the execution of the mortgage appellant had actual notice of the contract for improvements, and that the work had progressed to a considerable extent at the time of the execution of the mortgage. It therefore follows that the lien of the original contractor, as well as the liens accruing to the subcontractors, mechanics, and material men, takes precedence of the mortgage lien of appellant."

This act of February 25, 1893, was amended by the act of March 21, 1896. Among other amendments, there was substituted for section 1 thereof the provision quoted at the beginning of this opinion, which is the same as section 2463, Ky. St. (2d Ed.), and which controls this case.

It is claimed by counsel for Myers that the case of *Foushee v. Grigsby*, supra, is decisive of the construction to be put on this provision, and that the case of *Association v. Volmering* has no bearing thereon. The ground of the latter contention is that it arose under the act of February 25, 1893, before it was amended by the act of March 21, 1896, and that, according to it, a mechanic's lien, which was prior in time to a mortgage, took precedence to it, even though it was for value, without notice. The answer to this contention is that, in view of section 15 of said act, such is not the proper construction thereof; and in that case, to say the least, the court assumed that, if the mortgagee therein had been a mortgagee for value, without notice, the mechanic's lien would not have been adjudged superior to it. As to the case of *Foushee v. Grigsby*, it is clear that it is not an authority in support of the construction which counsel urges should be put upon the law as it now stands. The ground upon which it was held in that case that information of the fact that the property in question was being improved when the mortgage was taken was not notice of the liens of the mechanics and material men engaged in improving it was that such information, if notice at all, was only constructive notice. It was not actual notice,—not even actual notice inferred from circumstantial evidence. And though it might be constructive notice, irrespective of statutory determination, the statute under consideration in that case had defined what should be constructive notice of the liens created by it, so as to affect a subsequent mortgagee or purchaser. Inasmuch as information that the improvements were being made was not actual notice, in any respect, and was not constructive notice according to the definition of the statute, it necessarily followed that the subsequent mortgagees were not affected by such information. Such a

process of reasoning can find no room in the construction of the present statute. It provides that the liens created by it, which date from the beginning of the labor or furnishing of the materials, shall not take precedence of a subsequent mortgage or conveyance for value without notice unless a statement has been previously filed as authorized by it. If such statement has been previously filed, the lien is superior to every mortgage or conveyance subsequently made. If not, it is not superior to a mortgage or conveyance subsequently made, which is for value and without notice, but, though such statement has not been previously filed, it is superior to a mortgage or conveyance subsequently made, which is not for value, or, though for value, is with notice of the lien. There is no express reference in the statute to either actual or constructive notice,—much less, any definition of either kind. The only distinction as to kinds of notice which it can be said to recognize in any way is such as arises from the filing of the statement, and such as arises otherwise. In determining, therefore, what is such notice as will affect a subsequent mortgagee or purchaser for value, other than the mere filing of the statement, we have no other guide than the settled doctrines and rules of equity. There is none in the statute itself. Is, then, knowledge or information that certain property which the owner proposes to mortgage or sell is in the state of being improved by mechanics and material men, notice, according to the settled doctrines and rules of equity, of their respective liens, to one who takes a mortgage or conveyance for value from him? It must be held that it is. It is so held by the court of appeals of Kentucky in the case of *Association v. Volmering*, *supra*. And it has been so held in the cases of *Bank v. Taylor*, 91 Tex. 78, 40 S. W. 876, 966; *Graton & Knight Mfg. Co. v. Woodworth-Mason Co.* (N. H.) 38 Atl. 790. In the latter case, Chase, J., said:

"The building being in the course of erection when the claimant took the mortgages, he would have constructive, if not actual, notice of the contract under which the belting was furnished; and his security would be subject to the statutory lien, if one existed. *Institution v. Stone*, 52 N. H. 365; *Pike v. Scott*, 60 N. H. 469, 472."

Now, as to the effect to be given to the other one of the two important facts in this case; that is, to the fact that when Myers' attorney made the loan to Wagner the latter represented to him that the parties signing the release were all the persons engaged in furnishing labor or materials for the improvements then being made upon the property. Does it nullify or destroy the effect to be given to the fact that Myers' attorney knew that the property was being improved? Or, in other words, did he have a right to rely on this representation, and to refrain from further inquiry? The court feels impelled to answer these two questions in the negative. The reason for this is well put in 2 Pom. Eq. Jur. § 601. He says:

"When, however, the grantor, vendor, or mortgagor admits that his title was defective or incumbered, or that there was some outstanding claim upon or equity in the property, or makes any other communication which unexplained would constitute an actual notice, but adds a further declaration to the effect that such defect has been cured, or incumbrance removed, or claim or equity rescinded and destroyed, the purchaser, according to the

weight of authority, is not warranted in accepting and relying upon this explanation or contradiction. The information obtained under such circumstances and from such a source is sufficient to put a prudent man upon an inquiry. The reason of this is plain. The informant is under a strong personal interest to misrepresent or conceal the real facts. While the former branch of his communication is made against his interest, and is therefore more than likely to be true, the latter part is in conformity with his personal interest, and is essentially untrustworthy."

In the case of *Littleton v. Giddings*, 47 Tex. 109, it was held that looking at the records and inquiring of the grantor is not enough, when an inquiry among the neighbors would have led to the truth. And in the case of *Russell v. Petree*, 10 B. Mon. 184, Judge Simpson, delivering the opinion of the court of appeals of Kentucky, said:

"It is admitted by the answer the mortgagees had notice at the time the mortgage was executed that the bonds for the lots were in the possession of Russell, having been previously deposited in his hands by the mortgagor as a security for certain purposes. It is alleged, however, that the mortgagor informed them at the same time that, although Russell held the bonds in his possession, he had no further lien upon them or the property, his claim having been previously discharged in full. The information they had, apprising them of the fact that the bonds for the lots were in the possession of Russell, was sufficient to put them upon an inquiry into the nature and extent of his claim. If they relied upon the statements of the mortgagor, they did so at their peril. It was their duty to have ascertained from Russell himself whether he had any claim upon the property. If they failed to do it, the law deems it their own fault, and considers them constructively notified of his equitable rights to their full extent."

The principle upon which these authorities go is that a person put upon inquiry as to an existing claim to or lien upon property with reference to which he is dealing has no right to rely upon the representation of the owner thereof, when it is to the latter's interest not to have such claim or lien discovered, and when there is a disinterested source at hand from which information can be obtained. Such was the case here. Myers' attorney did not even pursue the inquiry with Wagner as far as he might readily have done. The release showed the relation of each man who signed it to the improvements that were being made, and the character of them. It was certain that lumber was being used in making them. None of those who had signed designated himself as having furnished the lumber. It does not appear from the testimony that any inquiries were directed to Wagner as to who had furnished the lumber, and why he had not signed it. Myers' attorney simply accepted Wagner's statement that those who had signed the release were all the lienholders, without more. Further inquiry from Wagner might have disclosed Humpert's claim, and such further inquiry was suggested by the absence of any one who had signed the release designating himself as having furnished the lumber. But, whether Myers' attorney should have pushed the inquiry to this extent with Wagner, there is nothing in the evidence showing that the persons who signed the release—particularly the contracting carpenter—were not within easy reach of any inquiries that might have been directed to them. And, if so, they should have been inquired of, and the representations of Wagner should not

have been entirely relied on. These considerations lead the court to adjudge that Humpert's lien is entitled to priority.

Counsel for Myers urge that because Humpert neglected to file a statement previous to the making of the mortgage, and thus prevented his attorney from discovering the existence of the lien by his examination of the records, it should be postponed to the mortgage. We cannot concur in this position. By such neglect he ran the risk of the property being mortgaged or conveyed to some one for value, without notice of his lien by knowledge of the fact of its being improved or in some other way. No other effect can be given to it. He further urges that what the statute requires, in order to affect a subsequent mortgagee or purchaser, is notice of the lien, and not notice of the improvements being made. This may be true, but, according to the settled rules of equity, notice of the fact that the property is being improved, being sufficient to put the subsequent mortgagee or purchaser on inquiry, is notice of the lien, either actual, inferred from circumstantial evidence, or constructive. That Humpert's lien should have precedence is enforced by the further consideration that, though the burden was on Myers to prove that he was a mortgagee for value, without notice, he has not testified himself at all; that his attorney, who did testify, did not expressly deny that he had notice of Humpert's claim, and expressly state that he believed Wagner's representation to be true, but left it to be inferred only that he had no notice, and so believed; and that no explanation is given how, if the release was executed before the loan and mortgage were made, it came to be dated July 31, 1900,—19 days after the making of the loan and mortgage, which was on July 12, 1900. The finding of the referee is confirmed.

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MYERS et al. v. UNITED STATES.

(Circuit Court, N. D. New York. September 17, 1901.)

1. CUSTOMS DUTIES—FINDINGS OF BOARD OF GENERAL APPRAISERS—WEIGHT ON APPEAL.

A finding of fact made by the board of general appraisers, while not conclusive upon the court on appeal, is entitled to the same weight as the finding of a master in equity, and unless wholly unsupported, or clearly contrary to the weight of evidence, should be sustained.

2. SAME—CLASSIFICATION—MICA.

Mica in small sheets or pieces, which fall off in the process of thumb-trimming, varying in width from one to two inches and in length from two to three and a half inches, is dutiable under paragraph 184 of the tariff act of 1897 (30 Stat. 166) as "mica unmanufactured," and not under paragraph 463 as "waste, not specially provided for."

Appeal by the importers from a decision of the board of United States general appraisers, which sustained the assessment of duty by the collector of customs at Rouse's Point, N. Y., upon the importation in question.

Charles S. Hamlin, for appellants.  
Taylor L. Arms, Asst. U. S. Atty.

COXE, District Judge. The majority of the board found that the merchandise in question is unmanufactured mica, consisting of small sheets or pieces which fall off in the process of thumb-trimming, varying in width from one to two inches and in length from two to three and a half inches. Duty was assessed by the collector under paragraph 184 of the tariff act of 1897 (30 Stat. 166), as "mica, unmanufactured." The importers, by their protest, insist that the merchandise in question should have been assessed as "waste, not specially provided for in this act," under paragraph 463 of the same act. The board overruled the protest, General Appraiser Somerville dissenting, and the importers appealed.

The question before the board was whether the merchandise was "waste, not specially provided for." The burden was upon the importers to establish the affirmative of this proposition and unless they succeeded in doing so it was the duty of the board to affirm the decision of the collector. *Davies v. Arthur*, 96 U. S. 148, 24 L. Ed. 758; *Baumgarten v. Magone* (C. C.) 50 Fed. 69; *In re Sherman* (C. C.) 49 Fed. 224, affirmed 5 C. C. A. 101, 55 Fed. 276; *In re Gerdau* (C. C.) 54 Fed. 143; *Hagedon v. Seeberger* (C. C.) 38 Fed. 401. The board having found specifically that the imported merchandise is not waste, this court, though not absolutely concluded by the finding, is bound to give it the same credence that is accorded to a master's report in an equity cause. "The circuit court should not undertake to disturb the findings of the board upon doubtful questions of fact, and especially as to questions of fact which turn upon the intelligence and credibility of witnesses who have been produced before the board." *In re Van Blankensteyn*, 5 C. C. A. 579, 56 Fed. 474. So that the question is not an original one in this court, to be determined upon a mere preponderance of testimony. Unless the finding of the board is wholly without evidence or is clearly contrary to the weight of evidence it should be sustained by this court. Tested by the rule it would seem to be the obvious duty of the court to affirm the decision of the board.

The elaborate discussion of the question found in the prevailing and dissenting opinions renders extended comment unnecessary. It is enough to say that the finding of the board that there is no commercial meaning of the term "mica waste," and that the imported merchandise cannot be considered "waste," as that term is ordinarily understood, is amply fortified by the testimony. Pieces of mica much smaller than some of those in the official exhibit are concededly used for washers in electrical insulation and for other manufacturing purposes. The merchandise does not lose its character as merchantable mica because it is of an inferior grade. The material called "waste" at the mica mines is refuse thrown out on the dumps, having little value and being incapable of use for any of the purposes for which mica is used. "Waste" as it is known at the mines is an entirely distinct product from the imported merchandise. The facts justified the board in holding that the merchandise in question is unmanufactured mica and not "waste," within the rule laid down by the following authorities: *Patton v. U. S.*, 159 U. S. 500, 16 Sup.



Ct. 89, 40 L. Ed. 233; Seeberger v. Castro, 153 U. S. 32, 14 Sup. Ct. 766, 38 L. Ed. 624; U. S. v. Schroeder, 35 C. C. A. 376, 93 Fed. 448.

The contention that the law operates as a prohibition against the importation of mica in small pieces, and thus works an injustice, is one that should be addressed to congress and not to the courts.

Decision of the board is affirmed.

### FARRELL v. UNITED STATES.

(Circuit Court of Appeals, Eighth Circuit. September 30, 1901.)

No. 1534.

#### 1. CONSTITUTIONAL LAW—PROHIBITING SALE OF INTOXICATING LIQUOR TO INDIAN PATENTEES.

Under its power to regulate commerce with the Indian tribes (Const. art. 1, § 8), congress had authority to pass the act of January 30, 1897 (29 Stat. 506), which declares it to be a crime punishable by fine and imprisonment to sell spirituous liquors to any Indian to whom an allotment of lands has been made while the title thereto is held in trust by the government.

#### 2. CONGRESSIONAL POWER TO REGULATE LIQUOR TRAFFIC WITH INDIAN ALLOTTEES—RENUNCIATION.

Congress did not renounce its constitutional power to regulate the traffic in intoxicating liquors with Indian and mixed-blood patentees while the United States holds the title to their lands in trust for them under the act of February 8, 1887 (24 Stat. 388), by the provisions of that act that such patentees shall have the benefit and be subject to the laws of the state or territory in which they reside, and that they are citizens of the United States, and entitled to all the rights, privileges, and immunities of such citizens, or by any of the other enactments of that statute.

#### 3. PRINCIPAL AND AGENT—OPINION EVIDENCE—CONCLUSIONS OF LAW.

When the authority of an agent is a conclusion of law deducible from various facts, he may not directly testify to it. Where the authority of an Indian agent over a certain Indian was a conclusion of law deducible from the constitution, statutes, and the situation and relations of the Indian, the agent was incompetent to testify what his authority was.

#### 4. SAME.

An agent may testify to the actual exercise of authority, although he is incompetent to testify whether or not he had such authority. An Indian agent may testify that he exercised control over a certain Indian, although his right to exercise that control is a conclusion of law to which he is incompetent to testify.

#### 5. INDIANS—TRIBAL RELATIONS—COURTS FOLLOW EXECUTIVE AND LEGISLATIVE DEPARTMENTS.

In ascertaining the tribal and other relations of Indians, courts generally follow the executive and legislative departments to which the determination of these relations has been specially intrusted.

#### 6. SAME.

A mixed-blood Indian, who has received an allotment and patent of land as a member of a tribe, whose mother was an Indian of that tribe, and whose father was a half-breed who had been recognized as a member of the tribe, is himself a mixed-blood Indian of that tribe, notwithstanding the fact that his grandfather was a white man and a citizen of the United States.

#### 7. INDIANS OF MIXED BLOOD—FOLLOWING MOTHER'S STATUS.

The child of a white citizen and of an Indian mother, who is abandoned by his father, is nurtured and reared by the Indian mother in the

tribal relation, and is recognized by the tribe as a member of it, falls under an exception to the general rule that the offspring follows the status of the father, and becomes a member of the tribe of the mother. (Syllabus by the Court.)

In Error to the District Court of the United States for the District of South Dakota.

S. B. Van Buskirk, for plaintiff in error.

James D. Elliott (William G. Porter, on the brief), for defendant in error.

Before SANBORN and THAYER, Circuit Judges, and ADAMS, District Judge.

SANBORN, Circuit Judge. Anthony Farrell, the plaintiff in error, was convicted of and sentenced for selling spirituous liquors in South Dakota on January 1, 1900, to Glode La Framboise, a mixed-blood Indian of the Sioux tribe, then in charge of Nathan P. Johnson, an Indian agent of the United States, under the act of January 30, 1897 (29 Stat. 506), which provides that any person who shall sell any spirituous liquor "to any Indian to whom allotment of land has been made while the title to the same shall be held in trust by the government, or to any Indian a ward of the government under the charge of any Indian superintendent or agent, or any Indian including mixed bloods, over whom the government exercises guardianship," shall be punished by imprisonment for not less than 60 days, and by a fine of not less than \$100, for the first offense. He urges three alleged errors in his trial: (1) That the Indian agent was permitted to testify that Glode La Framboise was under his charge at the time the offense was committed; (2) that the court refused to charge that, if a paternal ancestor of La Framboise was a white man, he was not a mixed blood over whom the government exercised guardianship, nor an Indian under charge of an Indian agent, and the defendant could not be lawfully convicted of selling liquor to him; and (3) that the court refused to hold that the act of January 30, 1897, was either unconstitutional or inapplicable to a mixed-blood Indian who had received an allotment and patent of land and had become a citizen of the United States and of the state of South Dakota under the act of February 8, 1887 (24 Stat. 388).

1. Nathan P. Johnson testified that his residence was the Sisseton agency, that he was the United States Indian agent, and that he knew Glode La Framboise. He was then asked whether or not La Framboise was under his charge as Indian agent at that place on January 1, 1900, and over objection of counsel for Farrell that the question called for a conclusion, and over his exception, he was allowed to answer that he was. The objection to this ruling is that the true answer to this question is a legal conclusion deducible from La Framboise's situation, the acts of congress, and the regulations of the Indian department, and provable only by the facts which conditioned the situation and relations of La Framboise, and not by the direct assertion of any witness. So far as the question and its answer tend to prove the right of the agent to superintend and control

the actions of this Indian of mixed blood, the objection is well taken. But it ignores another material issue upon which the testimony was not incompetent, and that was whether or not this agent was in fact exercising his powers of supervision and control as an Indian agent over this mixed blood. If the situation of La Framboise and his relation to his tribe had been proved to be such that under the statutes and regulations the agent had the right to take charge of him, a further material question, whether he had actually done so or not, would still have been unanswered, and the testimony of the agent would have been competent to answer it. It was not less competent, in the absence of all objection to the order of the proof, because it was asked before the situation and relations of La Framboise had been established by the evidence. The testimony of an agent to the authority he has actually exercised may be competent evidence, when his right to exercise that authority is a conclusion of law, to which he cannot lawfully testify.

2. The Indian agent testified that La Framboise was a quarter white,—a mixed-blood Indian; that he belonged to the Sioux tribe of Indians; that he was a married man; that his children went to the government school under his charge, a mile and a half from the agency; that they were clothed like white men, and went on and off the reservation when they pleased, except when they were going to other agencies. La Framboise testified that he was a mixed-blood Indian. His father testified that he (the father) lived near Veblin, S. D.; that his father was a white man and a citizen of the United States, and that he thought he was, but they passed him for an Indian; that he was a half-breed, and his wife was a half-breed; that he voted and paid taxes in South Dakota; that his son had lived on the land he then occupied several years before the reservation was opened; and that he voted, paid taxes, and did not wear Indian clothes. A patent dated June 19, 1889, which recited that the land on which Glode lived was allotted to "Glode La Framboise, an Indian of the Sisseton and Wahpeton tribe or band," on May 10, 1888, under the act of February 8, 1887 (24 Stat. 388), and that the United States would hold it in trust for him and his heirs for 25 years, and would then convey it to him, was introduced in evidence. It is assigned as error that in this state of the case the court refused to charge that if the paternal ancestor of Glode La Framboise was a white man the jury could not find the defendant guilty, and that this would be true whether his father or grandfather was a white man. This assignment rests on the general rule that the children of free parents follow the status of their father. Vatt. Law Nat. 101, 102; Ex Parte Reynolds, 5 Dill. 394, 403, Fed. Cas. No. 11,719; U. S. v. Ward (C. C.) 42 Fed. 320, 322; Ludlam v. Ludlam, 31 Barb. 486. But there is an exception to this rule which has been generally recognized and acted upon by the legislative, the executive, and judicial departments of this government, and by the Indian tribes in their intercourse with the United States. It is that the child of a white citizen and an Indian mother who is abandoned by the father, and is nurtured and reared by the Indian mother in the tribal relation, and is recognized by the

tribe as a member of it, follows the status of the mother, and becomes a member of the Indian tribe. *U. S. v. Hadley* (C. C.) 99 Fed. 437, 438. The Indians have usually recognized such children as members of their tribes, and have in their treaties jealously protected their rights either as Indians, half-breeds, or mixed bloods, and the acts of congress have often placed them on the same plane with other members of the tribes. There was no evidence that the father of La Framboise was born under the sanction of a lawful marriage, or that his grandfather ever lived with his grandmother or assisted to rear her children. The rational inference from the testimony of his father is that he did not. He testified, "My father was a white man, so they tell me,"—a statement which naturally leads to the conclusion that he never saw him, and so did not know his color. Moreover, the executive department of the government had evidently decided that the father of La Framboise followed the status of his mother, for he said he thought he was a white man, but they passed him for an Indian. And Glode La Framboise himself had been recognized as an Indian by the interior department, and had received his allotment of and patent to land as such under the act of 1887. In ascertaining the tribal relations of Indians and mixed bloods it is the rule of the courts to follow the action of the executive or political department to which the determination of those relations is specially intrusted. *U. S. v. Holliday*, 3 Wall. 407, 419, 18 L. Ed. 182; *U. S. v. Earl* (C. C.) 17 Fed. 75, 78. There was no evidence in this case which demanded a departure from this rule, and the court below properly refused to instruct the jury that the defendant could not be guilty if La Framboise's grandfather was a white man, and rightly charged them that, under the evidence and the decision of the interior department disclosed by the patent, he was a mixed-blood Indian of the Sioux tribe.

3. But the chief reliance of counsel for the plaintiff in error in his attempt to reverse the judgment below seems to be upon the proposition that this mixed-blood Indian had by his acceptance of the act of February 8, 1887, become a full-fledged citizen of the United States, and had thereby withdrawn himself from the jurisdiction of congress to superintend or regulate commerce or intercourse with him, and hence to punish any one for the sale of intoxicating liquors to him under the act of 1897. Counsel state the proposition in two forms: (1) That the act of 1897 is inapplicable to the sale of liquor to such an Indian, because his superintendence and control are not within the jurisdiction or power of congress, and hence the presumption must be that the act of 1897 was never intended to apply to the superintendence or control of commerce with such an Indian; and (2) that the act of 1897, which by its express terms applies to a sale of spirituous liquor to him, is unconstitutional, because the congress has no power to regulate commerce with him. The question which must determine this case, however, is single, and it is, did congress in 1897 have the jurisdiction, the power, to regulate commerce with this Indian? If this question is answered in the affirmative, the conviction was right and must be affirmed, because the act of 1897 ex-

pressly provides that the sale of liquor "to any Indian to whom allotment of land has been made while the title to the same shall be held in trust by the government or to any Indian or ward of the government under charge of any Indian superintendent, or agent, or any Indian including mixed bloods, over whom the government exercises guardianship," shall be punished, and La Framboise is clearly designated in at least two clauses of this statute. If the question is answered in the negative the conviction cannot be sustained, because in that event the enactment which made it a crime to sell liquor to Indian allottees was either inapplicable to the case of La Framboise, or was unconstitutional and void. The only question, therefore, which will be considered here is whether or not congress had the power in 1897 to regulate commerce with this Indian under the constitution. The constitution provides that congress shall have the power "to regulate commerce \* \* \* with the Indian tribes." Article I, § 8. This grant of authority includes the power to regulate intercourse with the individual members of such tribes, and therefore the power to regulate the sale of intoxicating liquors to such members, for the sale of liquors is commerce. *U. S. v. Holliday*, 3 Wall. 415, 416, 419, 18 L. Ed. 182; *U. S. v. Shaw-mux*, 27 Fed. Cas. 1049 (Fed. Cas. No. 16,268). The Indian tribes are domestic dependent nations, and they and their members are wards of the United States. *Cherokee Nation v. Georgia*, 5 Pet. 1, 8 L. Ed. 25; *U. S. v. Kagama*, 118 U. S. 375, 6 Sup. Ct. 1109, 30 L. Ed. 228. In accordance with these incontrovertible rules the United States, by means of acts of congress and treaties with the tribes, has maintained agents among them through whom it has regulated commerce with them, prohibited the sale of intoxicating liquors to them, distributed food, clothing, and implements of husbandry among them, has sought to protect their persons from the violence and their property from the avarice of the white man, and has used money and persistent endeavors to induce them to adopt agricultural pursuits and to educate their children in the arts of civilization. It has pursued this course for many decades, until this has become the settled policy and practice of the nation,—a policy and practice which are concededly warranted by the constitution and sustained by the uniform decisions of the supreme court. Presumptively, therefore, congress had the power to regulate the commerce with this particular Indian, to prohibit the sale of liquor to him, and to punish a violation of this inhibition. The argument of counsel for the plaintiff in error in contravention of this presumption is: Congress has no power to regulate intrastate commerce with any citizen of the republic. This Indian was a citizen of the nation and of the state of South Dakota when the act of 1897 was approved. Therefore that act was unconstitutional and void in so far as it interfered with his commerce with other citizens,—with his purchase of intoxicating liquors from them. The contention rests upon the following propositions of law and provisions of constitutions and statutes: Congress has no right or power to interfere with the internal trade of a state further than it is necessary to do so to exercise its power to regulate commerce among

the states, with foreign nations, and with the Indian tribes, and it has no authority to prohibit the sale of liquor to this Indian unless it derived it from the grant to it of power to regulate commerce with the Indian tribes. *U. S. v. Dewitt*, 9 Wall. 41, 44, 45, 19 L. Ed. 593; *Liquor License Cases*, 5 How. 504, 586, 12 L. Ed. 256; *License Tax Cases*, 5 Wall. 470, 471, 18 L. Ed. 497. The act of congress of February 8, 1887, provides that the president may allot and patent to the members of Indian tribes land selected by them respectively within their respective reservations which is advantageous for agricultural and grazing purposes (section 1); that the patents shall be to the effect that the United States will hold the title to the respective allotments in trust for the sole use of the patentees and their heirs for the period of 25 years, and as much longer as the president, in his discretion, may extend the period; that it will then convey them to the respective patentees and their heirs; that all conveyances and contracts touching the same made before such conveyances shall be void (section 2); that the government may purchase of the tribes and open to settlement that portion of their reservations not so selected and allotted (section 5); that upon the completion of the allotments all members of the tribes to whom allotments have been made "shall have the benefit of, and be subject to the laws both civil and criminal of the state or territory in which they may reside"; that "every Indian born within the territorial limits of the United States to whom allotments have been made under the provisions of this act \* \* \* is hereby declared to be a citizen of the United States, and is entitled to all the rights, privileges and immunities of such citizens" (section 6; 24 Stat. 490). La Framboise had received his allotment and patent, and the lands within the reservation of the Sisseton and Wahpeton bands of Sioux Indians, to which he belonged, that had not been allotted, had been opened to settlement under this act, before the act of 1897 was passed. His patent was issued on June 15, 1889. The unallotted portion of the reservation of his bands was opened to settlement on April 15, 1892 (26 Stat. 1036; 27 Stat. 1017). The constitution of the United States provides that congress shall have power "to establish an uniform rule of naturalization" (article 1, § 8), and that "all persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States." Amend. 14, § 1. The Revised Statutes read, "All persons born in the United States and not subject to any foreign power, excluding Indians not taxed, are declared to be citizens of the United States." Section 1992. The constitution of South Dakota (article 7, § 1) and the statute of that state (Laws Dak. 1889, c. 61, § 2) confer upon citizens of the United States residing in that state, and hence upon this Indian, the right to vote and to hold office therein.

Under these constitutions and statutes the concession must be made that this Indian was a citizen of the United States and of the state of South Dakota in 1897, and that the argument of counsel for

the plaintiff in error that he thereby became exempt from the jurisdiction of congress to regulate commerce with him is very persuasive and entitled to grave consideration. But is it sound? May not the government confer all the privileges and immunities of citizenship upon its wards, and yet retain its power to regulate commerce with them; to protect them against their appetites, passions, and incapacity? And, if it may lawfully do so, has it not done so in the case of the Indians of the Sisseton and Wahpeton bands? The true answer to these questions is not to be found in isolated statutes and constitutional provisions, but in a general view of the treaties, legislation, policy, and purpose of the nation in its dealings with the members of Indian tribes. As we have already seen, the Indians of the Sisseton and Wahpeton bands were prior to the act of 1887 wards of the government in the charge of an Indian agent protected against the sale of intoxicating liquors to them by constitutional legislation, and incited to adopt agricultural pursuits, and to permit their children to be educated by the government, under the settled policy and practice of the nation. The statutes provided that "each Indian agent shall within his agency manage and superintend the intercourse with the Indians, agreeably to law; and execute and perform such regulations and duties not inconsistent with law as may be prescribed by the president, the secretary of the interior, the commissioner of Indian affairs, or the superintendent of Indian affairs." Rev. St. § 2058. And these regulations require the agents to use their utmost vigilance in enforcing the penalties of the law against all persons who engage in the traffic in intoxicating liquors with the Indians, and to instruct and encourage those to whom allotments have been made to cultivate their farms. The great desideratum sought by this policy was the abandonment by the Indians of the chase,—of the wandering, idle, pastoral life to which they were addicted, and from which they were unable, as their reservations diminished, to obtain sustenance,—the adoption by them of agricultural pursuits, and the permanent occupation and cultivation by each Indian of a separate tract of land, by means of which he could obtain for himself and for his family a comfortable living, and could relieve the government of his dependence. This purpose is evident in nearly all the legislation, treaties, and acts of congress which deal with the Sisseton and Wahpeton bands. In 1863 the home of these bands was in the state of Minnesota, and congress passed an act for their removal beyond the confines of the states, which provided that the president should set apart for them a tract of land without the states sufficient to enable him to assign 80 acres of good agricultural land to each Indian; that the money annually appropriated for them should not be paid in money, but should be expended in such manner as would "in the judgment of the secretary of the interior best advance the Indians in agricultural and mechanical pursuits and enable them to sustain themselves without the aid of government"; that they should be subject to the laws of the United States, to the criminal laws of the state or territory in which they should reside, and "to such rules and regulations for their government as the secretary of the inte-

rior may prescribe"; and that the secretary should make reasonable provision for their education according to their capacity and the means at his command. 12 Stat. p. 819, c. 119. On February 19, 1867, the United States made a treaty with these bands which provided that the Lake Traverse reservation, from which the allotment to Glode La Framboise was made, was set apart to them for their permanent reservation; that this reservation should be apportioned in tracts of 160 acres to each head of a family or single person over 21 years of age belonging to the bands who should desire to locate permanently thereon and cultivate the soil as a means of subsistence; that any allottee under this treaty who should occupy and cultivate a portion of his tract for 5 consecutive years, and should have 50 acres thereof fenced, plowed, and in crop, should be entitled to a patent to himself and his heirs for his tract, but that the title should be inalienable to any one but the United States; that, to enable the Indians of these bands to enter at once upon an agricultural life, there should be expended on this reservation for their benefit \$350,000 in 1867, \$250,000 in 1868, \$100,000 in the year 1869, \$50,000 in the year 1870, and \$30,000 annually thereafter; that an agent should be appointed for them, who should be located at Lake Traverse; that the expenditures should be made for the agricultural improvement and civilization of the Indians, but that no issue of goods, provisions, or other articles, except houses to allottees, should be made to Indians or mixed bloods, except in payment for labor performed or to be performed, or for produce delivered, save that when persons in the bands were unable to labor by reason of age, sickness, or deformity, the agent might issue clothing and subsistence to them from the supplies provided for the bands. 15 Stat. 506. On December 12, 1889, the United States made another treaty with these bands of Indians, whereby it agreed to pay them \$2.50 per acre for all the unallotted lands on their reservation, and to hold the purchase price of these lands and interest thereon at 3 per cent. per annum in its treasury for the sole use of these bands of Indians, subject to appropriation by congress for the education and civilization of the bands and their members. 26 Stat. 1036, art. 2. And on March 3, 1891, congress appropriated \$2,203,000 for the purpose of carrying out this agreement. 26 Stat. 1038, § 27. On or about April 15, 1892, the allotments to these Indians under the act of 1887 had been completed, and the unallotted lands were opened to settlement. In 1897 congress provided that the allottees might lease their lands for three years for agricultural and grazing purposes (30 Stat. 75), and in 1898 it declared that such leases should be void unless they were first approved by and filed with the secretary of the interior. Since the allotments were made, congress has appropriated the amounts required to pay these bands the annuities stipulated to be paid to them in the treaty of 1889 (27 Stat. 133; 30 Stat. 75, 583, 935; 31 Stat. 232). And since they received their allotments and patents, as before, it has maintained among them a government school for their education, and an Indian agent to superintend their actions, and to instruct and encourage them to occupy and cultivate



their land. In 1897 it expressly declared that the sale of intoxicating liquor to them was unlawful and punishable by fine and imprisonment.

The review of the provisions of the acts of congress and of the treaties which are relevant to the question at issue in this case is now completed, and it leads us to seriously question the main premise of the argument for the plaintiff in error, viz. that congress has no power to regulate commerce with any citizen of the nation. These Indians are citizens, but they were originally wards. The nation had the right to prohibit the sale of liquor to them and to control and superintend their acts and proceedings. They were reasonable, friendly, peaceable, when sober; wild, passionate, and dangerous, when drunk. It adopted the settled policy of prohibiting the sale of intoxicating liquors to them to protect Indians and white men alike. Had it not the right to grant them all the privileges and immunities of citizens, and still to retain its power to protect them and their neighbors from the baleful effects of intoxication? The question is susceptible of but one true answer. It had the same right and authority to retain this power of control over the commerce with these Indians that it had to retain the title to their lands in trust for them for 25 years or longer. It is contended that the retention of this control is inconsistent with the grant to them in the act of 1887 of all the rights, privileges, and immunities of citizenship. But the privilege of buying whisky at all times and in all places is not one of the rights, privileges, or immunities of citizenship, within the meaning of the constitution of the United States. If it were, all the prohibitory laws of the states would be void, for the fourteenth amendment to the constitution provides that "no state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States," and yet many states have enacted laws, that no one would claim were unconstitutional, which prohibit the sale of intoxicating liquors, except for medicinal purposes, to all the citizens of the United States residing in their states. The truth is that the deprivation of these Indians of the right to buy intoxicating liquors is not the taking away from them of any privilege or immunity of citizenship, but it is an attempt to confer upon them an additional immunity which some citizens do not possess,—an immunity from drunkenness and its pernicious consequences. The government then had the power to retain its control over this baneful traffic with these Indians, and its retention was not inconsistent with its grant to them of the rights, privileges, and immunities of citizenship. Did it exercise its right and retain its power? It had this authority prior to the allotments under the act of 1887, and the burden is on him who assails it to show that it has been released or renounced. It had been the unvarying policy of the nation to retain and exercise this power for more than half a century. The wards of the government needed protection from this pernicious traffic as much after their allotments had been made and their patents had been issued as they did before. The issue of patents to them did not change the appetites, passions, character, habits, disposition, or capacity of these

Indians. It did not radically change the title to the lands reserved for them, or their need of care and education. The government held the title to their reservation in trust for them collectively before, it held the title to their allotments in trust for them individually after, the issue of the patents. There was every reason why congress should retain and exercise its power to superintend the trade with them, and none to induce it to renounce it. By the treaty of 1867 the United States agreed to appoint and maintain an agent for these Indians at Lake Traverse, and by its legislation and the rules of the interior department it made it the duty of this agent to use every endeavor to suppress the traffic in intoxicating liquors with them, to educate them, and to induce them to cultivate the soil. There has been no express abrogation of this agreement in any subsequent treaty or act of congress, and the government has continued to comply with it since the allotments as it did before. Agreements are not released or abrogated and statutes are not repealed by implication unless the subsequent agreements or laws are necessarily repugnant to those which preceded them. If the earlier and the later are susceptible of contemporaneous execution, they must be read, construed, and enforced together. The agreement to maintain the agent and the retention and exercise of the power to control the liquor traffic are not inconsistent, as we have seen, with the allotment of the lands in severalty, or with the grant to the allottees of the immunities and privileges of citizenship. Neither the act of 1887 nor any other act of congress or treaty with these Indians required those who selected allotments and received patents and the privileges and immunities of citizenship to sever their tribal relation, or to surrender any of their rights as members of their tribes, as a condition of the grant, so that after their allotments, as before, their tribal relation continued. And finally the legislative and executive departments of the government to which the subject-matter of the relations of the Indians and their tribes to the United States, and the regulation of the commerce with them, has been specially intrusted, have uniformly held that congress retained, and have constantly exercised, the power to regulate intercourse with these Indians, and to prohibit the traffic in intoxicating liquors with them, since these patents issued, to the same extent as before their lands were allotted in severalty. It is the settled rule of the judicial department of the government, in ascertaining the relations of Indian tribes and their members to the nation, to follow the action of the legislative and executive departments, to which the determination of these questions has been especially intrusted. *U. S. v. Holliday*, 3 Wall. 407, 419, 18 L. Ed. 182; *U. S. v. Earl* (C. C.) 17 Fed. 75, 78.

The question which has been discussed is a serious one, and it is not free from doubt. It has received investigation, study, and deliberation. The following authorities in addition to those which have already been cited have been read and carefully considered: *In re Lelah-puc-ka-chee* (D. C.) 98 Fed. 429, 433; *U. S. v. Rickert* (C. C.) 106 Fed. 6; *Smythe v. Henry* (C. C.) 41 Fed. 705, 707; *In re Coombs*, 127 Mass. 278, 279; *Beck v. Real Estate Co.*, 12 C. C. A.

497, 65 Fed. 34; *Lemmon v. U. S.*, 45 C. C. A. 518, 106 Fed. 650; *U. S. v. Hurshman* (D. C.) 53 Fed. 543; *U. S. v. Logan* (C. C.) 105 Fed. 240. But the considerations to which reference has now been made are persuasive that the courts ought not to hold that congress has renounced its power to prohibit the traffic in intoxicating liquors with Indians who have taken their allotments and patents under the act of 1887, but for whom the government still holds their lands in trust, until the legislative department of the government gives more positive indications of its intention so to do. The original condition of these Indians as wards of the government; the original power of congress to regulate commerce with them; the settled policy and practice of the nation to prohibit traffic with them in intoxicating liquors; the stipulation of the treaty of 1867 that the government would appoint an agent, whose duty it has always been to suppress this traffic; the absence of any condition in the act of 1887 requiring allottees to surrender their tribal relation or tribal property; the continuing need of the suppression of the liquor traffic with them while the government holds their lands in trust for the individual Indians as well as while it held them in trust for the same Indians collectively; the absence of any express renunciation of its power by congress, and of any treaty or act of congress repugnant to its retention and exercise; the holding of both the legislative and executive departments that it still exists, notwithstanding the allotments and patents under the act of 1887; the uniform exercise of this authority and the continuing endeavor of these departments to suppress this baleful traffic in spirituous liquors with these Indians since their patents were issued as before,—compel the conclusion that congress has never renounced its power to regulate this commerce, and that the act of 1897 is neither unconstitutional nor inapplicable to the case at bar. *Eells v. Ross*, 12 C. C. A. 205, 64 Fed. 417; *U. S. v. Logan* (C. C.) 105 Fed. 240, 241.

The judgment below must accordingly be affirmed, and it is so ordered.

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In re CHOW LOY.

(Circuit Court, D. Maine. September 2, 1901.)

No. 186.

**1. APPEAL.—PRACTICE.**

Mere appearance of an attorney and giving notice of an appeal does not constitute an appeal under the Chinese exclusion act of September 13, 1888 (25 Stat. 476) § 13, providing, without pointing out the manner of appeal, that any Chinese person convicted before a commissioner of a United States court may within 10 days from such conviction appeal to the judge of the district court for the district.

**2. HABEAS CORPUS.**

If the appeal under Chinese Exclusion Act Sept. 13, 1888 (25 Stat. 476) § 13, is not to the district judge as district judge, but to the district court, as claimed by the petitioner, any irregularities in the proceedings cannot be reviewed by habeas corpus; but the remedy is by appeal to the circuit court of appeals. *U. S. v. Gee Lee*, 50 Fed. 271, 1 C. C. A. 516, doubted.

Isaac W. Dyer, for the United States.  
John S. Richardson, for Chow Loy.

PUTNAM, Circuit Judge. On a warrant issued in accordance with "An act to prohibit the coming of Chinese laborers to the United States," approved on September 13, 1888 (25 Stat. 476), the petitioner was brought before William M. Bradley, a United States commissioner within and for the district of Maine, as a Chinese laborer unlawfully within the United States; and, after hearing, an order for his deportation was made by the commissioner on May 23, 1901, and on May 24, 1901, a warrant was issued accordingly. On May 31, 1901, the following occurred, as is shown by the record of the commissioner, namely: "Levi Turner, Esq., appears and gives notice of appeal." Mr. Turner was employed in the matter as the attorney of the present petitioner. On July 3d Mr. Turner withdrew his appearance, and on July 11th the following occurs in the record of the commissioner, namely: "John S. Richardson, Esq., of Boston, offers to appear and prosecute appeal." So far as the record before us is concerned, nothing further was done before the commissioner with reference to the appeal, and no formal paper of appeal was filed. Thus the matter rested until, on Mr. Richardson's appearing on the 11th day of July, the commissioner entered the appeal in the clerk's office of the district court for the district of Maine, and some time prior to the 30th day of July the matter was brought to the attention of the judge of the district court for that district. The precise day when it was thus brought to his attention is not stated. Subsequently, on a motion by the United States, the district judge, stating that he was of the opinion that the appeal was not presented within the proper time, and that the delay was not excusable, and was therefore to be construed as an abandonment of the appeal, ordered the case dismissed. This order was made on July 30, 1901. Throughout the proceedings the learned district judge assumed, and apparently held, that the matter was pending before him as a district judge, and not in the district court. Thereupon this petition for a writ of habeas corpus was seasonably brought in this court, claiming that the petitioner had had no proper hearing on appeal, and that in consequence thereof his detention by virtue of the warrant issued by the commissioner is unlawful.

Section 13 of the act referred to provides that any Chinese person convicted before a "commissioner of a United States court" may, within 10 days from such conviction, "appeal to the judge of the district court for the district." The context shows that the word "conviction" here refers to an order that the Chinese person in question shall be removed from the United States to the country whence he came, and that it does not refer to any "conviction," in the proper sense of the word, of a criminal offense. Inasmuch as section 13 provides that the warrant issued on the complaint, which the section authorizes, may be made "returnable before any justice, judge or commissioner of the United States court, or before any United States court," and for an appeal only in case the warrant is returned before a commissioner, it would seem to follow that the judge of the

district court acts on appeal in the same capacity as though the warrant had been first returned before him. Moreover, as the provision with reference to the return of the warrant in the same section expressly distinguishes between a judge of a United States court and a United States court, it would seem to follow, on just rules of construction, that this distinction must run throughout the section. Nevertheless, in *U. S. v. Gee Lee*, 50 Fed. 271, 273, 1 C. C. A. 516, the circuit court of appeals for the Ninth circuit held that, so far as an appeal from the commissioner is concerned, the words "the judge of the district court for the district" are to be read the same as though the words "the judge" were not there, and that the appeal is to the court, so that an appeal lies to the circuit court of appeals from the judgment on the appeal from the commissioner.

Looking, however, at the facts which the record discloses, to which we have referred, it is not possible to say that any appeal from the commissioner was properly taken. The statute does not point out in what way the appeal shall be taken, or how it shall be brought to the attention of the judge of the district court, or to the court, as the case may be; but certainly the mere fact that an attorney appeared and gave notice of an appeal, nothing else occurring within the 10 days specified by section 13, cannot meet the purposes of the statute, and the learned judge of the district court was right in dismissing the case.

Having regard, however, to the disposition of the courts in this circuit to apply the rule *stare decisis* with reference to the decisions of the circuit courts of appeals of other circuits, we perhaps ought to follow the circuit court of appeals for the Ninth circuit in *U. S. v. Gee Lee*. In that event the only remedy which the petitioner has is by an appeal to the circuit court of appeals for this circuit, because a writ of habeas corpus cannot be made use of in regard to irregularities which are thus justiciable. In *re Lennon*, 166 U. S. 548, 552, 17 Sup. Ct. 658, 41 L. Ed. 1110; In *re McKenzie*, 180 U. S. 536, 546, 21 Sup. Ct. 468, 45 L. Ed. 657. In either view the same result is reached.

There will be an order that the petition be dismissed.

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**Ex parte McMINN.**

(Circuit Court, N. D. Alabama, S. D. September 21, 1901.)

**FEDERAL COURTS—HABEAS CORPUS—DISCRETION IN ISSUANCE OF WRIT.**

A federal court is vested with a discretion in the issuance of the writ of habeas corpus for the discharge of a person confined under state authority, both before and after trial and judgment in the state court, in cases in which the act of the legislature under which the state court is proceeding is challenged as in conflict with the federal constitution; and under ordinary circumstances, where the petitioner has a clear remedy in the state courts, whose decisions may be reviewed, if necessary, by the supreme court of the United States, he will be remitted to such remedy.<sup>1</sup>

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<sup>1</sup> Jurisdiction of federal courts, see note to *In re Huse*, 25 C. C. A. 4.

On Petition for Writ of Habeas Corpus.

Mr. Wilkerson and J. W. Davidson, for petitioner.

SHELBY, Circuit Judge (orally). The petition in this case shows that the petitioner is confined in the insane hospital at Tuscaloosa, Ala. He is held under an order or judgment of the probate judge of Cullman county, Ala., made under the Alabama law relating to insane persons. Code Ala. 1896, § 2553. It is alleged in the petition that the section of the Alabama Code referred to is in conflict with the constitution of the United States, and especially with the fourteenth amendment.

In the view I take of the case, it is unnecessary to consider the question as to the constitutionality of the statute.

The first question to be considered is, is this a case in which a writ of habeas corpus should be allowed, even though the statute be unconstitutional? There is a discretion in the federal courts in the issuance of the writ of habeas corpus, both before and after trial and judgment in the state court, in cases in which the act of the legislature under which the state court is proceeding is challenged as in conflict with the federal constitution. The federal courts may, in their discretion, refuse to grant the writ, and leave the petitioner to his remedy in the state courts. In this case the petitioner has clearly a remedy to review the action of the probate court in other and higher state courts.

Under the circumstances of the case, I have concluded to refuse to grant the writ, leaving it to the petitioner to pursue his remedy in the state court as he may be advised. I think this course is sustained by the decisions of the supreme court in *Ex parte Royall*, 117 U. S. 241, 6 Sup. Ct. 734, 29 L. Ed. 868, and *Ex parte Fonda*, 117 U. S. 516, 6 Sup. Ct. 848, 29 L. Ed. 994. In *Ex parte Kieffer* (C. C.) 40 Fed. 399, where the remedy by habeas corpus was allowed, there were considerations not involved in this case. The case was of a character that the public, as well as the individual, were interested in a speedy settlement, and it appeared that it could be more speedily settled in the federal court. If the petitioner reserves the federal question, after the supreme court of the state has passed upon it, he can then, if necessary, by proper proceedings, review the case in the supreme court of the United States. *Wo Lee v. Hopkins*, 118 U. S. 356, 6 Sup. Ct. 1064, 30 L. Ed. 220. The petition is denied.

INTERNATIONAL SILVER CO. v. SIMEON L. & GEORGE H. ROGERS CO. et al.

(Circuit Court, D. Connecticut. August, 1901.)

No. 1,068.

**1. TRADE-MARKS—INFRINGEMENT—PRELIMINARY INJUNCTION.**

The original firm of Rogers Bros., composed of three brothers, first established the business of manufacturing silver-plated ware in this country by the electro-plate process, and their goods, with the name "Rogers Bros." stamped thereon, acquired a high reputation. They

were succeeded by different corporations, each of which acquired the right to use the name "Rogers" as a trade-mark, and continued to use the same stamped upon their wares in various forms, among which were "1847, Rogers Bros.," and "Rogers" preceded and followed by the figure of an anchor. In 1898 complainant acquired the property and business of all such corporations, including their trade-marks, which it has since used. In 1900 the defendant corporation was organized under the name "Simeon L. & George H. Rogers Company," and commenced the manufacture and sale of silver-plated ware upon which it stamped the name "Rogers" in different forms, among others, "S. L. & G. H. Rogers Bros.," and "S. L. & G. H. Rogers Co.," the initials in each case and the "Co.," being in the form of a monogram, which, owing to its small size, was not readily decipherable. Simeon L. and George H. Rogers, who together owned about one-eighth of the stock issued, were sons of one of the original Rogers brothers, but neither had previously been engaged in the manufacture of plated ware, although one had been employed in the business as a workman for wages. The active managers of the corporation were men whose names did not appear in its own name. *Held*, that the names "Rogers" and "Rogers Bros." constituted the substantial and distinctive part of complainant's trade-marks, and that it was entitled to a preliminary injunction restraining defendant from using them on its goods, with or without a preceding or succeeding emblem or symbol or initials, or in any manner which simulated complainant's trade-marks.

**2. SAME—UNFAIR COMPETITION.**

Defendant also, in its advertising matter, and on its labels and wrappers, displayed the names of S. L. & G. H. Rogers, with the assertion that they were "the only real Rogers Bros.," and that the goods were "the real Rogers goods." *Held*, that such action was clearly for the purpose of impressing upon the public the belief that defendant was the manufacturing successor of the original firm, and constituted unfair competition, against which complainant, as the actual successor to such business, was entitled to a preliminary injunction; but that whether or not defendant should be enjoined from the use of its corporate name, as having been adopted solely for the purpose of creating unfair competition, would not be determined until a final hearing.<sup>1</sup>

In Equity. Suit to enjoin infringement of trade-marks and unfair competition. On motion for preliminary injunction.

Hiram R. Mills and John P. Bartlett, for complainant.

John R. Buck and Charles L. Burdett, for defendants.

SHIPMAN, Circuit Judge. This is a motion for a preliminary injunction. Some of the historical facts in this case also existed in *R. W. Rogers Co. v. Wm. Rogers Mfg. Co.*, and were stated in 17 C. C. A. 576, 70 Fed. 1017, as follows: "About forty years ago, three brothers, by the name of Rogers, composed a firm in Connecticut under the style of 'Rogers Bros.' This firm first applied the art of electro-plating to the manufacture of silver-plated ware in this country, and acquired by steadfast integrity a high reputation for the sterling quality of their ware, and the name of 'Rogers Bros.' stamped upon the back of the goods also obtained a widely extended reputation." A corporation called the "Wm. Rogers Manufacturing Company" was "the successor of the business established in 1865 by William Rogers, one of these brothers, and was after 1872 enga-

<sup>1</sup> Unfair competition in trade, see notes to *Scheuer v. Muller*, 20 C. C. A. 165; *Lare v. Harper & Bros.*, 30 C. C. A. 376.

ged in manufacturing and selling silver-plated ware, and continued the trade-marks upon such goods which its predecessor adopted in 1866, viz. '1865, Wm. Rogers Mfg. Co.,' and 'Wm. Rogers & Son.'" It also used, from and after 1877, the following mark: "[Figure of Anchor] Rogers [Figure of Anchor]." "Two other corporations acquired from one or more of these brothers the right to use the name 'Rogers' also, and for a number of years last past the goods of these corporations, called in the speech of the public, 'Rogers goods,' have maintained a high character and a well-known reputation." One of these corporations was the Meriden Britannia Company, which adopted, in 1862, as a trade-mark, the following: "1847, Rogers Bros." Another corporation, Rogers & Bro., established in Waterbury, Conn., used as a trade-mark "[Star] Rogers & Bro." In May, 1898, the complainant, called the "International Silver Company," was formed, which bought or acquired the entire capital stock or properties of 14 silver-plating corporations, including the William Rogers Manufacturing Company, the Meriden Britannia Company, and the Rogers & Bro., and obtained by purchase or assignment the ownership of all their trade-marks, and now owns and controls the business of all the original Rogers companies, with the good will and trade-marks of each. The manufacture of the same goods to which their trade-marks were applied is continued by the complainant, the trade-marks are applied, the trade-mark goods are advertised as aforesaid, and the exclusive right to the use of these marks is in fact, and is considered to be, of great value. To the goods formerly manufactured by the corporations not entitled to use the Rogers marks the trade-marks are not applied. In May, 1898, when the consolidation took place, the factory of the William Rogers Manufacturing Company was in Hartford. William H. Watrous was, and had been from 1879, its president and controlling manager, and was well known as a practical and skillful manufacturer; John McFadyen was, and had been for many years, its superintendent; and Samuel McFadyen had been also for many years its treasurer and bookkeeper. These officers were of known reputation and skill in their respective departments. The manufacturing business was continued in the same factory, and these gentlemen remained in the positions which they had formerly occupied until December 8, 1900, when the two McFadyens resigned. Watrous resigned as president and manager in January, 1901, and in March, 1901, resigned as a director of the complainant. On October 3, 1900, a corporation with a nominal capital of \$200,000 was organized in Maine under the name of "Rogers Bros. Mfg. Company," to carry on, among other things, the silver-plating business. Simeon L. Rogers, George H. Rogers, John McFadyen, Samuel McFadyen, and Henry L. Cram, of Portland, Me., each subscribed for 1 share, and 1,995 shares remained unissued. On January 16, 1901, the name was changed to "Simeon L. and George H. Rogers Company." It established a factory in Hartford, and silver-plated ware was first put upon the market about the last week of February, 1901, and by May, 1901, it began to do a little business, which has gradually increased, and apparently has been vigorously pushed.



Simeon L. Rogers and George H. Rogers were the sons of Simeon S. Rogers, one of the three brothers who composed the original firm of Rogers Bros. George H. Rogers has, either as tenant or employé, been a farmer and had no connection with the business of silver-plating until this company was formed. Simeon L. Rogers was born in 1844, and died July 21, 1901. At the termination of the Civil War he learned the business of burnishing, and for years worked in various silver-plating shops in New Britain, Waterbury, and Shelton as a maker of blanks for plating. From September, 1888, to September, 1900, he was pressman in the forge department of the Silver-Plate Cutlery Company in Shelton, was engaged in cutting out steel knives and forks on the press upon an average compensation of \$2.50 per day. He was not a manufacturer, but was a workman upon wages by the day or week. Mr. Watrous was a nephew of Simeon S. Rogers, and the two McFadyens are brothers of Mrs. Watrous. On July 21, 1901, Simeon L. Rogers and George H. Rogers each owned 49 shares of the capital stock of the defendant company, of the par value of \$4,900. The two amounts are said to be "about one-eighth of the capital stock which has been subscribed for and issued up to" August 10, 1901. From February 20, 1901, to May 10, 1901, the silver-plated wares of the defendant were marked as follows: "[Maltese Cross] Rogers [Maltese Cross]," "[Cross] Rogers Bros. [Cross]," "[Cross] S. L. & G. H. Rogers [Cross]." The cross was dropped, and from April 20, 1901, to May 10, 1901, an acorn was substituted, and the goods were marked as follows: "[Acorn] Rogers [Acorn]," "[Acorn] Rogers Bros. [Acorn]." The acorn was then dropped, and from May 10, 1901, the goods have been stamped as follows, the letters "S. L. & G. H. Co." appearing in monogram: "S. L. & G. H. Rogers Bros.," "S. L. & G. H. Rogers Co." It will be remembered that the Meriden Britannia Company, and its successor, the complainant, have continuously used "1847. Rogers Bros.," and that the William Rogers Manufacturing Company and its successor have continuously used "[Anchor] Rogers [Anchor]." The monograms of the defendant, when reduced to the size necessary for stamping them upon the back of a spoon or fork, are too small to be easily deciphered by a person with no previous knowledge of their meaning. Such a person simply understands that they represent something, and consequently the name "Rogers" or "Rogers Bros." is both the prominent and the legible imprint upon the article. I have mentioned only the trademark rights which appertained to these corporations, without reciting their history, or the history of the trademark rights of any other corporation. It is unnecessary to go more minutely into that part of the case, because the history of the various Rogers marks has been two or three times the subject of careful analysis in the Connecticut court of last resort. *Britannia Co. v. Parker*, 39 Conn. 450, 12 Am. Rep. 401; *Manufacturing Co. v. Simpson*, 54 Conn. 527, 9 Atl. 395; *Rogers v. Rogers*, 53 Conn. 122, 1 Atl. 807, 5 Atl. 675, 55 Am. Rep. 78.

It can hardly be denied that the defendant has no right to the use of "Rogers Bros." or of "1847, Rogers Bros.," or of "[Anchor] Rog-

ers [Anchor]"; but it is said, "We have a right to the use of our whole name, and we prefix our initials to 'Rogers Bros.' and to 'Rogers,' and we add to 'Rogers' the letters 'Co.'" In point of fact, these prefixes and suffixes are obscure, and, to the ordinary observer, enigmatical. They actually convey no meaning. The marks simulate the marks of the complainant, and, under the guise of monograms, present the appearance of the marks of the complainant. The motive for such simulation was the advantage to be gained by misleading the purchaser at retail to the belief that the articles so stamped are what the public calls "Rogers goods." Neither can the defendant corporation simulate the marks of the complainant by the use of the name "Rogers Bros.," or "Rogers" with or without a preceding or succeeding emblem or symbol or initials. These names are the substantial and distinctive part of the trade-mark in the mind of the purchasing public.

The bill is for the restraint or prevention of the infringement of trade-marks, and of unfair competition in trade in connection therewith, and asks for a preliminary as well as permanent injunction against the use upon silver-plated ware of the mark "Rogers Bros.," whether alone or accompanied by a symbol or monogram, and against the use of a mark consisting of the word "Rogers," either alone or preceded or followed by some symbol or monogram; in other words, the bill asks for an injunction against the simulation of the complainant's trade-marks upon silver ware, and asks for a like injunction against the use of the corporate name "Simeon L. & George H. Rogers Co." in connection with the business of manufacturing and selling silver-plated ware, upon the ground that the adoption of this corporate name was a fraudulent attempt to gain the benefit of the manufacturing reputation of the corporations known as the original "Rogers" companies. There is no adequate reason why a preliminary injunction should not issue as prayed for against the simulation of the complainant's marks upon silver ware, especially against the use of the marks heretofore used; and the simulation is sufficiently complete when "Rogers Bros." or "Rogers" is plainly presented, either alone or accompanied by some symbol or emblem or hieroglyphical device.

A preliminary injunction against the use of the defendants' corporate name remains to be considered. The charge is that the individual defendants conspired to create a corporation which should have a pretended color of right to use the name "Rogers" for the purpose of deceiving the public into the belief that the promoters of the corporation were the manufacturing successors of the original Rogers Bros., and thus to create, by means of the deception, an unfair and tricky competition in trade with the complainant. The history of the corporation, which the individual defendants, with the exception of Watrous, formed, is relied upon to support the charge. Watrous is not a stockholder in the defendant corporation. He is its adviser, and its advocate before the public. The circular of March 19, 1901, which offered to the public "real Rogers goods," was signed "The Simeon L. and George H. Rogers Co., by W. H. Watrous"; but, as he is not pecuniarily interested in the new corporation, his

connection with it need not be commented upon. That the name of the corporation was selected solely for the benefit which would accrue from the name of "Rogers," and not for the benefit which would accrue from the services or reputation of Simeon L. or George H. Rogers as silver platers, is manifest. George H. Rogers was a farmer as tenant or employé. Simeon L. had been a workman in silver-plating factories, had the reputation which other workmen of mature years ordinarily have, but he brought no peculiar elements of success to the new business except the declaration that he was the son of one of the original members of Rogers Bros. The McFadyens had an acquired and deserved reputation in the silver-plating business, and were to be the active managers of the corporation, but their name did not appear. On the contrary, in advertisements and upon labels or upon wrappings the names of Simeon L. Rogers and George H. Rogers are displayed, with the assertion that they are "the only real Rogers Bros." in the business. The advertisements speak of them as "the real Rogers," and say that the goods of the defendant corporation are "the real Rogers goods." The defendants say in one of their affidavits that the object of these advertisements was to counteract similar assertions in the advertisements of C. Rogers & Bros., of Meriden, who are not descendants of the original Rogers firm, but who, having been silver-plate manufacturers, thereafter, some years ago, went into the business of plating flat ware, and are competitors of the complainant, as they were of its predecessors. C. Rogers & Bros. had issued advertisements containing pictures and assertions that they are the only living Rogers Bros. making silver-plated ware. This reason for the action of the defendant corporation existed, but it had also a broader motive, which was to impress upon the public the belief that its business is a continuation of the character and the business of the original firm, and of gaining thereby an advantage over those who are the rightful successors in the same business. This practice shows the unjustifiable use which the corporation is attempting to make of the position of the two sons of Simeon S. Rogers in its business, and these assertions should be restrained by injunction.

The defendant corporation has been careful to assert that it was not in the trust, and that it had no connection with any other Rogers company or trade-marks. The two arguments which it has presented for the favor of the public have been that it was a Rogers company, and was not in the trust, and, so far as it has asserted that its goods were not those of any other company, but were made by itself, its statements are worthy of commendation. If this case was at final hearing upon precisely the same evidence that is now presented, the history of the corporation would strongly tend to the conclusion that its name had been selected unnecessarily for the purpose of unfair competition, but I am unwilling, by a preliminary injunction, to forthwith restrain the corporation from any use of its corporate name, to which it may be considered to have had a color of right by reason of the fact that Simeon L. Rogers was a workman in silver plate. I prefer that the question of an entire change of

name should be left until the test of cross-examination shall have been applied to statements made in affidavits. Let a preliminary injunction issue as heretofore directed in the opinion.

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WILLIAMS v. SMYTHE et al.

(Circuit Court, M. D. Pennsylvania. September 25, 1901.)

No. 4.

**COPYRIGHT—INJUNCTION AGAINST INFRINGEMENT—INCORPORATION OF PIRATED WITH ORIGINAL MATTER.**

Where it is clearly apparent from inspection that in a city directory compiled for publication by defendant matter has in numerous instances been pirated from a copyrighted directory published by complainant for a preceding year, complainant is entitled to an injunction restraining the publication of defendant's directory as a whole, although portions of it appear to be free from the charge of piracy, unless defendant can eliminate the portions which he has unlawfully appropriated.

Rule for a Preliminary Injunction. Sur bill in equity to restrain violation of copyright.

The affidavits showed that the plaintiff, Catharine A. Williams, was the owner of a copyrighted directory of the city of Scranton for the year 1900, and that the defendant W. L. Smythe had compiled, and was about to issue, a directory of the same for the year 1901. The bill charged that the one had in large part been pirated from the other, in violation of the copyright, and prayed that its publication be enjoined.

H. M. Hannah and H. C. Reynolds, for plaintiff.  
C. H. Soper, for defendants.

ARCHBALD, District Judge. In the compilation of his directory the defendant has unquestionably done considerable independent work, as an examination of the book abundantly shows. Not one of the 441 pages which contain the alphabetic list of residents of the city, and make up the largest and most important part of the directory, but shows a material difference from the corresponding page of that of the plaintiff. Names are added and omitted, and corrections made, some of which, to my own knowledge, are mistakes, but all of which go to establish to my satisfaction that as to this part of the publication the defendant has practically compiled it, as he declares, from original sources, and that so far the charge of piracy is not made out. It is true that in the affidavits in support of the motion the plaintiff has pointed out a few errors which have been evidently carried forward from the one directory to the other, and in general terms alleges, but fails to specify, a number more. But I am not prepared to have this overcome the manifest proof of independent work to which I have alluded, sustained, as it is, by the evidence produced by the defendant of the means employed to gather the information on which this part of his directory is based.

Unfortunately, however, the same cannot be said as to other parts of it. In what is known as the "Business Directory," pages 442 to 448, inclusive, while not a little new material has been introduced, yet so many glaring mistakes which appear in the plaintiff's direct-

ory are found in exactly the same shape and connection in that of the defendant, I am forced to the conclusion that much of the one has been appropriated and incorporated bodily into the other, in violation of the copyright by which it is protected. A few examples will suffice. Thus under the head of "Lawyers," "Clark W. Bliss" is given in both as "Charles W. Bliss"; "R. Louis Grambs" as "P. Louis Grambo"; "M. F. Sando" as "M. F. Sands"; "John F. Murphy" as "John T. Murphy." Under the head of "Physicians," "Daniel H. Jenkins" appears as "David H. Jenkins." Under "Meat Markets," "Frank M. Aylesworth, 223 Wyoming avenue," is given, when the fact is that he has long since gone out of that business; and under the head of "Insurance Agents" we find "William Hodby, 807 Mears Bldg.," although he has not been at that office since February last, and is said to have removed from the city. There are a large number of other instances in which either the parties have changed their offices or places of business, or are no longer residents of the city, and yet are accredited just as they stand for the year 1900 in the directory issued by the plaintiff at that time. In like manner, in the introduction, pages i. to xlv., where the several associations and corporations of the city are grouped together, changes in the officers and organizations which have occurred in the last year are not noted, but on the contrary a long list of those which have gone out of existence are continued on in the defendant's directory the same as in the plaintiff's, while in some which still exist the officers and addresses, although materially changed, are found exactly as if they had been copied from the one into the other. These are mistakes which would not have occurred if the defendant had gone to original sources for his information, and no explanation has been attempted with regard to them. All we have to counteract their effect is the evidence of some additional original work here, as in the main part of the directory, and the proof afforded by the defendant's affidavits, such as it is, as to the independent manner in which the directory was gotten up. This is not sufficient, however, to overcome the inference, which I consider irresistible from the appearance of this matter in the defendant's directory, that he has been guilty of abstracting and using, as the basis of these parts of it (however interfused with other matter), more or less of the plaintiff's copyrighted directory of last year, which he had no right to do.

The law upon the subject is plain. As said in *Kelly v. Morris*, L. R. 1 Eq. 697, in the case of a dictionary, map, guidebook or directory, although there are certain common objects of information, which must, if described correctly, be described in the same words, a subsequent compiler is bound to set about doing for himself what the first compiler has done, where his work has been copyrighted; or, in other words, he must go to original sources for his information, and cannot appropriate that gathered together by his predecessor. To the same effect are *Morris v. Ashbee*, L. R. 7 Eq. 34; *Morris v. Wright*, L. R. 5 Ch. App. 279; *Publishing Co. v. Keller* (C. C.) 30 Fed. 772; 7 Am. & Eng. Enc. Law (2d Ed.) p. 578. On the strength of these authorities and the proofs to which

I have alluded, I am compelled to hold that the defendant has no right to issue his directory in its present form; and this applies to the whole publication. At the same time, I am satisfied that there are parts of it which are free from the charge of piracy, although I cannot now separate them. As it stands, the book must go out, or be suppressed for the present as a whole. If, however, the defendant can sever that which is not open to the charge of piracy from that which is, or can in any way eliminate the matter which he has appropriated, he may, upon a proper showing, be entitled to a modification of the present order, so as to allow him to publish the rest of his work. *Lewis v. Fullarton*, 2 Beav. 6.

Let a preliminary injunction issue, as prayed for, to continue in effect until the next session of the circuit court for this district. Rev. St. § 719.

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GENERAL ELECTRIC CO. v. WINSTED GAS CO.

(Circuit Court, D. Connecticut. September 24, 1901.)

No. 916.

PATENTS—INFRINGEMENT—ELECTRIC GENERATORS.

The Eickemeyer patent, No. 342,504, for a magneto-electric and electro-magnetic machine, covers a unipolar or homopolar machine for generating a continuous current, which is an improvement on such machines in the prior art, but has never been practically useful; and the patent, while valid, is not entitled to a broad construction, to shut out other practical improvements in machines for producing alternating currents. Claim 7 construed, and *held* not infringed.

In Equity. Suit for infringement of patent. On final hearing.

Kerr, Page & Cooper and Frederick P. Fish, for complainant.

C. E. Mitchell and H. B. Brownell (Mitchell, Bartlett & Brownell), for defendant.

TOWNSEND, District Judge. Suit for infringement of patent No. 342,504, applied for on November 8, 1882, and granted on May 25, 1886, to Rudolph Eickemeyer, for a magneto-electric and electro-magnetic machine. The defendant is a mere user of a single machine. The real defendant is the Stanley Electric Manufacturing Company, of Pittsfield, Mass., which appears to be an entirely responsible party, and is engaged in the extensive manufacture of the alleged infringing machine; and no special reason is shown why this special user, instead of the manufacturer, has been sued.

The patent in suit relates to unipolar or homopolar machines, so called. A unipolar or homopolar machine is one in which currents are generated continuously in the windings in one direction. It is a machine in which the lines of force are cut in one direction only, as distinguished from alternating current machines, in which the lines of force are cut in alternately opposite directions, and which require the use of commutators to straighten out the current. The patentee's object was to produce a practical, commutatorless, continuous current machine. He states that hitherto "it has been necessary to use a device called a commutator," and that "there are many disadvantages attending the use of \* \* \* such commutator," which do not arise in an apparatus in which the current "is induced in one di-

rection"; and he says: "The object of my invention is to obtain such a machine." He further states that, while such machines "have hitherto been devised by which a feeble continuous current can be developed, \* \* \* so far as I am aware, no machine has been devised for practical purposes in the arts in which is embodied" his suggested mode of operation.

Perhaps the best example of the prior unipolar art, recognized by Eickemeyer as above, was the Siemens British patent, No. 3,134 of 1878, for unipolar generators. The Siemens illustrative drawing, introduced by defendant, shows an inner pole, A, surrounded by a revolving copper shell, b, and outside of this a cylindrical iron shell, A', the function of which was to concentrate the force and reduce the resistance of the magnetic circuit. The current passes up from the positive pole through the copper shell, and down through an external conductor to the negative terminal, thus making a complete magnetic circuit. This external shell did not completely inclose the exciting coils of the field magnet, and the magnetic circuit was irregular. This machine and the publications relating to it showed the principle of connecting a plurality of armature conductors in a series in a single unipolar machine. Eickemeyer improved this construction by completely housing the exciting coils within the magnetic shells, thus preventing leakage, and by suppressing the outside return path, and placing his cylindrical conductors in a single annular magnetic field. The patentee further says (page 1, lines 63-74, of the patent):

"A characteristic feature of machines embodying my invention is the organization, with a magnet affording an annular field of force, of an armature which embodies two or more separate conductors, each of which, during its movement within said field of force, operates as an independent element, and is traversed by an electric current always in the same direction; and I have so organized said independent conducting elements that any two or more of them can be coupled in linear series."

The essence of Eickemeyer's improvement, thus described, consisted in taking the old unipolar, commutatorless, continuous current machine, and so coupling a number of separate and insulated conductors in linear series, constituting an armature by outside wires, as to increase the power of the current and get a higher continuous potential, varying according to the number of elements. He arranged two opposite cylindrical poles concentrically, so that the lines of magnetic force would flow from the outer to the inner pole, and be evenly distributed throughout the annular space between the two poles. Then he rotated a series of independent bars or conductors parallel to the axes of said cylinders, so as to always cut said lines of force in the same relative direction and generate a continuous current in one direction; he then added all the electro-motive forces together by coupling them together in linear series; that is, by connecting the positive terminal of one pole to the negative terminal of another, by the use of sliding contact rings and intermediate stationary external conductors. Counsel correctly says:

"In all of the machines devised by the patentee and claimed by him as of his own invention, the induced or armature circuit is made up of a series of independent bars or conductors, disposed in such a manner as to cut the

lines of the magnetic field of force always in the same relative direction; and these are coupled together in linear series by means of sliding contact rings and intermediate, stationary, external conductors. \* \* \* A moment's consideration of the conditions which are present in the machine in question will suffice to show the purpose and result of this arrangement. All of the internal bars or sections of conductor, being parallel to the axis of rotation of the armature, generate currents in the same direction. To superimpose the currents in any two bars, therefore, so that their electromotive forces may be added to one another, the positive terminal of the one must be connected to the negative terminal of the other; but, as all of the terminals at one end of the armature are positive and at the other negative; this can be accomplished only by the use of stationary paths exterior to the magnetic field of force, and with which the independent internal conductors are maintained in electrical connection through connecting rings and rubbing contacts."

Eickemeyer illustrates various forms of his alleged invention by some 42 figures, and (on page 6, lines 115-125, of patent) refers to the special feature claimed to be appropriated by defendant as follows:

"It will be observed that, in many of the machines illustrated, the exciting helix or helices are inclosed within a mass of magnetic metal, which is chambered and which surrounds the armature, and that each helix is concentric with the axis of the armature, and that these parts, thus organized, involve a novel feature, which I deem of value, in that the magnetic currents or forces are thereby practically restricted to the interior portions of the machine."

Complainant's counsel describes this construction and its advantages as follows:

"The particular feature exhibited by many of the forms of generator illustrated in the patent, and to which special attention is directed by the paragraph on page 6, lines 115 to 124, quoted above, will be seen to involve exterior and interior cylindrical magnetic elements, between which are the convolutions of the conductor or coils which impart magnetism unvarying in direction to both. The exterior element is the inclosing frame or shell of the machine. The interior element serves to complete the magnetic circuit, and thus to maintain a region of very intense magnetic force, within the influence of which are the armature or current-generating coils. The advantage which is attributed to this arrangement by the patent is stated to lie in the fact that 'the magnetic currents or forces are practically restricted to the interior portions of the machine.' This practical restriction of the magnetic currents or forces to the interior parts of the machine, by the inclosure of the concentric exciting helix or helices within a mass of magnetic metal which surrounds the armature, results in important advantages (obvious to the electrician) in the operation of the machine, such as the practical constancy of the magnetic flux throughout the magnetic circuit of the machine, thereby preventing mechanical thumping and waste of energy in heating, the magnetizing of the machine with a much less expenditure of energy and a consequent reduction of expense, and great magnetic power with a minimum of material. A magnetic shell, inclosing a helix concentrically surrounding the armature, as shown and described in the patent, affords the shortest possible circuit for the lines of force enveloping the magnetizing conductors; the whole annular cross section being available for the purpose. There is a minimum resistance to the passage of the lines of force for two reasons: First, the path is shorter; and, second, its total cross section is relatively great, even with a shell of but moderate thickness. Moreover, the exterior shell affords the machine a desirable protection against mechanical injuries. In addition to the above, this particular arrangement in which 'the exciting helix or helices are inclosed within a mass of magnetic metal, which is chambered and which surrounds the armature,' each helix being 'concentric with the axis of the armature,' lends itself very readily to the construction of machines having any number of poles, without increasing



the number of field coils, as was necessary in other types of machines. In other words, this arrangement is peculiarly useful, not only in continuous current dynamos, but also in those alternating current machines in which the magnetic polarity of the rotating and stationary elements, respectively, is not reversed in the operation of the machine and not subject to violent fluctuations."

The only claim referring to this feature, involved in this suit, is the seventh, which is as follows:

"(7) In a magneto-electric or electro-magnetic machine, the combination, substantially as hereinbefore described, of a revolving armature, an inclosing magnetic shell, and one or more exciting helices housed within said shell and arranged concentrically with the axis of the armature."

Eickemeyer's construction was an improvement upon the constructions of the homopolar machines of the prior art, and involved invention. It does not appear that any such machine as is described in the patent has ever been manufactured or would have any practical value; but such a machine would produce a limited current, and would be capable of practical application, except for the fact that the ordinary machines in the art are vastly superior. The complainant's position is that:

"Eickemeyer was the first to devise and to apply to magneto-electric or dynamo-electric machines the feature of construction which involves an inner rotating cylinder, an outer inclosing magnetic shell, and a concentric exciting helix housed within the shell and imparting magnetism of one polarity to the core and another to the shell; and this feature is one of great practical value and importance in all machines of that class to which both the Eickemeyer and the Stanley generator belong, and in which a constant polar relation between the stationary and the rotary elements is an essential prerequisite."

The defendant's machine is "an inductor dynamo, namely, a machine in which all windings are stationary; the alternating current being produced by rotating magnetized iron masses in front of the armature coils, and does not require any collector, rings or brushes." Defendant thus describes and distinguishes his apparatus:

"The defendant's machine is a recognized standard machine of the alternating current generator of the 'inductor' type, in which, as contrasted with a rotating armature, carried by an 'inner pole,' about which the uniform or annular field exists, there is only a rotating field magnet core provided at each end with a plurality of poles, energized by a stationary exciting coil surrounding its center, and acting to vary the flux in a stationary armature, consisting of a stationary induced system imbedded in stationary iron frame, which magnetically connects the poles of the revolving field magnet core. In this generator, all the electrical conductors are stationary, a condition which is impossible in a machine of the 'unipolar' type. A reversal of defendant's machine would consist in making the inner field magnet core stationary and revolving the outer armature. That mere reversal would not consist in transferring the armature coils to the inner portion, with or without other changes, is demonstrated by the fact that the transfer of the Eickemeyer armature coils from the moving part to the stationary part would make that machine incapable of generating any current at all. An inductor system demands an irregular magnetic field, producing variations in flux. The unipolar system demands a regular, or, as Eickemeyer puts it, 'annular' (page 1, line 58), magnetic field, producing no variation of flux in any part of the machine. The two classes of machine demand different elements and different combinations of elements and different methods of operation."

The issue is on the question of infringement. One of the elements of the seventh claim is a "revolving armature." What, then, is the definition of the term "armature," as used in this claim? Defendant denies that he uses a revolving armature. In the Eickemeyer construction, the inner iron core is surrounded by copper conductors which revolve. In the defendant's machine, these conductors are stationary. Defendant's counsel contends that by "armature" is intended these conductors. He says:

"Our position is that the gist of the armature is the copper conductors, which revolve in the Eickemeyer machine and generate the current which is sent into the external circuit. In every one of the machines shown and described, the copper element, which constitutes the electric conducting portion of the revolving device, rotates. The iron element, however, which supports the rotating armature, sometimes revolves, as in Fig. 23, and sometimes does not revolve, as in Fig. 22. It is material that the copper conductor should revolve. It is immaterial whether the iron, within the copper conductors constituting the armature, should revolve. Indeed, Eickemeyer nowhere speaks of the internal iron as being the armature or as being a part of the armature. He always calls it, if I am right, either a magnet pole or a magnet."

Complainant's position is as follows:

"In every form of machine shown in the Eickemeyer patent, and in every conceivable embodiment of the invention which involves an outer shell, there is shown, and there must be presented, an inner core. Its absence would be fatal, in that it would leave no magnetic circuit such as an operative machine demands. The invention of claim 7, in order to be realized in any conceivable form, must include a magnetic core; and it is equally essential that this core be surrounded by the exciting helix or helices. The relations or positions of the armature conductors to the exciting helix or helices are largely immaterial. It is not at all necessary that they have their axes concentric with that of the helix or helices, but it is necessary that the core and the helix be concentric. Unless claim 7, therefore, includes by the term 'armature,' and unless lines 115 et seq., on page 6, are intended to describe as the 'armature,' the iron core with which the armature conductors are shown as associated, the said paragraph and the seventh claim are meaningless. By no other conceivable arrangement or device than the shell and core could the lines of force be practically restricted to the interior of the machine."

Complainant's contention is, in substance, that the term "armature" in the claim should be construed to mean the inner part which revolves, whether the copper conductors revolve with it or not. That the patentee would have so stated his claim as to have made it applicable to an alternating current machine, if he had foreseen this litigation, is probable. That by "revolving armature" he in fact meant "revolving conductors" seems reasonably clear. One instance of its use is:

"The armature consists of insulated conductor bars, *b* (see Fig. 34), imbedded in a cylindrical shell of hard rubber (see Fig. 36), which has grooves to receive the conductor bars, and is rigidly secured to the inner rotating magnet, *A*."

In several other places in the specifications he distinguishes between the armature and the inner magnet, which, in most of his constructions, rotates with it. From the evidence it also appears that this use of the word "armature" to describe the conductors accords with the prevailing usage at the date of the application for the pat-

ent. If Eickemeyer's real invention, as his counsel insists, is equally valuable in a machine in which the conductors are stationary,—an alternating current machine,—then his invention is broader than his claim. It may not be necessary that he should have foreseen all the uses to which the invention may be applied, but it is necessary that the claim should not be so worded as to exclude them. Even if by the term "armature" Eickemeyer meant the rotating element comprising the iron core, as contended by complainant, his language so repeatedly contradicts his meaning that this court would not be justified in adopting such alleged meaning. In fact, it is immaterial whether the iron core rotates or not. The violence of the strained construction contended for by counsel for complainant is suggested in the argument in support of its interpretation,—that, inasmuch as the application was pending for five years, the court might "assume that it was amended by some man other than the patentee, who used different forms of expression, and did not use them in the same sense as Eickemeyer." Even if such a violent assumption might justify a decree in favor of any patent, it ought not to be invoked to broaden a mere unpractical improvement in one limited branch of an art to cover a practical development in another branch of such art.

Furthermore, even if the words "revolving iron core" were substituted for "revolving armature" in the claim, the constructions and operation of the machines differ so widely that defendant's machines could not be held to infringe. In Eickemeyer's there is no variation of the continuous magnetic flux. In defendant's there is a constant variation and pulsation which is essential to its operation. If the armature coils of defendant were to be changed to the revolving part, as in Eickemeyer's, the machine would be inoperative. If, in Eickemeyer's, the armature coils were attached to the stationary part, as in defendant's, it would be inoperative. The requirement, in Eickemeyer's, that each linear conductor should be connected to the other by an outside current, would make it practically inoperative, if the armature were stationary. The improvement is so narrow that it is doubtful whether it should in any case be extended to cover a reversal of operations; but, even if it could be so extended, it cannot embrace the defendant's construction, because the patented machine could not itself be so reversed in operation as to make an operative machine. The patent in suit covers a mere impracticable improvement upon the prior continuous current unipolar art. The defendant's construction embodies a practical improvement in a distinct alternating current inductor art.

These conclusions dispense with the necessity of discussing defendant's contention that the serious leakages essential to the operation of its machine, by reason of its different construction, show that defendant does not use the functionally inclosing magnetic shell, whereby "the magnetic currents or forces are practically restricted to the interior portions of the machine," and a uniform field is secured, and that the sole function of defendant's iron frame is to render the field less uniform and to support the armature. For 20 years the courts have been struggling to so develop the patent law as to protect the rights of the contracting parties, and to give full

meaning to the promise implied in the constitutional grant, "to promote the progress of useful arts, by securing to inventors the exclusive right to their discoveries." For the protection of the inventor, they have differentiated him from the mechanic. They have extended the scope of patentable inventions. We must not forget, however, that the foundation of the duty to the patentee or the public is "to promote the progress of useful arts." When, therefore, an inventor, claiming only to be a mere improver upon an art previously confessedly impracticable, is admitted to the race by a patent granted on a theoretical utility, but finds no practical method to surmount the obstacle, or break down the barriers which have closed the way to his predecessors, while his machine may still keep its place in the chosen path, yet, having no inherent capacity for forward movement, the inventor will not be permitted to drag it across the whole road open to the world of invention, and pervert the purposes of his admission to promote, by obstructions to prevent, the progress of the useful arts. "A construction which would permit such a course would operate rather to discourage than to promote inventive talent." *Deering v. Winona Harvester Works*, 155 U. S. 286. And, while an inventor may not be improved out of his invention, yet he may be altered out of a mere improvement patent by a construction differing in means, object, and result.

Let the bill be dismissed.

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BALLOU v. POTTER et al.

(Circuit Court, D. Rhode Island. September 24. 1901.)

No. 2,549.

PATENTS—INVENTION—PROCESS FOR MAKING SAFETY PINS.

The Ballou patent, No. 380,380, for an improved process of manufacturing safety pins, which in substance consists in the use of a cold-swaging machine to form and temper the pin and catch, is void because what is therein described does not constitute a patentable process, and the description is not such as would enable a person skilled in the art to use the same without extended and original experiment, it appearing that pins cannot be successfully made by the method described, except from a special alloy, and by using specially constructed dies in the swaging machine, neither of which are mentioned in the patent.

In Equity. Suit for infringement of patent. On final hearing.

Warren R. Perce, for complainant.

Charles A. Wilson, for respondents.

BROWN, District Judge. This suit is for infringement of letters patent No. 380,380, dated April 3, 1888, to Barton A. Ballou, for an improvement in the process of manufacturing safety pins. The defense is the invalidity of the patent, infringement being conceded if the patent is valid. The specification states that the invention "relates to that class of pins commonly called 'safety pins,' in which the pin point is protected by the catch receiving it; and it consists of a series of operations, as hereinafter specified, by which the wire blank

is formed with a central broad body and one end of the wire is swaged to form a pin catch, and the other end is reduced, elongated, tempered, and pointed by compressing dies to form a pin tongue, after which said ends are bent so as to engage with each other." Also: "It has been common hitherto to form the tongues of broad-backed safety pins by hammering, but such process has a tendency to make the pin tongue brittle. By cold-swaging the pin tongue, as above described, it is not only shaped and pointed, but receives that hardness and temper which are necessary, without wasting the material, as when the stock is filed, or destroying the fibre of the metal, as when the stock is hammered." The claim is as follows: "The improved process of manufacturing safety pins herein described, consisting in forming the central portion of the wire blank into a bodied portion, a, by a die and plunger, swaging one end of the wire to give it a longitudinal groove, reducing, elongating, tempering, and pointing the opposite end of the wire by cold-swaging by suitable dies, and bending the ends so as to make them engageable with each other, substantially as specified." The patent states also that the end of the blank from which the pin is formed is "reduced and elongated by compression in any suitable machine, for which purpose I use the needle swaging machine described in letters patent of the United States No. 268,874. By this machine the wire end, c, is subjected to the process known as 'cold-swaging,' whereby it is lengthened out and tempered to form the pin tongue." This cold-swaging machine, known as the "Torrington machine," is also used in forming the other end of the blank into a pin catch. The defendant contends that the patent discloses no patentable invention, and no process, but merely familiar mechanical operations, not patentable under a process claim; and relies upon *Iron Works v. Medart*, 158 U. S. 68, 15 Sup. Ct. 745, 39 L. Ed. 899. To avoid this decision, the complainant contends that the "tempering" of metal is a process, and that the use of the word "tempering" in the claim indicates the ground upon which the patent should be supported. The only "tempering" referred to in the patent is that produced by the action of the cold-swaging machine. It seems apparent that there is no relation between the manner of forming the rest of the blank and the "tempering" effect of the cold-swaging machine. Whether the central portion of the blank is formed by a die and plunger, as specified in the claim, or by rolling, or by the hand hammer, is immaterial. The patent, then, is, in substance, for the use of a cold-swaging machine to form and temper the pin and catch of a safety pin. As the patent concedes that it is old to form the tongues of broad-backed safety pins by hammering, but says that this has a tendency to make the pin tongue brittle, and as condensation and compression of metal by a hammer to some extent affects the temper and elasticity of the pin, it would appear that the improvement effected in the Ballou safety-pin tongue was due simply to the superior manner in which the machine hammer dies of the swaging machine performed the old operation of hammering and condensing the metal, and that the advance pointed out in the patent was due simply to the superior performance by Torrington's patented machine of work that previously had been

performed less perfectly by hand. Upon this view, I am of the opinion that there was no invention in doing what is described in the patent. *Peters v. Manufacturing Co.*, 130 U. S. 629, 9 Sup. Ct. 643, 32 L. Ed. 1057; *Kilbourne v. Bingham*, 1 C. C. A. 617, 50 Fed. 697; *Rynear v. Evans* (C. C.) 83 Fed. 696.

It furthermore appears in evidence, however, that for the making of the Ballou safety pin much more is essential than is disclosed by the patent. Thus, the Torrington machine is referred to as a proper machine for cold-swaging; but it appears from the evidence of the complainant that the Torrington machine did not solve the difficulties that arose in making pin tongues; that its dies were unsuitable; and that much experimenting was necessary, as a result of which it was found that to elongate the wire and harden the metal without injury depended upon getting a proper taper of the dies; and that the patentee found "that the pin must be simultaneously struck its entire length, beyond the taper, and all around, in order to get the requisite stiffness and strength, hardness and temper." It appears also that much experimenting was necessary with alloys before a suitable stock was found which could be made sufficiently elastic and hard by cold-swaging. The complainant concedes that the machine must operate upon a prepared or alloyed stock. He testifies also: "In ordinary jewelry the alloy is copper and silver only, but I found that these alloys did not give a material suitable for tempering and hardening by my process; therefore I used the other metals which I have mentioned [i. e. gold, copper, silver, nickel, tin, and zinc in composition]." It also appears from the testimony of the complainants that the Ballou pins get their peculiar qualities "from the combined metals from which they are made, the dies used in their manufacture, and the action of the swaging machine and dies upon the combined metals, whereby the peculiar qualities of each are developed"; that is to say, dies of a peculiar taper and an alloy of a particular character are essential to the complainant's "process." The patent is silent upon these points. It is obvious, therefore, that the patent does not give such a full disclosure of the way of making safety pins as is required by the patent law. After the expiration of the patent, there must be extended experiment, both with dies and alloys, before one skilled in the art can make the Ballou pin. The complainant's brief attempts to meet the objection that the specification and claim do not contain the word "alloy," or any reference thereto, by saying "that the use of the word 'tempered' in the claim necessarily implies an alloyed stock, a pure metal requiring a mixture therewith of some one or more other metals in order to secure a 'temper.'" I do not think that such an implication exists; but, if we concede it, the mere instruction to use an alloy would be still insufficient, for the complainant has testified that the ordinary alloys, copper and silver, are unsuitable for the "process." It is apparent from the evidence that the desirable features of the Ballou pin are due rather to skill and excellence of manufacture than to any inventive thought which led to a patentable process or product. I am of the opinion that the patent, construed in the light of the testimony as to the prior art, does not disclose a patentable invention;

that what is there described does not constitute a patentable process, and is not such a description as would enable a person skilled in the art to use the same without extended and original experiment. I find the patent invalid. The bill will be dismissed.

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**BARR CAR CO. v. CHICAGO & N. W. RY. CO.**  
(Circuit Court of Appeals, Seventh Circuit. October 1, 1901.)  
No. 767.

**1. PATENTS—CONFLICTING CLAIMS TO INVENTION—EVIDENCE.**

The presumption arising from the issuance of a patent that the patentee was the inventor of what is therein described is overcome by proof that he had previously prepared the specification, and signed as a witness an application by another for a patent for the same device; and the duty is cast upon him to prove that he, and not the original applicant, was in fact the inventor.

**2. SAME—FAILURE TO ASSERT CLAIM—DURESS.**

The relations between an employé of a railroad company and the head of the department in which he works are not of such a confidential nature as to sustain a claim of the subordinate that his failure to claim as his own an invention for which his superior had, with his knowledge, applied for a patent in his own name, was due to compulsion or duress, because of his fear that he would lose his position, where no actual duress is charged; and his claim to the invention cannot be sustained upon his own testimony alone, which is directly contradicted, and is inconsistent with his acts, in not asserting any claim thereto for 15 months after he had severed all relations with the other claimant.

**3. SAME—ORE CARS.**

The Barr patent, No. 349,134, for a coal and ore car, *held void* on the ground that the patentee was not the original inventor.

**Appeal from the Circuit Court of the United States for the Eastern District of Wisconsin.**

This suit was brought by the appellant, as the assignee of Lester J. Barr, for the alleged infringement by the appellee of letters patent of the United States No. 349,134, issued to Lester J. Barr September 14, 1886, for a "Coal and Ore Car." The defendant below pleaded (a) want of novelty; (b) that Barr was not the inventor; (c) laches. The court below, in an opinion in the record, but otherwise unreported, held that the alleged invention involved no patentable novelty; that one George H. White, and not Lester J. Barr, was the original inventor; and a decree was thereupon entered dismissing the bill for want of equity. In view of the conclusion reached upon the appeal, it is only necessary to state the facts disclosed by the record with respect to the question who was the original inventor of the claimed improvement. George H. White entered the service of the Chicago & Northwestern Railway Company in 1872, acting as foreman and assistant to the master mechanic of the Peninsula Division of that railway, being in the ore district of the Northern Peninsula of Michigan. He so continued until the year 1875, when he was appointed master mechanic of the Peninsula Division, which position he filled until the spring of the year 1883, when he left the service of that railway and went to Duluth to take charge, as superintendent, of the Duluth & Iron Range Railway, which position he held until 1887. He testifies that in the year 1873 the Chicago & Northwestern Railway Company had two eight-wheeled, double-truck, double-hopper ore cars constructed at the Fond du Lac shop, which were received by him at Escanaba and placed in the ore service between Escanaba and Negaunee. These cars, it was found, were required to be set or spotted twice in order to dump both hoppers, and, as the opening of the hoppers came over the two

inner axles of the truck, the ore bruised and cut the axle. This led, he states, to his consideration of the question, and in 1881 he conceived the idea of a single-hopper, double-drop bottom car, and in 1882 he obtained permission to construct two of them, which permission was afterwards countermanded by Layng, the general superintendent, it not being deemed advisable to introduce a larger car into the service at that time, as such change would require alterations in the docks and pockets at the mines. On February 7, 1883, White verified an application for a patent for his invention, which was filed in the patent office February 12, 1883. The invention described is conceded to be identical with the invention claimed in the Barr patent, which is the subject of this suit. Barr was born in the year 1853 at Erie, Pa., where his father manufactured stoves, agricultural implements, and machinery. From the age of nine to that of nineteen, he spent his summer vacations from school in his father's foundry. Having graduated from the high school, in the summer of 1872 he commenced to learn the carpenter trade at Erie, and in September, 1874, entered Lehigh University, taking a course of civil engineering, where he remained until 1877; then became a teacher in the Erie high school for one year, and from April, 1878, until August, 1879, was engaged in the lumber business at Menominee, Mich., and thereafter, until December, 1879, was employed as a carpenter at Ishpeming, Mich. On December 2, 1879, he entered the service of the Chicago & Northwestern Railway Company at Escanaba as a carpenter and subforeman in the construction of coal trestles and sheds in the Escanaba yard. In the summer of that year he was foreman of a gang of men repairing bridges and buildings along the line of the Peninsula Division of the railway, and in the autumn of 1880 he entered the office of George H. White, the master mechanic, as a draftsman, having, as he said, general knowledge of car construction, but not enough to make complete working drawings; and he obtained a copy of the Master Car Builders' Dictionary, issued by the master car builders' association in 1879, to familiarize himself with the business. During the winter of 1880-81 he was assistant foreman in the construction of an ore dock at Escanaba. In the spring of 1881 he returned to his work as draftsman in White's office, remaining there until April, 1882. On April 4, 1882, he was married, and thereupon commenced the business of building and contracting in Escanaba upon his own account, and after three months' experience therein, becoming involved, he returned to his position in the office of White as draftsman, remaining there until May, 1883, when White became superintendent of the Duluth & Iron Range Railroad, taking Barr with him to Duluth. He remained in the service under White until September 1, 1884, when he entered the service of the Milwaukee, Lake Shore & Western Railroad Company as superintendent of construction of certain docks at Ashland, and upon their completion took charge of their operation until the summer of 1886, when he entered upon the superintendence of the construction of ore docks for the Penokee Railroad, in which service he remained until the summer of 1887, from which time until December, 1889, he was "interested in the Gogebic iron boom," where he lost all the earnings of the preceding few years, when he entered the service of the government in the general post office at Chicago as draftsman and topographer, where he is now employed. He claims that between the years 1880 and 1883 he conceived the idea of the patented car for which Mr. White filed an application for a patent. He prepared Mr. White's specifications and drawings, writing the specifications in his own hand, and signed both the specifications and drawings which had been executed by Mr. White and verified by him, as a witness to their execution. Neither prior to their execution nor thereafter until he left service under White, September 4, 1884, did he make any claim, to White or to any other person, that he was the inventor of the car in question, knowing all the time that Mr. White was—to use Barr's own language—"posing as its originator," and knowing that White was generally given the credit of contriving this ore car during the time that he (Barr) was employed under him. His application for the patent was filed January 16, 1886, at which time he was in the service of the Milwaukee, Lake Shore & Western Railroad Company. No witness is produced who testifies that Barr ever claimed to be the in-



ventor of this car until his application for a patent, although one or two witnesses testify that he showed them the drawings of the car which were in the office of Mr. White. Several witnesses testify to the public claim of Mr. White to this invention at the time of his application for a patent, and at least one testifies to conversation with White concerning the car and its claimed invention by White before the time that Barr entered into service under White. Barr gives as an excuse for his silence that by reason of his unfortunate business adventure just after his marriage, and during the spring and summer of 1882, he was in debt in the amount of \$1,500,—\$900 upon his home, and \$600 upon contracts which he had undertaken just previous to leaving the service of the Chicago & Northwestern Railway Company under Mr. White. In May, 1883, he accompanied Mr. White to Duluth in the service of the Duluth & Iron Range Railroad Company. Barr sold his house for \$1,100, the purchaser assuming the amount of indebtedness upon it. The balance of his indebtedness of \$800 he subsequently paid off. He states upon his return to Mr. White's office in the summer of 1882 he obtained his consent to an arrangement by which he could give orders on his salary each month to certain of his creditors, because others of his creditors were pressing him unreasonably, and this was done to enable him to avoid infraction of a rule of the railway company "that two garnishees of an employe's salary would mean his discharge." Because of this fact he states that he did not suggest to White at the time that he signed as a witness White's specifications and drawings that he (Barr) was the real inventor; but he gives no reason for his silence after May, 1883, when he left the employment of the railway company. The claim at the end of the specifications of the White application, as drawn and as amended, was disallowed, and finally a claim was allowed in such narrow terms that White testifies he thought it not worth while to pay the expense of the patent. The claims of the invention asserted and as amended by Barr were likewise disallowed by the patent office, and finally allowed in the restricted language in which they now appear.

John W. Munday, for appellant.

George S. Payson and Lloyd W. Bowers, for appellee.

Before WOODS, JENKINS, and GROSSCUP, Circuit Judges.

JENKINS, Circuit Judge, after the foregoing statement of the case, delivered the opinion of the court.

It is doubtless true that the letters patent to Barr afford a prima facie presumption that he is the original and first inventor of what is therein described as his improvement, and that the burden to establish the contrary rests upon the defendant below, who asserted the fact. *Agawan Woolen Co. v. Jordan*, 7 Wall. 597, 19 L. Ed. 177; *Stimpson v. Woodman*, 10 Wall. 122, 19 L. Ed. 866. But that prima facie presumption may be rebutted so as to shift upon the patentee the duty of overcoming the probative force of the evidence produced by his opponent, and this prima facie presumption, we think, is, in the first instance at least, fully met and overcome by the fact that Barr several years before the date of his application prepared specifications and drawings for an application for a patent for the same device then claimed to have been invented by White, and which plans and specifications he signed as a witness for White. If that act is to stand as of probative force, Barr is convicted out of his own mouth, and cannot be held to be the original inventor. He seeks to avoid the effect of this act under the claim that what he then did was done under some sort of compulsion or duress. He does not claim any active compulsion by White, but that he then acted under fear that, if he

claimed his own, White would procure his discharge from the employment of the railroad company. We are cited to many cases which avoid things done under compulsion and duress, and where dealings between persons in confidential relation—as, for example, lawyer and client, trustee and cestui que trust, guardian and ward, physician and patient, husband and wife—are watched with extreme jealousy, and are avoided if any duress or undue influence appear. *Lyon v. Home*, L. R. 6 Eq. 674; *Casbourne v. Barsham*, 2 Beav. 76; *Haydock's Ex'rs v. Haydock*, 33 N. J. Eq. 501; *Taylor v. Taylor*, 8 How. 183, 12 L. Ed. 1040; *Munson v. Carter*, 19 Neb. 293, 27 N. W. 208. A multitude of cases could be assembled to the same purport, and the law of them is undoubted. The present case cannot, however, be held to fall within the principle of those decisions. Here there was no such confidential relation between White and Barr. He was a clerk or draftsman in the service of the railway company under White. He was under no more dependence upon White than is any clerk in the service of a railway company in dependence upon the head of the particular department in which he serves. Both were free men. White, with the consent of the railway company, could discharge Barr at any time, and Barr was at all times at liberty to leave his employment. It would be carrying the rule a great way and to a dangerous extent to hold that any one occupying a subordinate position is not to be bound by his acts, as between himself and his superior, because of a supposed fear upon the part of the clerk that, should he protest, he might lose his employment. See upon this subject *Leary v. Railroad Co.*, 139 Mass. 580, 2 N. E. 115, 52 Am. Rep. 733; *Dougherty v. Steel Co.*, 88 Wis. 343, 60 N. W. 274; *Reed v. Stockmeyer*, 34 U. S. App. 727, 741, 20 C. C. A. 381, 74 Fed. 186. The contention that Barr was acting under some sort of duress or compulsion arising from his fear, and not from any act of White, is rendered of still less avail by the fact that within two or three months after signing these specifications he voluntarily left the service of that railway company and accompanied White to another field of labor, and for fifteen months after he left service under Mr. White and entered the employment of another railway company never suggested to any one, by act or deed or word, that he was the inventor of this car. His conduct under the circumstances, if he was in fact, or deemed himself in fact to be, the inventor of this car, is inexplicable, and runs counter to the usual conduct of responsible human beings. He stands alone in the assertion of his alleged invention. His testimony is in sharp conflict with that of White, who claims also to be the inventor, and whose evidence is fortified by the surrounding circumstances, and greatly strengthened by the action of Barr. In the light of these circumstances, we are unable, judging of the case in the light of the usual conduct of men, to give credit to his testimony thus contradicted directly by circumstances and by his own act. As was well said by the supreme court in *Atlantic Works v. Brady*, 107 U. S. 192, 203, 2 Sup. Ct. 225, 234, 27 L. Ed. 438, 442,—a case much like the present:

“Interested as he is in the result of the suit, his own testimony cannot be allowed to prevail against a course of conduct so utterly at variance

with it. It may be true; but we cannot give it effect against what he himself did, and did not do, without disregarding the ordinary laws that govern human conduct."

The decree is affirmed.

WOODS, Circuit Judge, sat at the hearing of this case, and concurred in the result, but departed this life before the preparation of this opinion.

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CASTER SOCKET CO., Limited, v. CLARK et al.

(Circuit Court, D. Connecticut. September 20, 1901.)

No. 1,027.

1. PATENTS—VALIDITY—INFRINGEMENT—SOCKETS FOR FURNITURE CASTERS.

The Berkey patent, No. 318,533, for a socket for furniture casters, made in halves, one-half having an interior spring integral with the socket, and formed by the same operation, which engages with the bulbous head of the caster shank to prevent the same from dropping out unless pressure is applied, is of doubtful validity in view of the prior art, which discloses a socket identical in all respects except that the spring is made from a separate piece of metal, and riveted to the socket. If conceded validity, it is limited to the precise construction shown, and, as so limited, *held* not infringed.

2. SAME—DATE OF INVENTION—EVIDENCE.

An unsupported oral statement, made by a patentee many years after, is too vague and indefinite to carry the date of his invention back to a time prior to an application by another inventor, filed more than three years before his own, and covering substantially the same invention.

3. SAME—VALIDITY AND INVENTION—SOCKET FOR FURNITURE CASTERS.

The Denton patent, No. 594,937, for a socket or case for furniture casters, is void for anticipation. Also *held* not infringed, if conceded validity.

In Equity. Suit for infringement of patents. On final hearing.

Taggart, Denison & Wilson, for complainant.

Mitchell, Bartlett & Brownell, for defendants.

TOWNSEND, District Judge. The complaint alleges infringement of United States patents No. 318,533, dated May 26, 1885, to Julius Berkey, and No. 594,937, dated December 7, 1897, to Lemi B. Denton, both for sockets for furniture casters. Defenses are invalidity of patent, no capacity for conjoint use, denial of infringement. The object of these patents is to furnish a socket for furniture casters such that the casters, when inserted, will not drop out on lifting the article of furniture under which they are placed, but such that the casters can be readily removed by the use of slight force when desired. At the time of the issue of the Berkey patent it was common to make caster sockets in two separate halves. The specification of the Berkey patent describes the construction as follows:

"The socket is made in two parts, and when in use the two parts are put together so as to form the socket, and are driven into the opening in the furniture provided to receive the same. \* \* \* A represents a half socket of iron or other metal, having the tongue, a, formed by casting the half socket and tongue in one piece, the tongue projecting or inclining inwardly, as

shown in Fig. 3. B is a half socket without the tongue, a, but having a ridge, c, and a depression, d, for holding the ball, C, of the caster shank. \* \* \* The shank is in the ordinary form, except it is provided with the ball or enlarged portion, C, so as to be held in place by the springs or spring and ridge, c. Two of the half sockets A, when put together, form a complete socket, or the half socket A and half socket B are put together to form a complete socket."

The single claim is as follows:

"In a caster socket, the half socket A, provided with a tongue, a, integral with and formed of a part of the half socket A, substantially as and for the purpose described."

As appears by the description of this patent, the half socket has a spring made from the same piece with the socket, and integral therewith, projecting from the lower part of the socket upward and inward. The pintle or stem of the caster has a ball or enlarged portion at the upper end. When inserted in the socket, the ball presses the spring backward until it has passed the upper end of the spring, when the spring again inclines inward, and presses against the stem of the caster just below the ball; thus, when the piece of furniture is lifted, the caster is held in place by the pressure of the spring, but a firm pull by the hand upon the caster will suffice to overcome the force of the spring and remove the caster. When the half sockets A and B are used, the upper end of the spring combines with the ridge of the socket B to hold the ball, and thereby the caster in place; when the two half sockets A are used, the two springs combine their action with the same result. The specification of the Denton patent uses the term "caster case" instead of "socket." In this patent, the caster case or socket is made of one piece of metal, not divided in halves. The socket is open at the top, and split, or made with a slot, the split or slot extending a short distance from the top downward, the body of the case from the lower end of the slot to the track plate being made solid. The upper end of the case from the bottom of the slot upward is made somewhat smaller than the body of the case. The upper end of the pintle or caster stem is made bulbous shape. When the stem is pressed into the socket, the parts of the upper end of the socket on the different sides of the split or slot spring outward allowing the bulbous-shaped end of the stem of the caster to pass between and above them, when they spring back to their original position, and press against the stem below the bulbous-shaped part, thus holding the caster in place. As in the Berkey construction, so in the Denton construction, the caster will not drop out when the furniture is lifted; but a firm pull upon it will separate the parts of the socket adjoining the slots, and allow the caster to be removed. The single claim of the Denton patent is as follows:

"In a case for furniture casters, a solid body extending up for a distance from the track plate, the upper end contracted or made smaller and slotted down to the line of contraction so that it can be made to spring apart, and the end left open, so that the bulbous end of a caster stem may be forced through and supported by resting upon the end of the case, substantially as and for the purpose set forth."

The only substantial difference between the construction of the Berkey patent and that of Kane and Brown, No. 52,420, of 1866, is

that the spring of the Kane and Brown patent is riveted upon the interior of the socket, while that of the Berkey patent is integral with the socket. The essence of the claimed invention is this integral spring. This is squarely and frankly and repeatedly stated by complainant's counsel in their brief. Thus, after describing eight patents for the same purpose from 1854 to 1876, all of which they claim to have been unsuccessful, they say of the Berkey invention:

"He used a cast-metal socket of substantially the same form shown by several earlier patents. He used a pintle with a bulbous head of substantially the same form shown by several earlier patents. He used a spring engaging this bulbous head, and removably holding it in position. His improvement and his invention consisted, and consisted only, in making the spring integral with the socket, of the same material, and formed by the same operation, instead of making the spring of another material by separate operation, and then by a further operation attaching the two together. It is evident that greater simplicity, cheapness, and efficiency were thereby obtained. The patent is not a broad one in the sense that it was the first for its purpose; on the contrary, the margin of invention upon which it stands is narrow. We hope to convince the court, however, that this margin, though narrow, is ample."

The complainant's contention is that this invention of a spring integral with the body of the socket is so far forth a pioneer invention, and should be construed broadly so as to cover every form of socket having a spring integral therewith; and therefore that it covers the construction of the Denton patent, the Denton construction being a mere improvement on the principal or Berkey invention; and that each of these patents is infringed by the defendants. At the time of the issuing of the Berkey patent, springs integral with the main structure were well known to mechanics, and were commonly used in a great variety of arts. Under the ordinary application of the doctrine of equivalents, there could be no invention in substituting the Berkey spring for that of Kane and Brown. The terms of the claim apparently confine it to the particular construction shown. The "half socket A" apparently indicates the half socket shown in the drawing. This is closed over the top, and, until the use of the track plate came in, no other construction than one with a closed top was practicable. After track plates were introduced, the grip-neck construction, so called, having an open top, supplanted the prior constructions. Seemingly, the Kane and Brown construction would be much more likely to suggest to a mechanic the Berkey construction than the Berkey construction would be to suggest the Denton construction, or that used by the defendants. Moreover, if the Berkey claim be construed broadly enough to cover the construction of the Denton patent, it is anticipated by a construction shown in patent No. 217,349, of 1879, to Donovan. The Donovan patent shows and describes a caster socket of which the lower part is solid and the upper part has a slit down each side. The caster pintle carries a flat button-shaped head, which passes through the socket, but is not of such shape that, after having been placed in position, it can be pulled back, as the upper ends of the two sides of the socket, after the pintle is in place, will close beneath this head, and, the under side of the head being flat, hold the pintle firmly. If used with a caster pintle like Denton's, having a bulbous head, it would constitute his exact device.

The claim of both patents, however, is for the socket as such, and not for a socket in combination with any form of pintle. Moreover, pintle heads shaped like those of the Berkey and Denton patents were well known. The Denton patent is anticipated by the Donovan patent above mentioned, and by the McElhiney patent, No. 485,706, which shows substantially the same construction, the upper ends of the sockets being contracted, and having splits or slots so that the sides may be caused to spring apart, and the bulbous-shaped head of the pintle be forced through. The application for the McElhiney patent was filed on July 25, 1891; the application for the Denton patent was filed on September 22, 1894. In a preliminary statement in an interference with one Wilmot, Denton stated that he had conceived the invention on or about June 1, 1891, and on or about that day made a crude model, and exhibited it to others, no drawing thereof ever having been made; that he reduced the same to practice by making several full-sized casters, and presenting them to others, on or about the 1st day of May, 1892. In his testimony in this case he testified generally that the statements of fact contained in said preliminary statements were true. This oral statement, made years after, is too vague and indefinite to support a finding of invention previous to July 25, 1891, in view of the fact that his application for a patent was actually filed upwards of three years subsequent to McElhiney's.

Again, in view of the prior art, the Denton patent must be held to cover only the precise construction shown. In the patent office the application was rejected upon McElhiney, No. 498,444, and Diss, No. 436,307. Thereupon Denton inserted in his claim the limiting words "solid body," and in the specification stated, "The body of the case from the lower end of the slot to the track plate is made solid, so that there can be no danger of the sides being forced out of place and lap by each other." The examiner rejected the application, however, and on appeal the examiners in chief held that the making of the body of the case below the slot solid was patentable, saying, "The difference is between a socket which has a solid body and one which has a yielding body." Defendants' socket is made by rolling a sheet of metal into the form of a tube. Thus there is an open seam at one side of defendants' socket, and it is a yielding body, rather than a solid body, and therefore is not within the claim in the sense in which it was construed by the examiners in chief when allowing it.

The complainant, however, insists that the Berkey invention was successful in producing a result sought for many years; that his patent revolutionized the caster business; that a vast amount of furniture now embodies one or both of the patents in suit; that the public have acquiesced; and that, under the rulings in the Barbed-Wire Case, 143 U. S. 282, 12 Sup. Ct. 443, 450, 36 L. Ed. 154, and in Acme Clasp Co. v. Cary Mfg. Co., 41 C. C. A. 338, 101 Fed. 269, it was this commercial success which decided the questions in favor of the inventor, and that the same rule should be followed in this case. The evidence is very meager as to the number of sockets manufactured of the construction shown in the Berkey patent. Other improvements, business ability and push, and the use of sheet metal

seem to have contributed very largely to the increased sales; and it is by no means clear that any considerable number of articles made according to the specifications and drawings in the patent were ever in actual use. The improvements which led up to the socket now manufactured seem to have consisted in choosing from known mechanical devices, and using those best adapted for the purpose, rather than in actual invention. By means of the integral spring, as shown in the Berkey patent, greater simplicity, cheapness, and efficiency may have been obtained, as claimed by the complainant. Undoubtedly, these advantages were produced by later improvements, but, in view of the prior art, and in the absence of evidence as to the particular form of the sockets made during the earlier part of the period covered by the testimony, and with the forms of the sockets as to which the only definite evidence is produced differing widely from that shown in the Berkey patent, the precedents cited cannot determine the issue against the ordinary rules of mechanical equivalents in patent causes.

Defendants introduced in evidence a very large number of patents and other evidence illustrating the prior art. Even if the patents above particularly referred to had not been offered, it is very doubtful if either of the patents in suit could be sustained. The validity of the Berkey patent is doubtful, and, if valid, it is not infringed. The Denton patent is invalid, and, if valid, is not infringed. The Berkey patent should not be so construed as to cover the construction of the Denton patent, and these patents are not capable of joint use. Let the bill be dismissed.

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#### DAYLIGHT PRISM CO. v. MARCUS PRISM CO.

(Circuit Court, E. D. Pennsylvania. September 20, 1901.)

No. 35.

##### 1. PATENTS—ANTICIPATION.

The use of the laws of optics for one purpose cannot be regarded as an anticipation of the use of them for another, however similar, in connection with another and distinct subject.

##### 2. SAME—CONSTRUCTION OF CLAIMS.

The terms employed in a patent to describe the invention are to be interpreted reasonably, with reference to the art to which it relates, and what a mechanic skilled in the art would be able to do with it. While the patent is not to be extended beyond its terms by construction, it is not to be made impracticable within them, having regard to the subject with which it deals, by a too literal and precise interpretation.

##### 3. SAME—APPLICATION—DISCLAIMER.

Where a patentee, whose application had been rejected, in renewing the same, made certain descriptive declarations with regard to his invention to meet the objections of the examiner, this is not to be taken as a disclaimer, intended to narrow the claim, but an argument, to show certain things in regard to it.

##### 4. SAME—INFRINGEMENT—PRISM GLASS.

The Cummings patent, No. 593,045, for "daylight prism glass" for lighting dark interiors, consisting of panes or lights, one side of which is made up of a series of parallel triangular projections or prisms, and the other of parallel and uniform convex projections or lenses placed edge to edge, was not anticipated, and is valid; also held infringed.

In Equity. Suit for infringement of patent. On final hearing.  
Kenyon & Kenyon, for complainant.  
Charles Hunsicker and Ernest Howard Hunter, for respondent.

ARCHBALD, District Judge.<sup>1</sup> The striking practical results obtained in the lighting of dark interiors by the use of the plaintiffs' "daylight prism glass" are full proof of its utility, and are strongly persuasive of its novelty as well. This glass is manufactured by the complainants under patent No. 593,045, issued to George K. Cummings November 2, 1897, on an application filed May 28th of the same year, for an improvement in light transmitters. The glass consists of panes or tiles, one side of which is made up of a series of parallel triangular projections or prisms, and the other of parallel and uniform convex projections or lenses placed edge to edge. By the one the rays of light falling from the sky are refracted or deflected into the room or place to be lighted; and by the other these rays, instead of remaining in a single beam, are focused and diffused, thereby utilizing them to the greatest possible extent, and effecting a uniformity of light throughout the whole place. This is not merely the theoretical effect. It is what has been demonstrated by actual installation and use.

The first question is with regard to the novelty of the invention. There is no novelty in the use of a pane of glass as a light transmitter, one side of which is made up of ribs or projections in the shape of prisms, nor is it so claimed. This is found in the Boughton English patent (1880), the Pennycuick (1885), and the Jacobs (1891). It also appears in the three Basquins and the Soper, all of July, 1897, now owned by the Luxfer Company; but, as they are subsequent in date to the Cummings application, they need no further notice. In all of these, however, the surface of the opposite side is plane, while in the Cummings, as already stated, it is composed of a series of convex projections or lenses; and it is in the combination of the two—prisms on one side, and lenses on the other, parallel to and co-operating with each other—that the whole invention consists. This combination, I am persuaded, is not anticipated by anything found in the prior state of the art. The Johnson patent (1866), on which much reliance seems to be placed, is far different. Neither in purpose nor construction does it touch the patent in suit. It is a device for vault lights or covers, to be put in sidewalks or floors where light is to be transmitted directly from above to a vault or area below, at the same time that the space given up to it is freely used for ordinary transit or passage. We may assume that one of the points sought to be gained and actually accomplished by it is an increase of light over that of the ordinary bull's-eye, although no stress is laid on this feature by the patentee; but this is attained by an enlargement of the glass area, and not by any particular form given to either of its surfaces. As constructed, the vault cover is made up of a metallic frame in which narrow strips of heavy glass are set and kept in place by metal girders, the joints being made water-tight by cement, and further pro-

<sup>1</sup> Of Middle district, specially assigned.



tected by weather strips screwed onto the girders and made to overlap the edges of the glass. It is true that in a cross section of the vault cover, as displayed in the patent, we find the glass represented with a convex surface on one side, and triangular projections on the other, and it is claimed that this anticipates the patent in suit. But the single point of correspondence between the two so seized upon is factitious, while the differences are many and material. The Cummings glass is made in a single piece; the Johnson vault cover consists of separate pieces, with metal girders and weather strips—both opaque substances—in between. The whole purpose of the one is to make use of certain principles in optics by which the rays of light from a narrow sky arc are deflected and diffused into and throughout dark interiors; in the other, no optical effect whatever is attempted, other than simply to let the light from above sift through. In the one, the combination of the curved or convex projections on one side with the triangular or prism projections on the other is everything; in the other, the only significance given to the convex surface is that it affords “a safe and secure foothold for pedestrians,” while no mention whatever is made of the pointed or triangular character of the other. Thus not a single idea which is now relied on can be regarded as involved in the former invention, or suggested by it. It is as much a new discovery as if the other did not exist. Much the same is to be said of the Fitzgerald patent (1867), which is also for a vault light. In this the bull’s-eye construction is maintained; the upper side of the glass lenses being furnished with irregular protuberances formed by intersecting grooves, while the under side consists of three unequal ridges, more or less pyramidal in shape, with rounded ends and edges, and concave depressions in between. The purpose of having the upper surface corrugated, as declared by the inventor, was to prevent pedestrians from slipping, and to obscure the outline of passing objects, although an increased refraction and transmission of light is also asserted. But the particular feature of novelty claimed for the invention is “the ridge-like protuberances” on the under side. These, it is said, “cause a powerful multifarious refraction and reflection of the light, which, besides diffusing it equally over the vault chamber to be lighted, also enhances the aggregate illumination.” Here, in a measure, is an anticipation of the better lighting of dark interiors through the combined effect of lens and prism, but several things are nevertheless to be noted and distinguished. The only use made of it is as to light coming directly from above. There is no deflecting of the light by which that which would not otherwise enter the vault or area is made to do so. No more light, in other words, gets in than would without it. The most that can be said of it is that the light is better diffused after it gets in, use being made of the principle of refraction for that purpose, and that is evidently all that was in the mind of the inventor. It still remains nothing more than a bull’s-eye vault light, of better than the ordinary or globular construction because of its diffusing effect; but with that exception it has nothing in common with the patent in suit, and is not remotely suggestive of it. I will not stop to consider the Trollope patent (1872), put in evidence by the defendants, except to say that it

has merely to do with the better setting or securing in place of vault lights. While they are represented in the diagrams accompanying the patent as curved on one side and triangular on the other, I do not see how this circumstance can be seriously urged as having anything to do with that with which we have here to deal. The Hyatt patent (1882) may be somewhat similarly disposed of. Like the Johnson and the Fitzgerald, it is a device for a vault or area cover or grating, and seeks the better lighting of the interior below. This is accomplished, it is true, by what the inventor calls "combination lens and prism glass," having rounded, lens-like projections on one side, and prisms on the other; but the lenses are not elongated into parallel ribs, as in the Cummings patent, and the combined deflecting and diffusing effect of the two surfaces, which is the whole of that patent, does not seem to have been thought of. The effect of the lenses, as stated by the inventor, is to enlarge the light receiving surface; and of the prisms, to obtain a correspondingly enlarged distributing surface, to take care of the increased light volume; and the whole mind of the inventor in employing this combination is directed to the construction of a grating to be used in the front or rear areas of buildings, for the direct, and not the deflected, transmission of light into them. While this may be a branch of the same art as that of the Cummings patent, it is sufficiently separate from it to be regarded as a substantially different one. At the same time, it must be confessed that, if there has been any anticipation of that which is involved in the patent in suit, it is to be found here. The Doig (English, 1859), the Pulford (English, 1875), and the Richardson (1896), in my judgment, have no relevancy. They all relate to a plainly distinct and different art,—that of lamp chimneys,—and, whatever use may be made in them of similar principles of optics, either singly or in combination, to those employed by Cummings, they cannot on that account deprive him of the results which he has obtained by the exercise of his inventive genius in lighting the interiors of buildings by the deflected light of the sun. The laws of optics under all circumstances are the same, and the use of them for one purpose cannot be regarded as an anticipation of the use of them for another, however similar, in connection with another and distinct subject.

The question of anticipation being thus disposed of, that of infringement remains. That the defendants at the time this suit was brought were manufacturing a glass which was a direct imitation of one pattern of that manufactured by the plaintiffs, under the Cummings patent, is established by an inspection and comparison of the two, as found among the exhibits (Exhibits 5 and 10). Persuasive evidence also of an express intent to copy the plaintiff's glass appears in the advertisement taken from the Philadelphia Times, and in the illustrated cut on the outside of the defendants' circulars, in both of which the glass which the defendants offer to the public is represented as made up of a combination of parallel convex projections on one side, and prisms on the other,—the very feature which distinguishes the patent in suit. Further than this, in the body of these same circulars not only have the defendants adopted the line of argument found in similar circulars sent out by the plaintiffs, but they have ab-

stracted whole phrases bodily from them, as though they did not hesitate to appropriate both the ideas and the efforts of their competitors. To obviate the effect of this showing, the defendants contend that neither the glass which the plaintiffs manufacture, nor that which they themselves have hitherto manufactured in imitation of it, falls within the terms of the Cummings patent. That patent, as they claim, requires that the convex projections which make up one side of the glass be placed edge to edge, so that the arcs which bound them shall intersect with mathematical exactness, and leave absolutely no intervening spaces of any character in between, while the surface of the glass which has been put in evidence against them, they assert, is sinusoidal; that is to say, is composed of alternate convexities and concavities, making a sinuous or undulating line. In support of this construction of the patent, it is pointed out that the patentee, in describing his invention, specifies that:

"The convex projections are placed edge to edge, so that the end or edge of one convex surface meets the end or edge of the adjoining surface, and so on; or, to describe this feature in other words, the convex surface of each projection is bounded by an arc of a circle, the arc of each projection joining or intersecting the arcs of the adjacent projections, as a result of which there are no intervening spaces between the convex projections, and these projections cover the entire face of the plate."

But this quotation from the specifications is to receive a reasonable interpretation. It does not mean that the edges must meet, or the arcs intersect with the precision insisted upon, and no one versed in the art would so understand it. While a patent is not to be carried beyond its terms, it is not to be made impracticable within them, having regard to the subject with which it deals. Molten glass will flow more or less in molding, and it is impossible to handle it so that it will not; and even in cut glass the edges and intersections, while somewhat more sharply defined, cannot be fashioned to a hair; and the same is true of every material, even the hardest. To require a nicety of construction, such as is contended for, would practically bar any manufacturing under this or any other similar patent. The terms employed to describe an invention are to be interpreted with reference to the art to which it relates, and what a mechanic skilled in the art would be able to do with it. All that is fairly meant in the patent in suit is that the convex ribs on the one side and the prisms on the other jut up against each other, so as to leave no substantial intervening spaces in between. A glass having a distinctly sinusoidal or undulating surface no doubt does not infringe upon it; but that in which the circumscribing convex arcs intersect as closely as the character of the material or the skill of manufacture will permit, certainly does. It has not escaped my notice in reaching this conclusion that the patentee, through his counsel, in renewing his application for the patent, which was at first rejected, specifically declared that the circumscribing arcs touched at their edges, "so as to leave no intervening spaces of any kind whatever, either flat, concave, or otherwise." But this, it is to be remembered, was advanced by way of argument, and is not to be carried beyond the occasion which gave rise to it. The examiner had decided that the invention of Cum-

nings was anticipated by the Johnson patent, which showed a set of glass strips convex on one side and triangular on the other, which, as he said, it involved no exercise of the inventive faculty to unite in one integral plate. To meet this, it was pointed out that even though "the Johnson prisms were placed side by side without their intervening girders, and made integral, the convex side would show a number of connections separated at their bases by plane surfaces, which would be inoperative for the purpose desired," and would have no prismatic projections opposite them. This is not a disclaimer, but an argument, and it is not to be separated from the connection in which it appears. The particular part of it which is now brought forward was not intended to narrow the claim of the applicant, but merely to show that the Johnson patent did not touch it, and could not be transformed into it, and that was all. So viewing this patent, I am of opinion that the glass manufactured by the defendants (Exhibit 5) is an infringement. The defendants seek to escape this result, as already intimated, by attempting to show that it has a sinuous or undulating surface, and not one made up of intersecting convex projections. But the experiments put in evidence by the plaintiffs demonstrate the contrary. By an appropriate mechanical device the actual outline of the glass, as well as an exaggerated form of it, in which the perpendicular ordinate is three times magnified, have been traced and registered. Plaintiffs' Exhibits 43 to 47. In the exaggerated form the convexity of the ridges and the character of the intersections are clearly brought out, but both are sufficiently evident where the relation between the two dimensions is maintained. Indeed, it is manifest that whatever appears in the one must exist in the other, because the exaggeration does not create or change anything. It merely magnifies what is already there, so that we can perceive it. Nor is it any answer to this to say that in the glass manufactured by the defendants (Exhibit 5) the convexity is too slight to be made the subject of a charge of infringement. The laws of optics do not vary, and they respond to the smallest influences. And, however slight the convexity in the pattern exhibited, it is sufficient, according to the evidence, to produce the effect which is the especial feature of the patent and protected by it. Otherwise, why did not the defendants make the surface of their glass perfectly plane?

Without further discussion, I hold the patent to be valid, and that it has been infringed. The extent of the infringement may not be great, as the defendants have ceased to manufacture glass of this character, and substituted one of their own design, with concave depressions instead of convex ridges. If so, they will have the less to account for. Let a decree be drawn sustaining the bill and referring the case to a master.

THOMSON-HOUSTON ELECTRIC CO. et al. v. EXETER, H. & A. ST.  
RY. CO.

(Circuit Court, D. Massachusetts. August 9, 1901.)

No. 1,183.

1. PATENTS—SUIT FOR INFRINGEMENT—PRELIMINARY INJUNCTION.

A court cannot properly be required, on a motion for a preliminary injunction, to decide issues involving new and disputed theories respecting complainant's patent, and, where it is necessary to sustain the right to an injunction, to go beyond the prior adjudications and give such patent an enlarged construction.

2. SAME—INFRINGEMENT—SWITCH FOR ELECTRIC MOTORS.

The Condict patent, No. 393,323, for a switch for electric railway motors, considered on a motion for a preliminary injunction, and *held* not infringed by a controller in which no external resistance is inserted during the change of motor connections from series to multiple parallel, or vice versa, as distinguished from "motor resistance," although its mode of operation is by cutting out one motor during the change, leaving its armature in circuit to act as a dead resistance to the other live motor.

In Equity. Suit for infringement of patent. On motion for preliminary injunction.

Betts, Betts, Sheffield & Betts and Fish, Richardson & Storrow, for complainants.

Harding & Harding, for defendant.

COLT, Circuit Judge. The Condict patent, No. 393,323, dated November 20, 1888, upon which this suit is brought, is for an improved switch or controller for electric cars. The patent has been the subject of extensive litigation. It has been construed and sustained in three carefully considered opinions in the Second circuit: By Judge Townsend, in the circuit court, on final hearing, in the case of Electric Car Co. v. Hartford W. H. Ry. Co. (C. C.) 87 Fed. 733; by Judge Lacombe, in the circuit court, on motion for preliminary injunction, in the case of Electric Car Co. v. Nassau Electric R. Co. (C. C.) 89 Fed. 204; and on appeal in the same case, by the circuit court of appeals, in an opinion by Judge Shipman, reported in 33 C. C. A. 420, 91 Fed. 142.

In the suit at bar, the complainants filed a motion for a preliminary injunction against three types of controllers used by the defendant; and an injunction was granted against two of these. With respect to the third, the original motion was withdrawn; and the present hearing was had on the renewal of the motion to enjoin this controller, which is known as "Type No. 38." On the original motion, after the defendant's affidavits were filed, it was found that there was a material disagreement of fact as to the construction of this controller. This disputed question has been eliminated; the complainants now admitting that No. 38 controller is constructed substantially as shown by the defendant's affidavits on the original motion.

The complainants' proofs on the original motion brought this controller fairly within the Condict patent as interpreted by the courts

in the decisions referred to; and the testimony of the experts in support of the motion was based upon the same theories, and proceeded along the same general lines, as in the prior cases. If the complainants could have maintained their original position, the determination of this motion would have been comparatively free from difficulty. But the case which is now presented is very different. When we exclude from the defendant's apparatus the important feature which it was assumed by the complainants to contain on the original motion, we have a structure towards which the Condict patent bears a very different relation from what it did in the other structures which were held by the courts to infringe that patent. On this renewal motion, the complainants have been confronted with a situation where it has become necessary, in order to show infringement, to advance new theories respecting the scope and meaning of the Condict patent, and to ask this court to give a broader construction to the patent than it has heretofore received.

The general principles underlying the subject-matter of the Condict patent are not difficult to understand; but, when we descend to particulars, questions may arise which are involved, obscure, and troublesome; and when such questions are presented for the first time on motion, and the only proofs are the affidavits of experts, who advance inconsistent and contradictory theories in relation thereto, it becomes almost impossible for the court to reach any conclusion which rests upon the satisfactory determination of such questions, whatever amount of time and labor may be given to the subject. On motion for preliminary injunction, and in the absence of the cross-examination of witnesses and the full and orderly proofs presented on final hearing, the court should not be asked to pass for the first time upon the conflicting theories of experts relative to the mode of operation in certain positions of a complicated electrical apparatus like a controlling switch for motor regulation. When the complainants go beyond what the courts have decided in prior adjudications, and base their motion upon new and disputed theories respecting the Condict patent, or upon a new and enlarged construction of the patent, issues are raised not pertinent to a motion for preliminary injunction, and whose determination, properly, should be reserved for final hearing.

The court, without going further, might deny this motion with the simple statement that it appears upon an inspection of the record that to hold infringement in the first particular charged is to overrule the construction given to the Condict patent by the courts in prior suits; that to hold infringement in the second particular charged involves a new, extended, and doubtful construction of the patent, and the determination of electrical questions upon which the experts disagree; and that to hold infringement in the remaining particular charged is to pass upon the conflicting opinions of experts as to the action of the defendant's controller at a particular time, in relation to which it is not entirely clear that the patent has any application. But, on consideration, it seems to me, although some of the questions raised can only be properly determined on final hearing, in view of the importance of the case and the carefully prepared

and able briefs of counsel, that the disposition of the motion calls for a somewhat fuller statement and discussion of the general questions presented.

The ordinary electric car, like the one shown in the Condict patent, contains two motors. These motors consist of two armatures and two fields and their connections. In starting, and at slow speed, the two armatures and the two fields are connected in series, or in a single path. At full speed, the two armatures and the two fields are connected in multiple or parallel paths. The motor changes from series to parallel involve a temporary disorganization and rearrangement of the circuit. These changes may be quite sudden, or by gradual and progressive steps. During this transition period, unless the flow of current from the trolley or generator is checked, the circuit changes will be too severe to be borne by the motors, and there is great danger from sparking. The main purpose of the controller or switch is to regulate the supply of current delivered to the motors during the shifting of motor connections from series to parallel, or vice versa.

The principle of motor regulation through a controlling switch is based upon interposed resistances, which reduce the flow of current. These resistances are wire coils, which are cut in and out of the circuit. These coils may be either entirely separate from the motor coils, or they may be the motor coils themselves, or they may consist partly of motor coils and partly of external coils. The first form, in which the resistances are wire coils external to the motor, is known as the "rheostatic," or "external," method of control. The second form, in which the motor coils of the armatures and fields are substituted for external coils, is known as the "series parallel," or "internal," method of control. The third form, in which both external and motor coils are utilized, is known as the "mixed," "compound," or "composite," method of control. The rheostatic, or external, method was open to the objection of waste of energy, since the current was converted into heat and lost. Hence the resistance is called "dead" resistance, as distinguished from the "live" resistance of the motor coils. This method went into extensive use. The series parallel method proved to be impracticable for general use, for the reason that, when the circuit changes were numerous, involving only slight changes of internal resistance, the apparatus was too complicated, and when the circuit changes were large, involving large changes in the resistance, it was too severe upon the motor, and sometimes dangerous to the motorman. The combined, or mixed, method of control possesses the advantage of economy over the rheostatic method, and the advantages of the reduction of sparking and the avoidance of other dangers incident to the series parallel method. Condict was the inventor of this last method, and his invention is embodied in the patent in suit. The Condict patent describes a controlling switch in which motor, or internal, resistance is supplemented by external, or rheostatic, resistance introduced at the time of changing the motor connections. When the motor resistance is great, the external resistance introduced is small; and when the

motor resistance is small, the external resistance introduced is great. As the patentee says, in his specification:

"I have constructed my switch so that at the time of changing the connections I insert resistances more or less great according to the resistance of the motor connections; that is to say, if the motor resistance is great, the auxiliary resistances would be small, and vice versa."

It was in this way that Condict for the first time utilized both the old methods of control in a single switch. The courts have held that the Condict patent contains a main invention and a minor invention. The main invention is covered by claims 27, 28, 29, and 31, and is for the introduction of external resistance during the shifting of the motor connections. The minor invention is covered by claims 20, 21, and 22, and is for the introduction of such resistance without changing the motor connections, when combined in a switch which "embodies the main invention."

The essence of the Condict invention is the insertion of external resistance during the change of motor connections from series to multiple parallel, or vice versa; and no apparatus infringes the patent unless it contains this feature. All the controllers which heretofore have been enjoined by the courts have infringed the main invention of the patent by the insertion of external resistance coils during the shifting of motor connections; and on the original motion in this case the complainants believed that the defendant's controller plainly and on its face introduced such resistance. A controller which depends upon external or rheostatic resistance for motor regulation is not within the Condict patent. A controller which depends upon motor resistance for motor regulation is not within the Condict patent. A controller which combines both external resistance and motor resistance is not within the Condict patent, unless embodied in a system in which external resistance is introduced during the shifting of motor connections.

It is contended on this renewal motion that the defendant's controller infringes the Condict patent in three particulars: First, in positions 1, 2, and 3; second, in positions 4<sup>a</sup> and 6<sup>a</sup>; third, in passing from position 5 to position 6, from position 6 to position 5, and from position 7 to position 6. We will consider these in their order:

First. In positions 1, 2, and 3 external resistance coils are introduced into the circuit, but there is no change of the motor connections. This is the time of starting and slow speed, and the only change in the positions of the controller is the gradual cutting out of the external resistance coils. The motors remain in series, and the shifting of the connections does not begin until after position 4 is reached. As the introduction of rheostatic resistance for motor regulation was common before the Condict invention, there was no patentable novelty in the mere insertion of such resistance without change in the motor connections. This charge of infringement, therefore, cannot be sustained, unless it is also found that this controller infringes the main invention of the patent.

Second. Positions 4<sup>a</sup> and 6<sup>a</sup> are transitional positions during the change of motor connections from series to parallel; and, if external resistance is inserted in these positions, there is a plain infringement



of the Condict patent. In position 4<sup>s</sup> the external resistance coils are short-circuited, or cut out, and the field of No. 1 motor is also cut out; and the only resistances which remain in circuit are the armature coils of No. 1 motor, and the armature coils and field coils of No. 2 motor. The same is true of position 6<sup>1</sup>, except that the armature of one of the motors is cut out, instead of the field. Upon the face of things, certainly, it is not apparent how the cutting out of all external resistance and a part of the motor resistance at these positions, during the progressive steps incident to the change of motor connections from series to parallel, is the cutting in of the external resistance coils of the Condict patent. Although no external resistance is apparently introduced into the circuit in positions 4<sup>s</sup> and 6<sup>1</sup>, the complainants now maintain that, since the withdrawal of the original motion, they have discovered, upon careful inspection and in a form disguised and hidden, the presence of such external resistance in the motors themselves. This new discovery of complainants' experts is based upon the following line of reasoning:

In a controller which changes the circuit connections of two motors from series to parallel, each motor must be regarded as an entirety by itself and external to the other motor. This proposition lies at the foundation of the whole argument. The Condict patent, broadly speaking, is for the introduction of dead resistance to a single live motor, and not necessarily for the introduction of such resistance to supplement the internal resistances of two motors during the shifting of their connections from series to parallel. Dead resistance may be either wire coils external and foreign to the motors, as shown in the Condict patent, or it may be the motor coils themselves. Dead resistance is any resistance which forms a part of the circuit and which is not at the time acting as a motor; and the armature coils and the field coils of the two motors become the inserted external rheostatic coils of the Condict patent when they are in circuit and not acting as motors. When, during the shifting of motor connections in a series parallel system, the field or the armature of one of the motors is cut out, the motor is killed, and its armature coils or field coils which remain in circuit become dead resistance to the other live motor. Such armature coils or field coils are the external resistances of the Condict patent, because they are external to the other live motor; and they are the inserted resistances of the Condict patent, because they are, in effect, introduced into the circuit as dead resistance to the other live motor. When, in the harnessing and unharnessing of motor connections during the transition period from series to parallel, a live motor is converted into dead resistance by disconnecting part of it and permitting it to remain in circuit, this, in substance and effect, is the introduction of the external rheostatic coils of the Condict patent. In cutting out the field of one motor and leaving the armature in circuit to act as a dead resistance to the other live motor, the defendant's controller infringes the Condict patent at position 4<sup>s</sup>; and in cutting out the armature of one motor and leaving the field in circuit to act as a dead resistance to the other live motor, the defendant's controller infringes the Condict patent at position 6<sup>1</sup>.

This theory of the Condict patent is open to many and serious objections. It ignores the fundamental distinction, set forth in the specification and shown in the drawings, between the inserted external resistance and the internal resistance of the motors, between rheostatic resistance coils and motor resistance coils, on which the whole invention rests. It makes what is external to a thing internal, and what is to be inserted a part of the very thing itself. It confounds things, terms, and methods which have always been recognized as distinct in the controller art. It confuses and breaks down the recognized distinction between the series parallel method of control and the rheostatic method, by holding that both methods may be included in the series parallel system. It extends the scope of the Condict patent from a mixed system of control comprising both these methods to a single system embracing only one. It declares that one form of series parallel connections without the insertion of external resistance coils is without the patent, and another form of series parallel connections without the insertion of external resistance coils is within the patent. It undertakes to divide the two motors into separate entireties, although both form the parts of a single system of motor regulation, always known as something distinct from other systems. The series parallel method of control consists in connecting or disconnecting the two motors, or their several parts, in the transition from series to parallel, or vice versa, in any way found most advantageous. The transition steps are gradual and progressive, and the connections vary in many ways in different controllers, as this record abundantly shows. The form the connections assume is immaterial, because they are all simply separate ways, differing in details, of applying the same method. The patentee never contemplated that his invention covered the division of the two motors into separate entireties, and the insertion of a part of the motor resistance of one motor into the other motor. It is not until we go outside both the motors, and seek to supplement their resistance by the introduction of an artificial external resistance, that we encroach upon the Condict patent. Claim 31 clearly states the main invention, as follows:

"The combination of two motors, a source of electric power, a motor circuit, a switch for coupling the coils of the motors in series or multiple to vary their internal resistance, a resistance, a switch to insert the resistance when the motor switch is being shifted, and a connection between said switches to operate both simultaneously."

Whether the armature coils or the field coils of one motor act as dead resistance to the other live motor is a disputed question of fact upon which the experts differ; but, assuming that the complainants' contention is correct, it still remains true that the armature coils in one case, and the field coils in the other, are motor resistances, as understood in the art, and hence it becomes unimportant whether they are dead, half dead, or alive. Although rheostatic resistance may be dead resistance, and motor resistance may be generally live resistance, the Condict patent is not for any system of motor control which combines dead resistance with live resistance, but is for a system which combines external resistance with motor resistance.

In his specification, Condict refers to "internal resistance" and "motor resistance" as distinguished from "auxiliary resistances." He refers to the series parallel method, "in which the motors [not motor] are regulated by varying their internal resistance, which may be done by connecting up their coils in different ways." He then states that he has constructed a switch in which he inserts resistances "more or less great according to the resistance of the motor connections." The patent shows the motor connections of the two motors, the external rheostatic coils, a motor switch, and a resistance switch, and how, by a single movement of the handle of the controller drum, the external resistances are cut in and out at the proper time to secure the protection of the motors. It shows that the patentee means, by "internal resistance," all the motor resistance which is available in shifting the motor connections of two motors; and that he means, by "auxiliary resistance," an external and supplementary resistance. The patent is not broadly for the introduction of dead resistance, whether it be motor resistance or external resistance. The utilization of motor resistance is the series parallel method of control. The utilization of external resistance is the rheostatic method of control. The Condict invention is for a combination of both methods. He was not the inventor of either method, but of a mixed system which utilized both methods. To construe the Condict patent to cover a system of motor resistance, or the series parallel method, without the insertion of external rheostatic resistance, finds no justification either in the prior decisions of the courts, or in the state of the art, or in the language of the specification.

Third. In passing from position 5 to position 6, and from position 6 to position 5, the circuit is open at all available points. In passing from position 7 to position 6, the circuit to one motor is open, and all the contacts are open except those which control the circuit to the other motor. The infringement consists in the alleged use of rheostatic resistance at this time of open circuit. Whether external resistances can be utilized during the period of open circuit is a problem upon which the Condict patent throws no light, nor any decision of the courts respecting infringing controllers. Apparently there is no current flowing at this time, and therefore no current to check, because the contracts are broken at every available point. The insertion of external resistance at the instant of open circuit is manifestly not the usual and regular manner of introducing such resistance. The Condict controller does not seem to contemplate the use of such resistance at such a time, for no position of open circuit is found in that controller during the change of motor connections. To sustain infringement in this particular, the complainants contend that the introduction of external resistance during open circuit tends to minimize sparking, and that this was one of the main objects of the Condict invention. It is true that the prevention of sparking was, in the mind of the patentee, perhaps the chief object of his invention, but it is also true, as pointed out by Judge Townsend in the Hartford Railway Case, *supra*, that "the subsequent development of the art necessitated the introduction of other means to prevent spark-

ing," such as the magnetic blow-out, and that the Condict device is not now used to prevent sparking, but "to regulate the current."

On the original motion, it was not charged that there was any use made of external resistance in defendant's controller at the time of open circuit. On this renewal motion, in the moving affidavits, the point is taken in a general way, without any statement of the reasoning or theory on which it is based. It is not until the complainants' affidavits in reply that we find, for the first time, a theory advanced which undertakes to prove that the resistance of the Condict patent is utilized when the circuit is broken at all available points. To this evidence the defendant says it has had no opportunity to reply, and consequently the defendant's evidence is limited to answering in a general way this charge of infringement. The answer, though general, seems to have much force, and is substantially as follows:

At the time of open circuit, to break the circuit at all contacts available is the common and ordinary practice known to every electrician; its purpose being to divide the arcs and make them as small as possible at each break, and so prevent the burning of the contact points. There is no current flowing at this time upon which the resistance can operate, because the circuit is broken at every point available,—in nine points at full open circuit in passing from positions 5 to 6, and vice versa; and in five points when the circuit is half open in passing from positions 7 to 6. All these breaks take place simultaneously. The short circuit around the rheostat is broken at the same instant as all the other breaks. The reason why the resistance is not cut out, instead of short-circuited, is that it would require an additional contact finger, causing thereby a slight enlargement of the controller drum. In a word, there is no current flowing at this time, and, if there were, its action would be harmful; hence, it follows that the resistance is not utilized to dam back the current and minimize sparking.

The complainants do not deny that, if the break around the resistance were in the main circuit, and the breaks were all made simultaneously, there would be no flow of current through the resistance. Their whole theory rests upon the fact that this break is in the sub-branch, or short circuit around the resistance, and not in the main circuit. They claim that this has the same effect as if the break at this point were made before the other breaks,—the effect being that the arc at this point is feebler and less persistent than the other arcs, and is extinguished sooner, thereby throwing the current, which still continues to flow through the other and more persistent eight arcs, into circuit with the resistance; and the resistance then acts to dam back the current, and so helps to minimize sparking. It would serve no good purpose at this time to enter more fully into the reasoning by which the complainants undertake to demonstrate the truth of this theory. It is possible that arc No. 11 in defendant's controller is extinguished in advance of arcs No. 6 and No. 10; that these latter are extinguished before the remaining arcs, the effect being to reduce sparking; and that this is primarily due to the break in the short circuit around the rheostat; and, further, that this break causes the introduction of external resistance into the current with-

in the meaning and purpose of the Condict patent. But it is also possible that there is no substantial current flowing at this time of open circuit, or, if a small quantity, that its effect is harmful, or that the period of time is so inappreciable that the resistance has no effect, or that the resistance inserted at this time is outside of the scope and design of the Condict patent.

The decision of these questions, so far as they may prove material, must remain for the full proofs presented on final hearing. Looking at the Condict patent along its broad and plain lines, I am not satisfied, upon the evidence before me, that the opening of the short circuit around the rheostat at the time of open circuit is the introduction of external resistance into the circuit during the change of motor connections, which is the material invention of the patent. The motion for a preliminary injunction is denied.

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#### THE JOHN S. PARSONS.

(District Court, N. D. New York. October 10, 1901.)

##### No. 5.

#### 1. MARITIME LIENS—REPAIRS AND SUPPLIES—HOME PORTS.

A lien does not attach to a vessel for repairs and necessities furnished in a port of the same state as her home port, which can be enforced in a court of admiralty, unless such lien is given by a state statute, and the requirements of such statute have been complied with.

#### 2. SAME—PURCHASER OF VESSEL—VERBAL RECOGNITION OF LIENS.

Promises made by the purchaser of a vessel to pay claims for repairs and supplies furnished such vessel before his purchase, and statements recognizing liens therefor, will not bind either him or the vessel, where they were made upon representations by the claimants that they had valid liens, and in the belief that such representations were true, when in fact no such liens existed.

In Admiralty. Suit to establish and enforce maritime liens.

P. W. Cullinan and Udell Bartlett, for libellant.

John Carlisle, for claimant.

George N. Burt, for interveners.

COXE, District Judge. John S. Parsons filed a libel in rem October 20, 1900, for materials furnished in constructing and reconstructing the steam vessel John S. Parsons and for supplies furnished at various times between June, 1891, and June, 1897. Patrick Flanagan, the Oswego Tugmen's Association and George Goble intervened, asserting claims against the vessel, respectively, for groceries, towing and repairs furnished prior to August, 1897. Three other small claims for supplies have been presented. The home port of the vessel has at all times been Chaumont, N. Y. The materials were furnished and the repairs were made at Oswego, N. Y., about 50 miles from Chaumont. The claimant, D. C. Wheeler, is the present owner of the vessel, having purchased her in September, 1899. The indebtedness in controversy was contracted by Frank Phelps, the previous owner. Both Wheeler and Phelps reside at Chaumont. No proceedings were ever taken to establish a lien under the laws of New

York and it is not contended that such a lien existed when the libel was filed or when the bill of sale was given to Wheeler. 3 Rev. St. N. Y. (7th Ed.) pp. 2404-2410; Laws 1886, p. 170; 3 Gen. Laws N. Y. (Birdseye's Rev. St., 2d Ed.) p. 2806. A lien does not attach by the general maritime law for repairs and necessities furnished a vessel in the port or state to which she belongs. The theory upon which material men are refused a lien upon a vessel in her home port is that the credit may well be supposed to have been given to the owner and not to the vessel. Accordingly, there is no lien which can be enforced in rem in admiralty, unless such a lien is recognized by the local laws of the state. No principles of admiralty law are more firmly established than these. *The General Smith*, 4 Wheat. 438, 4 L. Ed. 609; *The Glide*, 167 U. S. 606, 17 Sup. Ct. 930, 42 L. Ed. 296; *The Edith*, 94 U. S. 520, 24 L. Ed. 167; *Davidson v. Baldwin*, 24 C. C. A. 453, 79 Fed. 95; *Stephenson v. The Francis* (D. C.) 21 Fed. 715. When the municipal law of the state where the materials are furnished so provides, a lien can be created, but only by a compliance with the provisions of the state statutes. Such a lien can only be enforced in the admiralty courts. *The Lottawanna*, 21 Wall. 558, 22 L. Ed. 654; *The Edith*, 94 U. S. 518, 24 L. Ed. 167; *The Guiding Star* (C. C.) 18 Fed. 263; *Vose v. Cockcroft*, 44 N. Y. 415; *The Arctic* (D. C.) 22 Fed. 126; *The John Farron*, 14 Blatchf. 24, Fed. Cas. No. 7,341. It being manifest that there was no lien, maritime or statutory, against the vessel, it is obvious that nothing short of the most clear and positive evidence will suffice to establish the liability of the claimant.

That a sane man would voluntarily, and without consideration, agree to pay the debts of another amounting to over \$1,000 can hardly be presumed. It was conceded at the argument by counsel representing the libelant that there was grave doubt whether the testimony established a promise on the part of the claimant which could be enforced in a court of common law, and it is difficult to perceive how the libelant's position is any stronger in a court of admiralty. Assuming that a purchaser of a vessel may, by parol, create a lien upon the vessel in favor of the unsecured creditors of the former owner, the testimony here falls far short of proving such an agreement. That Phelps told the libelant before the materials were furnished that his claim would be a lien against the boat and that he subsequently repeated the statement cannot be denied. But what Phelps said was true. The claim was a lien against the boat, but it was not a perpetual lien, and in order to make it effectual the libelant was required to comply with the simple requirements of the state law. Had he done so there would have been no misunderstanding and no litigation. All of the libelant's difficulties may be traced to this neglect. The libelant never saw the claimant until September, 1899. This was after the latter had purchased the boat and over two years after the last materials had been furnished to Phelps. The court is convinced that whatever statements were thereafter made by the claimant, of which it is sought to predicate an agreement to pay the debts of Phelps and to recognize them as liens upon the

boat, were made under an entire misapprehension of the facts and the law. The claimant is a farmer and a merchant in a small country village. He evidently knew nothing of the law maritime and little of the lien law of the state. He testifies that the libelant told him that his claim was filed in the office at Cape Vincent and the lawyer who was consulted about the transfer informed him that if claims were filed "they would follow the boat." That he believed for a long time that there were valid liens against the vessel and that all his statements thereafter were made in accordance with this belief seems fully established by the testimony and the presumptions arising therefrom. As soon as he ascertained what the law was he promptly repudiated all obligation to pay the debts. Had he known the law earlier it is inconceivable that he would have entertained the idea of liability for a moment. The libelant and Phelps repeatedly informed him that the claims were liens upon the boat after the purchase by him and he relied upon their statements and acted accordingly, but his actions were all based upon this erroneous information. The superstructure cannot stand after the foundation has been destroyed. The promise, if one existed, cannot be enforced when the consideration which might make it valid is shown to have had no legal existence. In short, no lien, maritime or statutory, existed, and the testimony fails to establish any liability on the part of the claimant; certainly not a liability in rem.

The libel is dismissed with costs.

#### **STERN v. LA COMPAGNIE GENERALE TRANSATLANTIQUE.**

(District Court, S. D. New York. August 23, 1901.)

##### **1. ADMIRALTY JURISDICTION—ENFORCING REMEDY GIVEN BY STATE STATUTE.**

Although a court of admiralty has jurisdiction of an action to enforce a remedy for a tort, given by a state statute, where such tort was of a maritime nature, and committed on navigable waters, it can give no relief except in conformity with the statute creating the right of action.

##### **2. WRONGFUL DEATH—ACTION UNDER NEW JERSEY STATUTE—LIMITATION.**

The New Jersey statute of 1848 (1 Gen. St. p. 1188) gives a right of action for wrongful death, "provided, that every such action shall be commenced within 12 calendar months after the death of such deceased person." *Held*, that such proviso was not merely a designation of the ordinary period of limitation for such actions, operating, as a part of the general statute of limitations of the state, on the remedy alone, and hence subject to extension under a provision of such general statute when the defendant was not a resident of the state, and leaving an action to enforce the right given when brought in another jurisdiction, to be governed by the law of the forum as to limitation, but was an express condition of the right of action itself, which must be given effect in every forum wherein an action based upon the statute is instituted.

##### **3. LIMITATION OF ACTIONS—TIME OF COMMENCEMENT TO RUN—ACTION IN FOREIGN JURISDICTION.**

Even if such proviso be held subject to the provision of the general statute of the state that limitation should not run during the time a defendant was not a resident of the state, a plaintiff bringing an admiralty action to enforce the statutory liability in another jurisdiction more than a year after the death sued for cannot invoke such extension, where the action might have been brought in the same court at any time

previously, and service on the defendant obtained, and no excuse for the delay is shown.

4. SAME—PLEADING STATUTE.

In an action based on a statute, which makes the time of bringing the action an express condition of the right given, it is incumbent on the plaintiff to plead a performance of such condition, and the defendant is not required to plead the limitation in the statute to entitle him to insist on the objection that the action was not brought within the time limited.

**In Admiralty.** Action under state statute to recover for wrongful death.

Hunt, Hill & Betts, for libelant.

Edward K. Jones, for respondent.

BROWN, District Judge. The above libel was filed on March 22, 1900, to recover damages for the death of John V. Poussa, a seaman, from drowning within the waters of New Jersey near Sandy Hook, about noon of May 14, 1898, through the upsetting of a small lifeboat, in which the deceased was engaged with other workmen in repairing wire cables connecting with some submarine mines. The boat was upset, as alleged, by the too near approach of the respondent's steamer *La Touraine*, outward bound, in going through the channel way 300 feet in width, between the mines, in the strong flood tide.

The accident was the same as that in which another workman, Robert H. Middleton, was also drowned, and for which on a previous libel the respondent was held liable for want of proper care and skill in the management of the vessel. *Middleton v. La Compagnie*, 41 C. C. A. 98, 100 Fed. 866.<sup>1</sup>

1. On the present hearing all the testimony in the former case, as respects the question of negligence, has been introduced, and also the testimony of a number of additional witnesses on each side, who were not called in the former case. Among the new witnesses called for the libelant was Woodsum, a seaman of evident intelligence, who was in the bow of the small boat and who testified positively that on the order of Rees, who was in charge of the boat, he cut the cable that was lashed to the small boat, soon after *La Touraine* in passing caught the small boat and dragged it along with her; and that after cutting the cable the boat drew rapidly astern until it was upset under the steamer's counter. The other new witnesses present more or less contradictions as before. All the new witnesses for the respondent, save one, made affidavits in its behalf on a motion for a rehearing after affirmance in the circuit court of appeals in the former case, but the affirmance was nevertheless adhered to and a rehearing denied. On the whole testimony I cannot say that my judgment of the probable truth of the matter is changed from the conclusion arrived at in the former case.

In the disposition of this case, however, there are other considerations, which I think must prevent any decree in the libelant's favor.

2. The present libel was not filed until nearly two years after the decedent's death, whereas the New Jersey statute on which the

<sup>1</sup> See note at end of case.



action is founded requires such suits to be commenced within one year. The action is not one authorized by the common law or by the maritime law of this country. *The Harrisburg*, 119 U. S. 199, 7 Sup. Ct. 140, 30 L. Ed. 358. It rests solely upon the statutory enactments of the territorial jurisdiction wherein the negligence and the death occurred; in this case, upon the New Jersey statute of 1848. That statute, after creating such actions for "the exclusive benefit of the widow and next of kin," continues as follows:

"And in every such action the jury may give such damages as they shall deem fair and just with reference to the pecuniary injury resulting in such death to the wife and next of kin of such deceased person: provided that every such action shall be commenced within 12 calendar months after the death of such deceased person." 1 Gen. St. p. 1188.

Though this court has jurisdiction of the cause of action in consequence of its maritime nature as a tort committed upon navigable waters, it can give no relief except in conformity with the statute that creates the right. *The Edith*, 94 U. S. 518, 24 L. Ed. 167; *The A. W. Thompson* (D. C.) 39 Fed. 115, 117; *City of Norwalk* (D. C.) 55 Fed. 98, 102; *Robinson v. Navigation Co.*, 20 C. C. A. 86, 73 Fed. 883, 894.

The libellant contends, however, that the one year proviso of the New Jersey statute is no part, or condition, of the right of action itself, but is to be construed as ordinary statutes of limitation are construed, viz. as affecting the remedy alone, and hence to be applied only according to the law of the forum where the suit is brought; and that as this suit is in New York, the period of limitation for such actions is the New York limitation of two years, instead of one year, as in New Jersey. See *Dennick v. Railroad Co.*, 103 U. S. 11; *Leonard v. Navigation Co.*, 84 N. Y. 48, 53, 38 Am. Rep. 491. It is further claimed that the modifying provisions of the general statute of limitations, both in New Jersey (1820) and in New York, as to the time when the period of limitation shall begin to run, and extending the continuance of the period during the time of defendant's absence or nonresidence from the forum where suit is brought, are also applicable; so that, as the defendant is a French corporation, having had no officer or place of business in New Jersey, the period of limitation there has never in fact begun to run; and that as respects New York also, under the New York statute, the period of limitation has for the same reason never attached.

The general statute of limitations of New Jersey (1820) declares that

"The time or times during which such person or persons shall not reside in this state, shall not be computed as part of the said limited period within which such action or actions are required to be brought." 2 Gen. St. p. 1976.

The actions referred to by this statute are stated to be those "specified in the first, second, third, fifth, sixth and seventh sections of this act." Only the actions stated in the second section have any analogy to the present libel, and those are the common-law actions of trespass for assault, menace, battery, wounding and imprisonment, which are limited to four years; but none of the actions there referred to are limited to one year. It is argued, however, that as the actions

named in the statute were the only actions of tort for negligence then existing, the same general statute of limitations should be deemed to extend to the subsequently created statutory action for death caused by negligence; because the extension of time during the nonresidence of the defendant is within the reason, the policy, and the equity of the general statute of limitations with all its modifying provisions.

The argument is, perhaps, a sound one, so far as compatible with the terms and apparent intent of the new statute. If, for instance, a new act, after creating some new right of action, should add: "The period of limitation for such actions shall be one year," or other equivalent words, there would be no doubt, I think, that such language would be construed as intended to form a part of the general statute of limitations, to be applied to such new actions; and that consequently all the other modifying provisions of the general statute of limitations would be deemed to attach to it.

But the language of this act is different and not compatible, I think, with the libellant's contention. If that contention were sustained the period of limitations would be according to the law of the forum where suit is brought. *Bauserman v. Blunt*, 147 U. S. 647, 654, 13 Sup. Ct. 466, 37 L. Ed. 316; *Telegraph Co. v. Burnham*, 162 U. S. 339, 16 Sup. Ct. 850, 40 L. Ed. 991; *Nonce v. Railroad Co.* (C. C.) 33 Fed. 429, 436; *Leonard v. Navigation Co.*, 84 N. Y. 48, 38 Am. Rep. 491; *Putnam v. Dike*, 13 Gray, 535. Hence, there would be no limit at all to the time within which such an action could be brought under the New Jersey statute in any other state except such limitation as the law of the latter state supplied, whether the defendant were a resident of New Jersey or not. Even a citizen or corporation resident in New Jersey, against whom the statutory limit had expired in that state, might still be sued in any other state where he or his property might be found, unless the statute of limitations in the latter state prevented; and as to foreign corporations, the limitation of the statute would never attach at all, either in New Jersey or elsewhere. *Kirby v. Railroad Co.*, 14 Fed. 261; *Boardman v. Railway Co.*, 84 N. Y. 157; *Olcott v. Railroad Co.*, 20 N. Y. 210, 75 Am. Dec. 393; *Rathbun v. Railway Co.*, 50 N. Y. 656.

The language of the act seems intended to exclude any such indefinite liability, whether the defendant is a resident or a nonresident, an individual or a corporation. The proviso, it has been held, is attached as a condition of the right of action itself, and not merely as a designation of the ordinary period of limitation for such actions, operating merely as a part of the New Jersey statute of limitations on the remedy alone. If the latter were the proper construction, it might be subject to the extension provided by the general statute of limitation of New Jersey; but the one year proviso would in that case be operative *ex proprio vigore* in that state alone. On the contrary, however, the proviso must be held to be attached to the right of action itself; and it must, therefore, run with the statute into every forum wherein any action under the statute may be instituted.

This construction of the statutory proviso was laid down in *Boyd v. Clark* (C. C.) 8 Fed. 849, and it was established by the decision of the supreme court in *The Harrisburg*, 119 U. S. 199, 7 Sup. Ct. 140, 30 L. Ed. 358, where the statute under consideration was in substantially the same language as the New Jersey statute, and the court there says:

"The time within which the suit must be brought operates as a limitation of the liability itself as created, and not of the remedy alone. It is a condition of the right to sue at all. \* \* \* Time has been made the essence of the right. \* \* \* No question arises in this case as to the power of a court of admiralty to allow an equitable excuse for delay in suing, because no excuse of any kind has been shown."

The same general doctrine was applied by this court in *The A. W. Thompson* (D. C.) 39 Fed. 115, 117; and in the case of *Theroux v. Railroad Co.*, 64 Fed. 84, 12 C. C. A. 52, it was held that the action would lie in Minnesota, though the two-year limitation of that state had expired, because the statute of Montana, where the death was caused, gave three years, which had not expired; and because the limitation of three years was a part of the statutory right of action, and not a limitation of the remedy merely, and hence, was not governed by the law of the forum like ordinary statutes of limitation. As the proviso in question, therefore, is not a part of the statute of limitations, but a condition of the right of action itself, the extensions of the statute of limitation as regards the remedy during absence or nonresidence, cannot be applied.

In actions in rem in admiralty, state statutes of limitation are not always applied. The time for the enforcement of liens may be enlarged or abridged under special circumstances; and it was presumably in reference to this fact that the supreme court in *The Harrisburg*, supra, used the language above quoted as regards an excuse for delay. But this is not a libel in rem to enforce a lien, nor yet a bill in equity; but a purely statutory action in personam, and hence must everywhere be governed by the provisions of the statute on which the action rests.

Nor has any sufficient excuse for the delay been shown in this case more than in *The Harrisburg*, even if the time-limit condition of the right of action itself could in any case be enlarged. The evidence shows no such excuse; and the fact that this libel was not filed until nearly eight months after the decision in the *Middleton* case on July 28, 1899, very strongly suggests that there was no intent to sue on this claim until after that decision was rendered.

From the time of the accident onward the defendant corporation, maintaining an important line of steamers running to this port, had always abundance of property within this district, by which its appearance here could have been compelled, in accordance with the established practice in admiralty, at any time within the year that the libellant chose to sue. In this district, therefore, where the libellant's suit is brought, there was throughout the year all the opportunity for suit that the statute intended to afford. Under such circumstances there is no sound reason why in this suit founded solely upon the New Jersey statute and brought in a federal court, the

time limit of the statutory proviso should not be applied according to its terms. To treat the proviso of the statute as a mere question of remedy in the local forum of New Jersey not of itself operative elsewhere would not only be contrary to the repeated decisions above cited, but largely subvert the purpose of the proviso. Its construction as a condition involves no hardship, since the lodgment of process within the year for the purpose of service by the sheriff or marshal, as the case may be, is a sufficient commencement of suit.

The answer has not pleaded this condition of the statute; but if the above view is correct, the technical rule as to pleading the statute of limitations is inapplicable. On the contrary, where the plaintiff's right is conditional, in strictness he should plead performance of the condition, unless that otherwise sufficiently appears. 5 Enc. Pl. & Prac. 871; 4 Enc. Pl. & Prac. 655; *Arnson v. Murphy*, 115 U. S. 579, 6 Sup. Ct. 185, 29 L. Ed. 491. Here there has been no surprise on either side; the matter has been fully argued, and if this defense might have been made known earlier, it will be sufficient to deny costs.

Another serious question as to the libelant's right to recover in this action in personam, is based on the recent decision of the supreme court in *Homer Ramsdell Transportation Co. v. La Compagnie Generale Transatlantique*, 182 U. S. 406, 21 Sup. Ct. 831, 45 L. Ed. 1155, in which, affirming the decision of Judge Choate as referee ([C. C.] 63 Fed. 848), it was held that no such action would lie at law against the owner when the damage arose, as it did in the present case, from the negligence of a pilot taken compulsorily; and the intimation of the dissenting justices in *The China* (7 Wall. 68, 19 L. Ed. 67) is there quoted, apparently with approval, that the same rule may apply to actions in personam in admiralty. But as the statutory proviso seems to me to require the dismissal of the libel, it is unnecessary to consider the latter point further.

The libel is dismissed but without costs.

#### NOTE.

The following opinion of the district court in Middleton against the same defendant sets out the facts in the case:

**BROWN**, District Judge. At a little after noon of May 14, 1898, as the respondent's steamship *La Touraine*, outward bound, was passing Sandy Hook in the Main Ship Channel and going through the passage 300 feet wide leading between the mines established there by the government during the late war with Spain, she sagged along the northerly side of the passage, too near to a small boat moored at one of the buoys, and caused the boat to upset, whereby Robert Middleton, an electrician, one of the men in the boat employed in repairing the mine cables, was drowned. This libel was filed by his administrator to recover damages under the state statute for the benefit of the deceased's widow and next of kin.

The passage through the mine field, as shown by Exhibit 4, was in the Main Ship Channel, a little to the northward of its middle line, and was 300 feet wide and 4,000 feet long. It was marked on each side by three white can buoys 2,000 feet apart. Its western half ran north 15° east, or about 4° more to the northward than the line of the Main Ship Channel. The small boat with eight men in it, was made fast to an anchor buoy on the north edge of the mine channel about 400 feet westward from the middle

white buoy and about 1,600 feet easterly from the western entrance of the passage. The boat had been moored there three or four hours before, for the purpose of repairing some cables leading from a "junction box", placed on the bottom 60 feet below the surface of the water and held in position by a 1,000-pound anchor, and the boat swinging to the flood tide headed about S. by E. to S. E. The "junction box" had been raised by a lighter and placed in the center of the boat; eight steel cables radiating from it led from over each gunwale, four on each side, some forward, some abeam and some aft. Most of these cables led downwards from the gunwale into the water at only a small angle from a vertical line; but one of them on the starboard side and running southerly was more taut and led higher in the water; and for that reason it had been disconnected from the "junction box" and its end made fast by a small rope to the gunwale, so that the rope might be quickly cut and that cable dropped if necessary; and instructions to that effect had been given to the men in the boat.

There is a difference between the witnesses from the steamer and those from the small boat as to whether the Touraine came in actual contact with the boat itself and rubbed along past it, or whether she only pressed and scraped the cables running from the boat down into the water. The witnesses from the small boat testify very positively that the Touraine rubbed against the starboard gunwale of the boat for a considerable distance; that soon after entering the passage she seemed to be heading for them; that when several hundred feet distant and apparently coming towards them she was hailed to keep off to the southward, but that she did not do so; that her bows when abreast of them were about 20 or 30 feet off and that her side at about amidships sagged against the small boat and rubbed along aft pressing down the starboard gunwale, but without upsetting the boat until just as it cleared the stern of the steamer, when the boat was very suddenly turned over to starboard, the stern going down first; two of the witnesses say that before the side of the steamship came against the boat and while it was some little distance away, a shaking of the boat was felt, (doubtless when the side or bottom of the steamer struck and scraped over one or more of the cables leading from the starboard side), and that a shout was then raised to cut loose the cables, which was done. Others of the boat's witnesses testify that the tauter cable was cut loose before the boats came together, and one of them says he saw it cut. Two of the steamer's witnesses say it was not cut. But none of the steamer's witnesses were watching the small boat when she passed the after part of the steamer; the master and others on the bridge and the boatswain Vincent, amidships, say she was five or six meters off when abreast of the engine room, and aft of that she was not seen by them. Vincent testifies that he saw one of the cables made fast to the boat by a painter, and one of the men with an open knife in one hand and the other hand on the painter. This confirms the small boat's testimony, as to the preparations and instructions for casting loose the tauter cable if necessary; and I have no doubt, therefore, that it was cut loose as the men on the boat testify, though this was probably done after the boat had passed the engine room.

I am satisfied, therefore, that the accident did not arise from any negligence of the men in omitting to cut loose the tauter cable; and I find that at least aft of the engine room and towards the stern of the steamer she sagged against the other starboard cables and against the starboard gunwale of the cable boat, pressing it down somewhat until the boat passed under the steamer's quarter. This is the necessary conclusion not only from the unanimous testimony of the men in the boat, but from the testimony on the part of the steamship, to the effect that abreast of her bows the small boat was only from 6 to 15 meters distant, and that it came nearer as it fell past the bridge and midships to 4 or 5 meters at the engine room. The pilot testifies moreover that the steamer in going through the passage was headed one point to starboard in order to counteract the drifting effect of the flood tide. Had she been so headed, her stern would have been 110 feet nearer to the north line of the passage than her bows, so that in passing along, even without sagging, if her bows went within 30 feet of the boat her side would have struck the boat about at the bridge. I am satisfied

from the steamer's testimony, however, that she did not strike the boat till aft of the engine room. For this reason and for others stated below, I find that the steamer's head was not put to starboard of the line of the passage more than one-half or one-third of a point. So much at least was necessary to prevent the steamer from drifting outside of the main channel to the northward. But even a heading one-third of a point to starboard, her bows being but 30 feet distant, would have made her stern strike the boat, even if the steamer had not been sagging; whereas she was in fact drifting to the northward, having according to her own testimony, drifted at least 100 feet in advancing 1,600, from the time of entering in the southerly one-third of the passage way; i. e. at the rate of 35 feet in a length. Manifestly putting the helm half over to port when abreast of the cable boat, to which the pilot testifies, could not have overcome the approach of the stern from both these causes as she passed by.

It was not this contact with the steamer's side, however, that caused the accident, since the boat was not upset until it cleared under the steamer's quarter and got abreast of the propeller's wheel, when it was suddenly overturned. I have dwelt somewhat upon the circumstance of the contact, however, because it involves the credibility of the small boat's witnesses, on whose testimony depends their freedom from what might possibly be regarded as contributory negligence, if the taut disconnected cable had not been cut loose; although in that aspect of the case the deceased, an electrician, does not appear to have been chargeable with any personal duty. While there may be some errors of detail in the evidence given by the libellant's witnesses, I do not find anything to impeach their trustworthiness in the general scope of their testimony.

What caused the boat to upset as it came abreast of the wheel, is not precisely known. A natural explanation may perhaps be found in the fact that the nearly vertical cables and the small boat itself might yield enough in position to avoid upsetting so long as the pressure from the steamer's side was even and gradual; but the cables, on rising somewhat when they got more free under the steamer's counter, might naturally, almost immediately thereafter, be caught by some one of the projecting propeller blades a little further aft, and the ship's forward motion, though the wheel was stopped, would then suddenly jerk the boat over and downward, just as happened, according to the testimony.

It is not at all essential, however, to understand precisely what it was that caused the boat to upset, since there can be no question that it was some contact with the steamer, and was not by any fault of management on the part of the deceased or his fellow workmen.

The men were lawfully employed and lawfully moored where they were moored, under the supreme military authority in time of war. The passageway, 300 feet in width, was moreover apparently sufficient, and it was the duty of the Touraine to keep away from the moored boat, and by a sufficient margin for safety. There is no evidence that the passageway left for steamers was unreasonably narrow. Within a half hour previous the larger steamer *Lucania* had passed, outward bound, going about 100 feet from the cable boat; and four or five minutes before the Touraine the German steamer *Ems*, a little smaller than the Touraine, passed out at about the same distance as the *Lucania*. The weather was mild and the water calm. The *Ems* properly stopped her wheel when getting abreast of the cable boat to avoid swamping her, and *La Touraine* observing this soon afterwards stopped her wheel also, being then probably, according to the pilot's testimony, from 200 to 300 yards west of the cable boat,—200 yards the pilot says, and according to the master's estimates, about 400 or 500 yards astern of the *Ems*.

It is suggested that the *Ems*' stopping was an embarrassment to *La Touraine*. It no doubt caused *La Touraine* to stop her wheel a little sooner than she would otherwise have done; but this altogether falls as a justification for her getting over to the northerly line of the passage. Before entering the mine channel her master and pilot had received notice from the government patrol boat that a small boat was at work near the middle buoy, and to keep away from her to the southward; the temporary stopping of the wheel of the *Ems* was known to be a proper maneuver, and was to be expected.

On entering the passage the engines of La Touraine were working at "slow," which gave her a speed as the master testifies, of from eight to ten knots. When abreast of the small boat she must have been going through the water at the rate of six knots and her average speed from the time she stopped her engine until the accident could not have been less than seven knots or about four times the rate of the flood tide.

At that speed La Touraine was perfectly manageable in such weather, and should have maintained her course in about the middle of the passage. Most of the witnesses including the pilot say that the flood current at that time of tide (three-fourths high water) runs west by north, which would cross the mine channel at an angle of two and one-third points; others say that the last of the flood runs more to the northward making an angle of four points with the mine channel, as the pilot says it was. But even reckoning the tide at an angle of four points, computation will show that had the steamer's head been put one point to starboard on entering the passageway, as the pilot finally says it was put, the steamer, going about four times as fast as the tide, would have fully offset the sagging effect of the tide, and would have gone through in a nearly straight path. Had she entered, as the pilot testifies, in the southern third of the mine channel, i. e. 200 feet from the north side and headed one point to starboard, her stern would have passed more than 100 feet from the cable boat, like the large steamers that preceded La Touraine. The necessary conclusion is that the pilot did not turn the ship's head a point to starboard as he ought to have done, and as he testifies he did; but that he starboarded too little to have much effect. The steamer must have been but little over two minutes in going from the entrance of the mine channel to the small boat; and in that time had she headed straight with the line of that channel the tide, even if angling four points, would have set her only about 250 feet to the northward. Entering the southern third of the passage, her stern would not have sagged over to the north line of the passage, even if the tide angled four points, had the steamer been headed a half point to starboard. The master indeed states that the small boat was first noticed bearing on the steamer's starboard bow. Though this would confirm the libellant's witnesses as to her approach, it is so incompatible with the master's other testimony as to her heading to the southerly part of the channel, that I give no weight to it, deeming it a mistake of expression.

The alarm, however, of the men in the small boat on the approach of the Touraine and their shouts to her to keep off, after they had become accustomed to the passage of other previous steamers, including the Lucania and the Ems, so as to feel no apprehension from steamers, is strong evidence that the approach of the Touraine was different from that of all the others, and not properly directed. And this in my judgment was the sole cause of the disaster. There was nothing to prevent the Touraine from heading a point to starboard, even if the tide angled four points, and that, as I have said, would have completely offset any sagging whatever from the effect of the tide, and would have kept both stem and stern from 75 to 100 feet clear of both sides of the passageway. That the Lucania and Ems both did so, is sufficient evidence that the Touraine might have done the same. There is not the least probability that the Ems stopped her wheel long enough to cause any material embarrassment to La Touraine. It was evidently done only while passing the small boat; and from the testimony of the captain of the incoming tug and tow, it is evident that after passing the small boat the Ems went on at or about her full speed.

The testimony of the witness Orloop on his re-examination as to the position of the cable boat inside the mine channel is opposed to all the other evidence; it may be based on the previous position of the anchor before it was moved further to the northward, as was done a day or two preceding this disaster.

The deceased was 29 years of age, for the last five years of his life in the employ of the Edison Electric Company, in good health, and earning about \$900 per year, and from his recognized excellence as a workman, he was in the line of promotion. He left a widow, and two sons, of five and two years, respectively, dependent wholly on his support.

I allow a decree for the libellant for the sum of \$12,500, with costs.

TAYLOR et al. v. WEIR.

(District Court, D. Oregon. August 7, 1901.)

No. 4,540.

**ADMIRALTY JURISDICTION—MARITIME CONTRACTS—EMPLOYMENT TO PROCURE CHARTER.**

A contract to obtain a charter for a vessel is not maritime, and a court of admiralty has no jurisdiction of an action thereon to recover commissions, although a clause providing for the payment of such commissions is embodied in the charter party.<sup>1</sup>

In Admiralty. On exceptions to libel.

F. R. Strong, for libelants.

W. W. Cotton, for defendant.

BELLINGER, District Judge. This is a libel in personam to recover commissions for services as brokers in negotiating a charter for the bark Laurelbank. The charter party was concluded on May 10, 1898, between Taylor, Young & Co., as agents for the owners, and the Portland Flouring Mills Company. The charter party contained this provision: "Vessel to be consigned (inward only) to charterers' agent at port of discharge, and there to pay to charterers, or their order, two and one half per cent. on amount of freight. A commission of five per cent. shall be paid to charterers and Taylor, Young & Co., half each, on the estimated gross freight in U. S. gold coin, at the exchange of 48 pence, on the completion of loading, or should vessel be lost." A contract like this to obtain a charter for a vessel is not a maritime contract, and admiralty has no jurisdiction over it. *The Thames* (D. C.) 10 Fed. 848; *The Crystal Stream* (D. C.) 25 Fed. 575; *The Humboldt* (D. C.) 86 Fed. 351. "Maritime liens are stricti juris, and do not arise on all contracts made by the owners to result in profit to the ship. The test is to be applied to the subject, and not to the object. It is the subject-matter of the contract which must be maritime, and not the mere object,—the ship." *Zeigler v. The Paola R.* (C. C.) 32 Fed. 174. The fact that the agreement for commissions constitutes a clause in the charter party does not make it a maritime contract. The question of jurisdiction does not depend upon the form of the contract, but the substance of the undertaking. *Richard v. Hogarth* (D. C.) 94 Fed. 684. Exceptions to libel are allowed.

<sup>1</sup> Federal jurisdiction as to maritime contracts, see notes to *The Richard Winslow*, 18 C. C. A. 347, and *Boutin v. Rudd*, 27 C. C. A. 530.



**MEMORANDUM DECISIONS.**

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**AMERICAN MFG. CO. v. McMILLAN.** (Circuit Court of Appeals, Fifth Circuit. May 28, 1901.) No. 1,044. In Error to the Circuit Court of the United States for the Eastern District of Louisiana. F. L. Richardson, for plaintiff in error. H. H. Hall, for defendant in error. Before PARDEE, McCORMICK, and SHELBY, Circuit Judges.

PER CURIAM. The judgment of the circuit court is affirmed.

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**BOARD OF COM'RS OF LAKE COUNTY v. KEENE FIVE CENTS SAV. BANK.** (Circuit Court of Appeals, Eighth Circuit. October 21, 1901.) No. 1,441. In Error to the Circuit Court of the United States for the District of Colorado. No opinion. Application for writ of certiorari. See 108 Fed. 505, and 110 Fed. 79.

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**CHICAGO G. W. RY. CO. v. WATTS.** (Circuit Court of Appeals, Eighth Circuit. September 23, 1901.) No. 1,576. In Error to the Circuit Court of the United States for the District of Minnesota. Dan W. Lawler, for plaintiff in error. Percy D. Godfrey, for defendant in error. Dismissed, without costs to either party in this court, as per stipulation of parties.

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**CHRISTIE et al. v. DAVIS COAL & COKE CO.** (Circuit Court of Appeals, Second Circuit. August 22, 1901.) No. 153. Appeal from the District Court of the United States for the Southern District of New York. Harrington Putnam, for appellants. J. Parker Kirlin, for appellee. Before WALLACE, LACOMBE, and SHIPMAN, Circuit Judges.

PER CURIAM. Affirmed on opinion of court below. 95 Fed. 837.

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**CROWN POINT MIN. CO. v. ONTARIO SILVER MIN. CO.** (Circuit Court of Appeals, Eighth Circuit. September 23, 1901.) No. 1,564. In Error to the Circuit Court of the United States for the District of Utah. Arthur Brown and Frederick T. McGurkin, for plaintiff in error. George Sutherland and Wilson I. Snyder, for defendant in error. Dismissed, without costs to either party in this court, as per stipulation of the parties.

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**FIRST NAT. BANK OF PEMBINA et al. v. EMMERLING.** (Circuit Court of Appeals, Eighth Circuit. September 23, 1901.) No. 1,560. In Error to the Circuit Court of the United States for the District of North Dakota. J. M. Cochrane and Guy C. H. Corliss, for plaintiffs in error. Tracy R. Bangs, for defendant in error. Dismissed, without costs to either party in this court, as per stipulation of parties.

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**FISH BROS. WAGON CO. v. LAKE.** (Circuit Court of Appeals, Eighth Circuit. September 23, 1901.) No. 1,595. Appeal from the District Court of the United States for the Western District of Arkansas. John N. Cook, for appellant. W. H. Arnold, for appellee. Dismissed, with costs, on motion of the appellant and by consent of the appellee.

**FOURTH NAT. BANK OF ST. LOUIS et al. v. ALBAUGH et al.** (Circuit Court of Appeals, Eighth Circuit. October 21, 1901.) No. 1,455. Appeal from the Circuit Court of the United States for the District of Kansas. Removed to the supreme court by appeal.

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**GARNETT v. PHOENIX BRIDGE CO.** (Circuit Court of Appeals, Third Circuit. September Term, 1901.) No. 6. In Error to the Circuit Court of the United States for the Eastern District of Pennsylvania. A. S. Ashbridge, for plaintiff. Dismissed under rule 23 (31 C. C. A. clixiii, 90 Fed. clixiii.). See 98 Fed. 192.

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**ST. JOHN'S LODGE et al. v. CAMPBELL.** (Circuit Court of Appeals, Fifth Circuit. May 28, 1901.) No. 1,041. Appeal from the Circuit Court of the United States for the Eastern District of Texas. T. O. Woldert, for appellants. W. Frank Knox, W. S. Herndon, and Ben B. Cain, for appellee. Before PARDEE, McCORMICK, and SHELBY, Circuit Judges.

PER CURIAM. On the facts in the record we concur with the circuit court, and we find no reversible error in the proceedings below. The decree appealed from is affirmed.

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**WILLEY et al. v. BROWNE et al.** (Circuit Court of Appeals, Eighth Circuit. September Term, 1901.) No. 20. Appeal from the District Court of the United States for the Eastern District of Pennsylvania. Jos. L. Greenwald, C. O. Mayer, and Sam. B. Huey, for appellants. John G. Johnson, for appellees. Dismissed under paragraph 5, rule 24 (31 C. C. A. clxvi., 90 Fed. clxvi.).

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**WM. SCHNEIDER WHOLESALE WINE & LIQUOR CO. v. HOSTETTER CO.** (Circuit Court of Appeals, Eighth Circuit. October 7, 1901.) No. 1,554. Appeal from the Circuit Court of the United States for the Eastern District of Missouri. Jacob Klein and Warwick M. Hough, for appellant. Albert H. Clarke and L. Frank Ottoby, for appellee. Dismissed, with costs, on motion of the appellant. See 107 Fed. 705.

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**FOSTER v. LEBANON SPRINGS R. CO. et al.** (Circuit Court, D. Vermont. October 7, 1901.) In Equity. For former opinion, see 100 Fed. 543.

WHEELER, District Judge. Because the railroad is not in the possession of the mortgagor, the general rule that the receiver in a foreclosure should have immediate possession is not applicable, and the motion to vacate the stay of possession by the receiver is continued to the hearing on the merits.

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**HOSTETTER CO. v. MODRY et al.** (Circuit Court, N. D. California. July 8, 1901.) Action by the Hostetter Company against E. P. Modry & Co. B. Edgar Galbreth and A. H. Clarke, for complainant.

MORROW, Circuit Judge. In accordance with the views expressed in the opinion in the case of Hostetter Co. v. Martinoni (C. C.; No. 12,780) 110 Fed. 524, a decree will be entered herein for the complainant, granting the injunction prayed for, and referring the case to the master in chancery for accounting.

**SPOOR v. BOARD OF SUPRS OF RIVERSIDE COUNTY et al.** (Circuit Court, S. D. California. August 28, 1901.) No. 736. William J. Hunsaker, for complainant. R. H. F. Variel, Otis, Gregg & Hall, and L. Gill, for defendants.

ROSS, Circuit Judge. This is a similar suit to that just disposed of (Town Co. v. Jasper [C. C. A.] 110 Fed. 702), and the views expressed in the foregoing opinion, applied to the evidence given in this cause, require a similar judgment herein. Ordered accordingly.

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**In re RAYMOND.** (District Court, E. D. Pennsylvania. September 9, 1901.)

BRADFORD, District Judge. The facts in this case are in all respects similar to those in the case of *In re Raymond* (D. C.; decided this day) 110 Fed. 155. The application of the petitioner for a discharge must therefore be denied, and the petitioner remanded to custody.

END OF CASES IN VOL. 110.